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The centres and margins of transnational law: potential developments and methodological challenges

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Abstract

This article challenges the dominant socio-legal focus on the nation-state by placing emphasis on its margins. Based on a review of the vibrant scholarship in the socio-legal literature, the article sketches the features of social facts that can be found in the interstices of national legal systems and professions. Though these facts are marginalized from the perspective of these systems and professions, their role is no less real in the global arena, in whose centres they are situated. The study of these facts raises methodological questions that this article seeks to address. By attempting to shift the research focus from one object to another, in particular, the article casts light on methodological debates concerning the need to define research categories on a preliminary basis.

1 | INTRODUCTION

In one of his texts, Henri Poincaré, a leading mathematician and physicist of the early twentieth century, summarily defines the scientific method as the ‘selection of facts’.¹ For Poincaré, the key method used by scientists – whether biologists, mathematicians, or physicists – is that of identifying factual patterns based on empirical data. He contrasts this relatively straightforward method

¹ H. Poincaré, *Science and Method*, trans. F. Maitland (1914) 19.

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with the difficulties faced by sociologists in identifying such patterns, due to the complexity and diversity of human behaviour in society.² For this reason, he claims, ‘nearly every sociological thesis proposes a new method, which, however, its author is very careful not to apply’.³ Poincaré then concludes with these damning words: ‘[S]ociology is the science with the greatest number of methods and the least results.’⁴

Poincaré’s claims were a clear provocation directed against the new-born discipline of sociology.⁵ However, his analysis cannot be dismissed entirely, as it captures the ‘embarrassing position’ in which students of social life find themselves when facing facts that are ‘too dissimilar, too variable, too capricious, in a word, too complex themselves’ in order to be ‘selected’ in meaningful ways.⁶ Poincaré’s pessimistic stance on sociological research is particularly relevant when transposed to transnational law, a field whose complexity is exacerbated by the number of actors and the variety of processes involved in it. This article highlights the ways in which the complexity of transnational law has led researchers to focus on certain research categories, and how their choices can be challenged in light of recent socio-legal scholarship.

The starting point of the analysis is a conventional account that is widely accepted in law faculties, according to which much of law is defined at the national level. In this view, the law is fragmented into and exhausted by national legal systems. Even when the law gains traction at the global level, it is labelled as ‘inter-national’, or dominated by the interaction between nation-states. This vision of the law downplays the key role of non-state entities – whether non-governmental organizations, corporations, individuals, or social networks – in the formal and informal regulation of global affairs.⁷ It also disregards the fact that the national is not a monolithic entity, but rather a complex juxtaposition of local and global traditions that often lacks uniformity.⁸ Despite its shortcomings, this vision has framed legal scholarship on a deep level. In fact, the legal map of the world is usually deemed to be composed of national legal systems or, at best, of legal families that combine several of these systems.

More surprisingly, the state-centric tradition has also cast its spell on socio-legal studies of globalization.⁹ For instance, scholars have argued that the process of globalization is firmly grounded in and limited by national legal cultures.¹⁰ In this view, the ‘society’ that is instrumental to understanding the ‘law’ is usually considered within a nation-state framework. Other scholars analyse the process of globalization as a competition between national elites and professions that vie for

² Id.

³ Id.

⁴ Id., p. 20.

⁵ Poincaré may have been targeting Emile Durkheim’s book *The Rules of Sociological Method*, which had first been published in 1895. Durkheim and Poincaré were colleagues at the Sorbonne. See M. Fournier, *Emile Durkheim: A Biography*, trans. D. Macey (2013) 410.

⁶ Poincaré, op. cit., n. 1, p. 19.

⁷ P. Jessup, *Transnational Law* (1956).

⁸ H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); D. Nelken, ‘Comparative Sociology of Law’ in *Law and Social Theory*, eds R. Banakar and M. Travers (2013) 341, at 350–351.

⁹ See, however, G. Teubner, ‘Breaking Frames: The Global Interplay of Legal and Social Systems’ (1997) 45 *Am. J. of Comparative Law* 149; P. Zumbansen, ‘Neither “Public” Nor “Private”, “National” Nor “International”: Transnational Corporate Governance from a Legal Pluralist Perspective’ (2011) 38 *J. of Law and Society* 50; O. Perez and O. Stegmann, ‘Transnational Networks Constitutionalism’ (2018) 45 *J. of Law and Society* S135.

¹⁰ P. Legrand, ‘On the Singularity of Law’ (2006) 47 *Harvard International Law J.* 517; D. Nelken, ‘Using the Concept of Legal Culture’ (2004) 29 *Aus. J. of Legal Philosophy* 1.

power and legitimacy in the global arena, which they attempt to frame in the image of their own legal systems and professions. The analysis of international commercial arbitration as a battle between Anglo-American litigators and Continental law professors is typical in this regard.¹¹ So is the analytical framework that portrays the contest to transform Latin American states along the lines of a power shift from lawyers educated in Europe to economists trained in the United States (US).¹² Still other scholars focus on the transformation of national legal systems through globalization.¹³

All of these approaches typically place emphasis on national legal systems and discrete legal professions in two main ways. The first strand of scholarship focuses on the role of legal elites, who are embedded in their national systems, in the emergence and maintenance of global law. Summarily put, the reasoning of these scholars runs as follows: just as legal elites have played a key role in the evolution of national legal systems,¹⁴ these same elites have invested significant capital – whether financial, social, or cultural – in the construction of a global world framed in the image of their own (national) system. On this account, the globalized world is a playing field for the competition between legal elites and professions seeking to impose their own legal traditions. The analytical focus on national elites is particularly apparent in Bourdieusian studies of legal globalization.¹⁵ It is also visible in the efforts to analyse legal globalization empirically, based on interviews with quintessential members of the elite¹⁶ or those concerned with the influence of a ‘small segment of advanced or developed economies’ on global law making.¹⁷

The second strand of scholarship is less focused on the actors involved in legal globalization than on the ways in which national legal systems frame this process. In its most developed form, this strand views global law as inherently doomed, to the extent that national legal cultures present an enormous challenge for, and an inherent limitation on, the emergence of global law. The ‘impossibility of “legal transplants”’ is one illustration among others of this approach.¹⁸ Another illustration is the pessimistic outlook on the ‘convergence’ of legal systems within the European Union.¹⁹

Both strands of scholarship mentioned above place their focus on the national legal system, profession, or culture as a central component of the globalization process. They brand the national

¹¹ Y. Dezalay and B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

¹² Y. Dezalay and B. G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002).

¹³ D. M. Engel, ‘Landscapes of the Law: Injury, Remedy, and Social Change in Thailand’ (2009) 43 *Law & Society Rev.* 61; E. H. Boyle and S. E. Preves, ‘National Politics as International Process: The Case of Anti-Female Genital Cutting Laws’ (2000) 34 *Law & Society Rev.* 709.

¹⁴ B. Latour, *The Making of Law: An Ethnography of the Conseil d’Etat* (2010); A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013).

¹⁵ Dezalay and Garth, op. cit., n. 11; M. Madsen and Y. Dezalay, ‘The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law’ (2012) 8 *Annual Rev. of Law and Social Science* 433.

¹⁶ J. Braithwaite and P. Drahos, *Global Business Regulation* (2000) 12.

¹⁷ S. Block-Lieb and T. C. Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (2017) 318.

¹⁸ P. Legrand, ‘The Impossibility of “Legal Transplants”’ (1997) 4 *Maastricht J. of European and Comparative Law* 111; M. Kurkchyan, ‘Russian Legal Culture: An Analysis of Adaptive Response to an Institutional Transplant’ (2009) 34 *Law and Social Inquiry* 337.

¹⁹ P. Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45 *The International and Comparative Law Q.* 52.

as a key explanatory variable or, at least, as an essential object for the study of legal globalization. One of the difficulties for students of transnational law arises from this focus on the national, which has deeply influenced the key developments of the transnational discipline. Because the selection of facts at the core of the most prominent studies of legal globalization is framed by the national, reflecting on the methodologies of transnational law requires an effort at defining transnational law in ways that are not tainted by pre-conceived notions. This effort rests on a review of socio-legal scholarship that has been published over the past 20 years.²⁰ This literature review reveals a nascent stream of scholarship that focuses its attention on social facts that are situated in the margins of national legal systems and professions.

Having sketched what a study of transnational law freed from the spell of the national might look like based on this literature review, this article then discusses the methodological challenges raised by this new approach. The multiple forms in which these challenges arise make it a daunting task to navigate the methodological minefield of transnational legal studies. The article highlights how research in the field of transnational law has proceeded based on the preliminary identification of relevant units of study – whether this identification is based on some scientific intuition or on an inductive process²¹ – before developing hypotheses and the methodological tools to investigate them. The question of *what* is to be researched in the transnational realm has therefore predated the question of *how* it is researched. The article then explores other methodological questions that arise in the field of transnational legal research, before concluding.

2 | SEARCHING FOR A SOCIO-LEGAL OBJECT: TRANSNATIONAL LAW

As seen above, the most influential scholarship on legal globalization traditionally places the emphasis on the key role played by national legal systems and professions. However, a review of the state of the art in research on transnational law suggests that studies of legal globalization have been progressively refocusing away from the centre and towards the margins of national legal systems and professions.

The actors operating at these margins cross the national and organizational frontiers that distinguish more traditional scholarship on transnational processes.²² In the context of French anti-terrorism trials, for instance, Sharon Weill observes that first-instance judges emerge as actors of transnational law by offering resistance to the national policies of the state.²³ Their position of relative weakness with respect to the formulation of legal doctrine or jurisprudence (at least when compared with judges sitting on higher courts) gives them a unique position of independence from their own legal system and allows them to promote alternative values such as ‘stronger criminal rehabilitation approaches’.²⁴ Another example is Elizabeth Holzer’s study of the Buduburam camp in Ghana, where she argues that refugees who are alienated from domestic legal institutions

²⁰ This overview of the scholarship is based on a systematic review of the *Journal of Law and Society* and the *Law & Society Review* over the past 20 years. It also draws, albeit less systematically, on other journals and sources of socio-legal scholarship.

²¹ K. Popper, *The Poverty of Historicism* (1957) 125.

²² B. Harrington and L. Seabrooke, ‘Transnational Professionals’ (2020) 46 *Annual Rev. of Sociology* 399.

²³ S. Weill, ‘Transnational Jihadism and the Role of Criminal Judges: An Ethnography of French Courts’ (2020) 47 *J. of Law and Society* S30.

²⁴ *Id.*, p. S53.

can act as ‘international legal subjects’.²⁵ She calls these refugees the ‘wards of international law’, defined as ‘people deeply embedded in the international legal system, but alienated from local law’.²⁶

Scholarship also highlights how transnational actors rise up to become leaders of global law not because of their grounding within a specific legal system, but because of their ability to build bridges and to operate at the interface between different systems. For instance, Gregory Shaffer, James Nedumpara, and Aseema Sinha highlight the role of ‘transnationally connected lawyers’ in the engagement of India with World Trade Organization law.²⁷ While some of these lawyers belong to the ‘older elites’, others are part of ‘an expansion of the Indian professional classes in light of new economic opportunities’.²⁸ Another example is Sida Liu’s analysis of the hybridization process between global law firms and local ones in the ‘formative years of the Chinese corporate law market’.²⁹ He highlights the process of ‘boundary blurring’ that has occurred in the Chinese legal profession over the past few years, and its role in the globalization of the Chinese legal system. Similarly, individuals described as ‘secant marginals’ have been critical in the construction of international arbitration.³⁰ These marginalized lawyers are individuals who, while members of multiple social groups, do not develop a sense of primary identity or loyalty with regard to any one of these groups. Due to their unique characteristics and position, these marginalized lawyers manage to construct a cooperative interface between separate legal systems and professions.³¹

All of these studies converge in giving rise to an alternative account of legal globalization. They often highlight the role played by social facts situated at the intersection of several national legal systems. They seem interested more in the role played by the periphery than by the core of national legal systems in the process of legal globalization. Some of these studies share an additional feature: they go beyond the traditional state-bound definition of lawyers as professionals who are licensed to practise law in a particular jurisdiction to focus instead on actors who operate across legal professions (and arguably outside this territorially and socially bounded definition).³² The actors of transnational law include all those – whether licensed to practise law or not – who engage in the definition and application of law beyond borders.³³

²⁵ E. Holzer, ‘What Happens to Law in a Refugee Camp?’ (2013) 47 *Law & Society Rev.* 837, at 837.

²⁶ *Id.*

²⁷ G. Shaffer et al., ‘State Transformation and the Role of Lawyers: The WTO, India and Transnational Legal Ordering’ (2015) 49 *Law & Society Rev.* 595, at 611.

²⁸ *Id.*

²⁹ S. Liu, ‘Globalization as Boundary-Blurring: International and Local Law Firms in China’s Corporate Law Market’ (2008) 42 *Law & Society Rev.* 771, at 801.

³⁰ F. Grisel, ‘Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession’ (2017) 51 *Law & Society Rev.* 790; F. Grisel, ‘Marginals and Elites in International Arbitration’ in *The Oxford Handbook of International Arbitration*, eds T. Schultz and F. Ortino (2020) 260.

³¹ Similar studies have appeared in publications other than the *Law & Society Review* and the *Journal of Law and Society*. For instance, Bruce Carruthers and Terence Halliday highlight the role played by ‘first-order intermediaries’ in the construction of Asian insolvency regimes between the early 1970s and late 1990s: B. G. Carruthers and T. C. Halliday, ‘Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes’ (2006) 31 *Law and Social Inquiry* 521. In an important book on gender violence, Sally Engle Merry analyses the role played by local intermediaries who translated local grievances into the parlance of global human rights in Hong Kong: S. E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006).

³² Harrington and Seabrooke, *op. cit.*, n. 22, p. 401.

³³ Holzer, *op. cit.*, n. 25; Merry, *op. cit.*, n. 31; Grisel, *op. cit.* (2017), n. 30; Grisel, *op. cit.* (2020), n. 30.

These studies offer empirical pieces of a broader puzzle that lacks a common theoretical framework. The present article does not take up the formidable task of filling this theoretical void, but it does seek to highlight the potential merits of this new approach, as well as the methodological challenges and ramifications to which it gives rise.

3 | NOWHERE (WO)MAN, THE WORLD IS AT YOUR COMMAND

The Beatles were right: the global world seems to be at the command of those actors and entities who are ‘nowhere’ and ‘everywhere’ at the same time.³⁴ In this section, I explore the role of these actors and entities in the instantiation of new social fields, and highlight the many ramifications that this analysis has for the broader field of sociology. The section serves as a basis for the exploration of the methodological questions that are presented in the next section.

The sociology of globalization is an obvious starting point for this analysis. Saskia Sassen has left a deep imprint on this field by offering a ‘new geography of centers and margins’.³⁵ Her research casts light on ‘the transnationalization in the formation of identifies and loyalties among various population segments that explicitly reject the imagined community of the nation’.³⁶ The map of the social world that she draws does not overlap with the map of a world divided into nation-states. Instead, her research highlights the new ‘assemblages’ that pervade the global world (for instance, the ‘global cities’) and the contact points that exist between these assemblages.

The study of these contact points has other ramifications for the field of sociology. For instance, urban sociologists have observed the key role played by minorities in the unification of the urban space.³⁷ In the words of two leading scholars of urban migration:

A . . . mode of incorporation has gained the attention of a number of scholars in recent years. It consists of small groups of immigrants who are inserted or insert themselves as commercial intermediaries in a particular country or region. These ‘middleman minorities’ are distinct in nationality, culture, and sometimes race from both the superordinate and subordinate groups to which they relate. They can be used by dominant elites as a buffer to deflect mass frustration and also as an instrument to conduct commercial activities in impoverished areas. Middlemen accept these risks in exchange for the opportunity to share in the commercial and financial benefits gained through such instruments as taxation, higher retail prices, and usury.³⁸

Economic sociologists have also highlighted the important role played by ‘nodes’ in the connection of social groups that stand apart from each other.³⁹ Their analysis draws heavily on network theory. In their account, nodes – which can be individuals, but also social facts broadly understood – are ‘isolates’ when they stand alone in the social world, ‘transmitters’ if arcs only originate from

³⁴ John Lennon composed ‘Nowhere Man’ after moving to the ‘Stockbroker Belt’, an affluent area on the outskirts of London, where he reportedly felt like a stranger. See P. Norman, *John Lennon: A Life* (2008) 417, 419.

³⁵ S. Sassen, *A Sociology of Globalization* (2007) 111.

³⁶ *Id.*, pp. 122–123.

³⁷ E. Bonacich, ‘A Theory of Middleman Minorities’ (1973) 38 *Am. Sociological Rev.* 583.

³⁸ A. Portes and R. D. Manning, ‘The Immigrant Enclave: Theory and Empirical Examples’ in *Competitive Ethnic Relations*, eds S. Olzak and J. Nafel (1986) 47, at 50.

³⁹ R. Burt, *Structural Holes: The Social Structure of Competition* (1992).

them, ‘receivers’ if arcs only terminate at them, and, finally, ‘carriers’ when arcs both originate from them and lead back to them.⁴⁰ Carriers are particularly relevant for the study of globalization. They connect different networks, but are they merely transmitters of social content, or something more? Based on his study of the US employment market, Mark Granovetter famously argues that ‘weak ties’ play a more important role in the functioning of societies than the ‘strong ties’ upon which sociologists have traditionally focused their attention.⁴¹ In the global space, the weak ties sustained by nodes across several legal systems and professions might be key to understanding the social and cultural foundations upon which legal globalization thrives.

Bruno Latour further explores the role played by these nodes by drawing a distinction between the ‘mediators’ and ‘intermediaries’ of social life.⁴² In his view, an intermediary is ‘what transports meaning or force without transformation’, while mediators ‘transform, translate, distort, and modify the meaning or the elements they are supposed to carry’.⁴³ Both mediators and intermediaries are carriers, but their roles are diametrically opposed; intermediaries are the faithful messengers who passively transmit social content, while mediators reinvent content in line with their own social identity. The key individuals highlighted in the above studies of legal globalization are, to adopt Latour’s lingua, mediators rather than intermediaries; they do not simply transfer content from one legal system to another, but also and more fundamentally create their own system of legal meaning and culture based on the weak ties that they maintain with a range of legal systems and professions.

Socio-legal scholars have noted the need to explore the role played by ‘marginalized subjects’ in the legal field as well as the methodological conundrums caused by doing so.⁴⁴ The position of these marginalized lawyers is, by definition, ambiguous. They often turn their weaknesses into strengths, to the point where it is difficult to cast them as either ‘outsiders’ or ‘insiders’. The example of Judah Benjamin, an American Jew born in the Caribbean who built a successful career as a litigator and politician in the American South before moving to England in 1865 and dying in France in 1884, is potentially relevant here.⁴⁵ Was Benjamin an insider or an outsider? He was certainly the uncontested leader in the space of international commercial law, which he himself contributed to carving out and in which his perceived weaknesses turned into strengths. Just like other famous ‘strangers’, Benjamin was ‘an element whose membership within the group involve[d] being outside it and confronting it’.⁴⁶ It is in this process of confrontation that the mediator can build new cultural forms and meanings across different systems. The stranger will always remain an outsider in this process, while gaining unique insider knowledge of the new field under construction.

The above observations help us to think more precisely about a new potential research agenda on the globalization of law and the important methodological questions arising from it.

⁴⁰ S. Wasserman and K. Faust, *Social Networks Analysis: Methods and Applications* (1994).

⁴¹ M. S. Granovetter, ‘The Strength of Weak Ties’ (1973) 78 *Am. J. of Sociology* 1360.

⁴² B. Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005) 37–42.

⁴³ *Id.*, p. 39.

⁴⁴ L. Mulcahy and D. Sugarman, ‘Legal Life Writing and Marginalized Subjects and Sources’ (2015) 42 *J. of Law and Society* 1.

⁴⁵ C. MacMillan, ‘Judah Benjamin: Marginalized Outsider or Admitted Insider?’ (2015) 42 *J. of Law and Society* 150.

⁴⁶ G. Simmel, *On Individuality and Social Forms* (1971) 144.

4 | A METHODOLOGICAL MINEFIELD

The approach outlined above encourages us to focus on the social facts that are well positioned to generate a global system. In particular, some actors and entities appear to mediate the interaction between legal norms, actors, and processes at the transnational level. Their role as mediators can lead them to create new legal institutions by borrowing elements from a variety of legal systems.⁴⁷ Having attempted to redefine, based on a selection of facts, what really characterizes transnational law, I now consider more specifically and in light of this definition the methodological challenges that are associated with this approach. Indeed, this new focus raises four sets of methodological difficulties that are further explored below.

4.1 | Defining the transnational object

The approach outlined above, which shifts the focus from discrete systems to social facts operating at the intersection of these systems, allows us to revisit classic debates concerning the methodology of the social sciences.

In a famous passage in *The Rules of Sociological Method*, Emile Durkheim contrasts the duty of ‘discarding all preconceptions’ when approaching social life with the necessity for the researcher to identify and define relevant research units on a preliminary basis.⁴⁸ According to Durkheim, the researcher is caught between the duty to be objective and the necessity to initiate research on the basis of pre-defined notions. In his own words: ‘The subject matter of research must only include a group of phenomena defined beforehand by certain common external characteristics and all phenomena which correspond to this definition must be so included.’⁴⁹ A concrete example of this methodology is Durkheim’s effort to define the notion of ‘suicide’ at the outset of his landmark book on the subject.⁵⁰ Of course, social scientists rapidly criticized Durkheim’s belief in the possibility of objectifying social facts based on their ‘external characteristics’ for being overly naive.⁵¹ However, Durkheim’s strong intuition that it is necessary to pre-define research objects surfaces with regularity in the social scientific literature. Relevant examples include Pierre Bourdieu, Jean-Claude Chamboredon, and Jean-Claude Passeron’s provocative statement that ‘method by itself does not generate anything new’.⁵² What these authors meant is that the inductive positivist approach can never be fully insulated from the preliminary construction of research categories. Another relevant illustration is Karl Popper’s famous plea for an experimental method based on a deductive approach, and his belief that hypotheses are formulated through a thought experiment that is never perfectly inductive: ‘[I]n the social sciences it is even more obvious than in the natural sciences that we cannot see and observe our objects before we have thought about them.’⁵³

⁴⁷ Grisel, op. cit. (2017), n. 30, pp. 810–811.

⁴⁸ E. Durkheim, *The Rules of Sociological Method* (1982) 72–75.

⁴⁹ Id., p. 75.

⁵⁰ E. Durkheim, *Suicide: A Study in Sociology* (1952) xl.

⁵¹ J.-M. Berthelot, *1895 Durkheim: l'avènement de la sociologie scientifique* (1995) 19–73.

⁵² P. Bourdieu et al., *Le métier de sociologue* (2021) 156–160.

⁵³ Popper, op. cit., n. 21, p. 125.

This article illustrates, with some nuance, Durkheim's point and the challenges that it raises for transnational research. The complexity of transnational law makes it challenging – if not impossible – to proceed other than through the identification of relevant units of inquiry (which offers support for Durkheim's views). However, the definitional shift promoted in this article shows how this process of identification can result from an inductive approach based on a review of the literature, but also from a more intuitive approach based on scientific habits (as illustrated, for instance, by the state-centric approach).

Ultimately, both approaches raise important questions of neutrality and objectivity, which are explored further below. Before doing that, I consider another methodological question concerning the cultural basis of transnational law.

4.2 | The culturalist objection

At a theoretical level, sceptics could object that the belief that mediators are capable of generating a new set of laws that is extracted from a given cultural ground is naïve and overly ambitious. The culturalist objection is fundamentally theoretical, but the response that I suggest further below is methodological. Proponents of the culturalist view argue, with typical panache, that the transnational project is inherently limited by legal cultures that are firmly grounded in longstanding (national) traditions. In other words, these traditions deeply influence and limit the ways in which global law can be interpreted and applied (assuming that global law can even arise). In Pierre Legrand's powerful words: '[N]o matter how cosmopolitan the trans-national institution or practice, any effectuation of it must manifest itself singularly.'⁵⁴ This singularity is typically instantiated within a space that nurtures and grounds a given culture. This approach does not deny the capacity of mediators to create new rules, but it does highlight the potential for divergence that emerges when *interpreters* of these rules infer meaning on the basis of their own cultural backgrounds. There is merit to this potential objection, since local cultures are a key marker of social identity and a significant factor of path dependence in the evolution of legal systems.⁵⁵

However, the culturalist objection has its own limitations. One of these limitations is temporal, the other empirical. First, the culturalists rightly insist on the importance of national legal cultures, their pervasive influence on the interpretation of 'global' rules, and the limits that they impose on this interpretative exercise. While insisting on the historically grounded character of legal cultures, however, they downplay the potential for cultural change, cultural resistance, or subcultures. It is somewhat paradoxical for this strand of scholarship to insist on the historically grounded dimension of legal cultures while neglecting to fully consider the historical processes through which these cultures have come about and evolved. Legal cultures are not set in stone.⁵⁶ The relative lack of interest on the part of socio-legal scholars in history as a discipline,⁵⁷ coupled with their historically grounded conception of legal cultures, can paradoxically lead to a 'failure to appreciate the power and the autonomy of legal culture'.⁵⁸

⁵⁴ Legrand, *op. cit.*, n. 10, p. 523.

⁵⁵ G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Rev.* 11.

⁵⁶ Nelken, *op. cit.*, n. 8, p. 351.

⁵⁷ D. Sugarman, 'Promoting Dialogue between History and Socio-Legal Studies: The Contribution of Christopher W. Brooks and the "Legal Turn" in Early Modern English History' (2017) 44 *J. of Law and Society* S37, at S40.

⁵⁸ A. Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *University of Pennsylvania Law Rev.* 1121, at 1154.

The limited temporal scope of culturalism becomes apparent when this insistence on cultural singularity is confronted with the work of legal historians, such as the scholarship of Harold Berman, who retraces the common origins of the Western legal tradition all of the way back to the ‘religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries’.⁵⁹ In a famous book, Berman argues that ‘the legal institutions, concepts, and values that have derived from [theological sources] still survive, often unchanged’.⁶⁰ Ino Augsberg echoes this argument, insisting that the religious mechanisms and values identified by Berman are ‘transnational’ in nature and that ‘social spheres are interwoven in a much more complicated way than the idea of highly autonomous subsystems wants to admit’.⁶¹ His implicit argument is that the concept of transnational law can draw on characteristics that reflect these common origins.⁶²

The second limitation of the culturalist objection is empirical, since it seems to disregard the possibility that transnational legal cultures can emerge in the future, and that they might even have existed in the past. The factual existence of transnational cultures is grounded in important empirical studies that pose a challenge to the sweeping notion of legal ‘singularity’, or at least accommodate this idea of singularity at a transnational level. One such study is Lauren Benton’s investigation of colonial legal cultures.⁶³ Another fascinating study is Yanna Yannakakis’ book on the interaction between Spanish (legal) culture and indigenous customs in Oaxaca in the eighteenth century.⁶⁴ In this book, Yannakakis charts in great nuance and detail how ‘native intermediaries’ played a key role in the furtherance of the Spanish colonial project in Mexico. She describes the ‘hybrid colonial culture’ of these legal intermediaries, whom she casts as the ‘most bicultural and linguistically skilled of any other intermediary figures’.⁶⁵ According to Yannakakis, these intermediaries ‘tended to have especially wide social networks, consisting of other native elites as well as Spaniards, and a fluency in Spanish law and the workings of colonial bureaucracy’.⁶⁶ Her fine-grained, contextualized research suggests that legal intermediaries managed to build a cultural interface between the Spanish colonizer and colonial Oaxaca by ‘making colonial rule a two-way dynamic rather than a one-way process with power flowing only from the center outwards’.⁶⁷

These observations tend to suggest that the theoretical challenges raised by the culturalists might not be insurmountable. The ‘impossibility’ that they flag can be overcome empirically with the right methodological tools. In fact, the difficulty seems to lie not so much in the weight of national legal cultures, as in the recognition of the possibility that new legal cultures might arise beyond borders. In this regard, ethnographic immersion can shed light on the ways in which transnational law – rather than developing without an original attachment to a specific cul-

⁵⁹ Berman, *op. cit.*, n. 8, p. 165.

⁶⁰ *Id.*

⁶¹ I. Augsberg, ‘Global Law before the State? On Canon Law as a Transnational Regime’ (2018) 45 *J. of Law and Society* S270, at S286.

⁶² *Id.*

⁶³ L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002).

⁶⁴ Y. Yannakakis, *The Art of Being In-Between: Native Intermediaries, Indian Identity, and Local Rule in Colonial Oaxaca* (2008).

⁶⁵ *Id.*, p. 37.

⁶⁶ *Id.*

⁶⁷ *Id.*, p. 130.

tural terrain – can be culturally embedded in communities that exist across nationally grounded professions and legal systems.

4.3 | Research at the margins: practical issues

Once one recognizes the possibility that new legal cultures might arise at the transnational level, however, a practical objection remains. This objection concerns the difficulties involved in shining a spotlight on the existence of intermediaries whose actions take place in the shadows of legal systems. Exploring the life of marginalized lawyers raises several difficulties. Linda Mulcahy and David Sugarman rightly describe ‘legal life writing’ as a methodological ‘minefield’ due to the limited (and often self-selected) sources available to researchers.⁶⁸ These difficulties are reinforced in the case of ‘marginalized lawyers’ or ‘lawyers from below’, whose ‘paper trail’ is disseminated across jurisdictions, if not lost, or perhaps never even existed to begin with.

However, these ‘new’ challenges can be addressed by the ‘old’ methodological tools that socio-legal scholars have borrowed from the social sciences. For instance, the triangulation of data from different sources can be used to avoid the pitfalls associated with biographical research. The difficulty of documenting the lives of marginalized actors and processes can be tackled, albeit imperfectly, by the multiplication of the sources from which these lives can be ascertained. I myself stumbled across these difficulties when exploring the life trajectories of the ‘secant marginals’ who were the leaders of international commercial arbitration in the 1950s and 1960s. My research led me to contact their family members, consult obituaries, and retrace their main life stages through archival research.⁶⁹ An anecdote might be worth considering here. After I reviewed the files of hundreds of arbitration cases and identified the leading individuals involved in these cases, a major breakthrough in my research occurred unexpectedly when I realized that one of these individuals (a lawyer called Henri Monneray) had changed his name (from Heinz Meierhof) in order to hide his Jewishness during the Second World War. This small, seemingly trivial, piece of information put me on the track of a pattern of marginality that I observed across my sample of leading individuals.

4.4 | The ethics of transnational methodology

Thinking of a methodology of transnational law along the lines suggested above leads to a reconsideration of the classic debates on the ‘same’ and the ‘other’. When carrying out a sociology of the margins, empiricists can be tempted to define ‘otherness’ in relation to the ‘centres’ in which they operate and to consider apparent traits of differentiation as relevant signs of ‘otherness’. However, the ethical duty of students of transnational law is to try to observe and understand, without recourse to pre-conceived ideas (for instance, those associated with the national, taken as a key explanatory variable for the transnational). As mentioned above, this ethical duty can conflict with the need to rely on pre-defined notions, especially when the object of study is complex.

The works of Albert Camus provide a relevant illustration of this tension. In his novel *The Stranger*, Camus famously draws the portrait of Meursault, a low-level bureaucrat who embodies

⁶⁸ Mulcahy and Sugarman, op. cit., n. 44, p. 4.

⁶⁹ Grisel, op. cit. (2017), n. 30; Grisel, op. cit. (2020), n. 30.

all of the features of the middle class in French-ruled Algeria.⁷⁰ Meursault is a white man with a low-level office job in Algiers. He dates a female colleague, eats in the same restaurant every day, drinks lattes, and watches comedies at the theatre on Saturday night. At first sight, Meursault seems to stand at the centre of colonial society. At the margins of this society, however, another figure appears, the ‘Arab’ whom Meursault murders for reasons that are obscure even to him. A superficial reading of *The Stranger* could result in a vision of a colonial context in which the white man holds the dominant position, accentuated by the murder of a silent and anonymous ‘Arab’ – in other words, of a man deprived of his own humanity. But Camus does not fall into the trap that he sets up for his readers.⁷¹ The ‘stranger’ mentioned in the title is, in reality, Meursault himself, the one who is least likely to be referred to in this way. Camus’ portrayal reveals a multitude of details that signal Meursault’s marginality. Though his general traits suggest the contrary, Meursault is a stranger to the colonial society in which he lives, a situation that eventually leads him to the guillotine. In Meursault’s own final words: ‘For everything to be consummated, for me to feel less alone, I had only to wish that there be a large crowd of spectators the day of my execution and that they greet me with cries of hate.’⁷² In his Nobel Prize speech, Camus later reflected on the difficulties that the writer faces in distinguishing the ‘same’ from the ‘other’, as well as on the ethical dilemmas raised by this exercise.⁷³ In his view, ‘true artists scorn nothing: they are obliged to understand rather than to judge.’⁷⁴

As with Camus’ artist, the ethical duty of socio-legal scholars is to remind themselves of the features of their own situation when considering their objects of study. They are ‘obliged to understand rather than to judge’. Another way to approach this duty is to assume, with Eviatar Zerubavel, that ‘nothing is inherently normal’ and to approach similarities in the same way as differences.⁷⁵ However, this ethics of understanding necessarily enters into conflict with the need to capture the unknown and the complex through categories that are ultimately chosen by the researcher – a conflict that is magnified by the involvement of multiple cultures and identities in the transnational arena.

5 | CONCLUSION

This article started with the observation that a reflection on transnational methodologies requires a redefinition of transnational law based on a selection of facts. This selection of facts draws on common analytical lines identified through a review of the state of the art over the past two decades. Based on this literature review, this article seeks to highlight a potential shift in socio-legal studies of globalization, as well as to draw the reader’s attention to the ramifications of this emerging strand of scholarship. The redefinition of transnational law advocated on this basis leads

⁷⁰ A. Camus, *L'étranger* (1942).

⁷¹ Though Camus was vocal in his denunciations of the colonial society, he was also hoping that ‘Arabs and Frenchmen find a way to live together’ in Algeria. See for example A. Camus, *Chroniques Algériennes 1939–1958* (1958); R. W. Johnson, ‘Mediterranean Man’ *London Rev. of Books*, 16 October 1997, at <<https://www.lrb.co.uk/the-paper/v19/n20/r.w.-johnson/mediterranean-man>>.

⁷² Camus, op. cit., n. 70, p. 184.

⁷³ A. Camus, *Discours de Suède* (1958) 12–14.

⁷⁴ Id., p. 14.

⁷⁵ E. Zerubavel, *Taken for Granted: The Remarkable Power of the Unremarkable* (2018) 44.

to a reflection on its methodologies and the challenges with which it can be confronted. In particular, the example of transnational law casts new light on the task of pre-defining the object of study when approaching complex social realities. It shows the difficulty of approaching new research terrains without pre-defined concepts. It also illustrates the contingent and thus challengeable nature of the choices involved in the selection of these concepts (whether this selection is based on scientific intuition or on an inductive process).

In the case of transnational law, much of the scholarship has approached this new terrain from the perspective of national legal systems and cultures. The approach advocated here seeks to disrupt our lines of understanding by focusing on the interstices and overlaps between socio-legal systems. This article will hopefully encourage researchers to further explore the role of marginalized lawyers in the globalization process, to study the cultural platforms that support communities of transnational lawyers, and to identify the ways in which they stand at the centre of transnational law. The ultimate goal is to create socio-legal tools that are suitable for the analysis of legal globalization, from a truly global perspective.

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