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## Legal Pluralism and Normative Transfer

Jennifer Hendry<sup>1</sup>

***Order from Transfer: Comparative Constitutional Design & Legal Culture*, G. Frankenberg (ed.) (Cheltenham, Edward Elgar: 2013) 153-170**

The transfer, transplant and translation of legal norms from one locus, context or culture to another is a topic with which comparative legal scholars are well-acquainted, it having been one of the issues central to the fledgling discipline at its inaugural Paris congress in 1900.<sup>2</sup> Although in the intervening period it could be said that these concerns receded somewhat from the academic limelight, the past thirty years have seen a resurgence of interest, no doubt due to the particular questions raised by a patent increase in globalization, Europeanization and governance operations, as well as by the recognition, reconciliation and 'decolonization' processes occurring in many post-colonial societies. While legal norms have always crossed borders, be these national, cultural or functional ones, recent legal and social changes and developments have served to make the study of this transfer of law more important than ever before.

It is not only issues of legal transfer that global, supranational, and post-colonial developments in society and society's law have brought to the forefront of the debates among proponents of comparative legal studies, however, but also the similarly topical matter of legal pluralism. Legal pluralism introduces the idea of there being spaces of normativity that may or

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<sup>2</sup> This refers, of course, to the famous congress on *Les Méthodes du droit compare*, held by the Société de Législation Comparée in Paris, 1900.

may not be congruent with the recognized boundaries of specific legal orders, promoting a fragmentation of 'law' within and across jurisdictions formerly understood as monist or even monolithic. An increasingly popular approach, legal pluralism has been described as a 'key concept in a post-modern view of law',<sup>3</sup> and has been employed in a wide variety of endeavors including, among others, questioning the very character of law, challenging the bias that saw the nation state as the sole legal source, and making sense of the connections and interactions that gave rise to new post-national constellations.<sup>4</sup> Alongside legal transfer, legal pluralism has starred in debates concerning the importance of locality and context in understanding legal features and practices, while also – and this is certainly as a result of their shared history within the discipline of legal anthropology – finding themselves inextricably linked by their conceptual relevance to different legal orders and to issues of conflict, contestation and interaction in terms of law, society, culture and legal culture.

Legal transfer suggests the movement of legal norms between closed legal or normative orders, which has often tended to concern nation state legal orders.<sup>5</sup> This chapter contends that framing legal transfer in terms of legal pluralism introduces another dimension to this debate, namely the

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<sup>3</sup> Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward A Post-modern Conception of Law' (1987) 14 *Journal of Law & Society* 279-302, 297

<sup>4</sup> This term was first employed by Jürgen Habermas in *The Postnational Constellation* (Polity Press 2000)

<sup>5</sup> This is more noticeable in terms of its employment in debates on *constitutional* borrowing or transfer; for a comprehensive account, see Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 *International Journal of Constitutional Law* 563-579, and also *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (Suhrkamp 2003). David Nelken raises a similar point, noting that 'given the way it often sets boundaries of jurisdiction, politics and language, the nation state will often serve as a relevant starting point for comparing legal culture.' See David Nelken, 'Defining and Using the Concept of Legal Culture' in D. Nelken & E. Örucü (eds) *Comparative Law: A Handbook* (Hart 2007) 109-132, 119

possibility of a reciprocal interaction of normative orders occupying a new 'space' that has the potential of giving rise to a newly contextualized form of the 'transferred' legal norm, detached as it is from both of its original contexts. It will attempt to illustrate this by focusing specifically on the normative *locus* of state-internal legal pluralism vis-à-vis post-colonial societies with indigenous communities.<sup>6</sup> This selection is driven by the particular challenges this presents in terms of how state-internal normative borders and boundaries are (re)presented, consideration of which is of course key to the concept of legal transfer, along with how these boundaries affect interaction among and across normative orders. It is the selection of intra-state legal transfer as the focal point of the investigation that necessitates a discussion both of legal and normative pluralism.

### ***Ordering Pluralism***

This title of this section, which was appropriated from the conference that gave rise to this volume, tends to conjure images of luckless legal-comparatists attempting to herd cats or undertake other equally unenviable tasks, for little appears to be less 'ordered' than legal pluralism, whether this is in terms of its (contested) conception or (diverse) application. Mireille Delmas-Marty makes a similar point in her book of the same name, observing the

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<sup>6</sup> There are, of course, alternative *loci* also pertinent to such an analysis, of which this is necessarily a selection. These alternatives include trans-state, supra-state, inter-state interactions and constellations, such as (and perhaps most obviously) the European Union (EU), but these will need to be the focus of another paper. For more on the multiplicity of legal orders or 'systems' in the EU, see: Julie Dickson, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union' (2008) 9 *Problema* 9-50, and Martijn W. Hesselink, 'How Many Systems of Private Law are there in Europe? On Plural Legal Sources, Multiple Identities and the Unity of Law', (2012) Amsterdam Law School Legal Studies Research Paper 59

inherent contradiction of the two words and stating that, while pluralism ‘refers to dispersion or free movement ... ordering evokes structure, even constraints’.<sup>7</sup> What is being referred to here is, in essence, the tension at the heart of any discussion of legal unity and legal, or normative, diversity. As Sionaidh Douglas-Scott notes:

*‘With its associations of order, regularity, proportionality and equality, there is something geometric or architectonic about the Rule of Law – a contrast with the ‘chaos of surfaces’ and ‘rhetorical fronts’ of postmodernity and pluralism. And yet, the very fact of complex trajectories and perspectives might suggest a reason why this structural component is needed more than ever ... as a means of containing the chaos of the legal universe’.*<sup>8</sup>

If it is assumed that such a structural component is required, how, then, can the perceived benefits of formal law mentioned in this quotation be given effect without perpetuating violence against legal-cultural alterity? Is it even possible to provide legal plurality with a semblance of order or structure without reducing it to (a hegemonically-dictated) uniformity? In terms of the *locus* mentioned above, the intra-state or intra-systemic issues raised by the interaction of indigenous normative orders and institutionalized post-colonial State legal systems concern the idea of legal character (or what counts as law), and as such the discussion is arguably more accurately described as one of *normative* pluralism opposed to legal pluralism. Clarity concerning this distinction is essential and so, before proceeding further with this investigation, it is necessary to explain and justify the definitions of legal and normative pluralism, and the resultant conception of alternative normative order, that will be employed throughout this chapter.

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<sup>7</sup> M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart 2009) 63

<sup>8</sup> Sionaidh Douglas-Scott, ‘Pluralism and Justice in the Contemporary European Legal Space’, (2012) University College London Current Legal Problems Lecture Series, 11

## *Legal / Normative Pluralism: Contestation and Interaction*

As discussed earlier, legal pluralism has become increasingly popular since its genesis in 1986<sup>9</sup> and now tends to crop up in a wide range of postmodern approaches, many of which conceptualize both it and law very differently.<sup>10</sup> The potential and scope of the concept of legal pluralism lend it a malleability that operates as a double-edged sword: on the one hand it is flexible enough to be discussed from many different perspectives, while on the other it appears to lack any real defining contours, other than being premised upon contestability. While not necessarily crossing over into outright conflict, a plural constellation nonetheless only manifests if there are alternative paths or processes available within a pre-defined legal space, in contrast to the monist situation (or jurisdiction) which offers no such potential for selection. Issues of selection, or choice, of course, introduce their own considerations of authority and enforceability but, to leave those to one side for the moment, suffice to say that the presence of different normative options within the same legal space constitutes those circumstances generally accepted as being legally plural.<sup>11</sup> Writ large, therefore, legal pluralism can be said to come into existence when there is a dispute, disagreement or some other form of contestation about the 'law' that applies in particular circumstances.

Importantly for the purposes of this chapter, moreover, wherever there is

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<sup>9</sup> John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1

<sup>10</sup> For a more in-depth account of this issue, see Brian Z. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law & Society* 2

<sup>11</sup> As Emmanuel Melissaris puts it, 'the conception of the law in terms of shared normative experiences reflects the fragmentation of our identities and memberships.' See Emmanuel Melissaris, *Ubiquitous Law* (Ashgate 2009) 125

normative contestation there is also *interaction* between (or among, to bypass the 'pervasive binary'<sup>12</sup> that tends to attach itself to the discourse on indigeneity and, by association, intra-state legal pluralism) normative orders, as this is a pre-requisite of legal transfer.

Another aspect that is interesting about this notion of contestability as fundamental to plurality is that, as long as legal pluralism can be defined in this broad sense, in essence, simply as the opposite of legal monism or centralism, without qualification, then contestability itself comes to represent the full spectrum of legally pluralist possibilities. The definition *contra* monism<sup>13</sup> has the effect of casting the net very wide, meaning that a huge variety of normative orders could arguably raise a plausible claim to existing in circumstances of legal plurality; indeed, it could be argued that this gives rise to a spectrum of legal plurality, with differences in positioning across this spectrum being premised upon conditions of contestability that could range from absolute normative conflict and even non-recognition, to an altogether far milder form that manifests as mutual recognition and compromise. Under these circumstances, then, the definition of an alternative normative order becomes a rather straightforward exercise, for the only features that appear necessary for inclusion in this category are that such an order is, in fact, normative, and that these (constituent) norms are at variance from the hegemonic, usually State, legal order. In essence the definition can be reduced to the simple observation that there exists within a single legal space,

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<sup>12</sup> This phrase is used courtesy of Mark McMillan (Melbourne Law School, University of Melbourne)

<sup>13</sup> The fundamental basis of legal pluralism, and perhaps the sole characteristic that unifies all proponents, is a rejection of the 'false ideology' of legal centralism as recognized by John Griffiths, whereby 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administrated by a single set of state institutions'. See John Griffiths, 'What is Legal Pluralism?' in (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1, 3

to use John Griffiths' term, a situation of 'normative heterogeneity'.<sup>14</sup> By way of contrast, however, legal pluralism is a more unwieldy concept both to employ and rely upon. Much of the difficulty, this chapter submits, can be attributed to both the popularity and malleability of legal pluralism, which have resulted in it becoming rather stretched and 'thin' and, moreover, that this dilution has occurred in two main areas, namely its character and its utilization.

This next section will investigate both of these areas: in terms of the former, the character or *object* of legal pluralism, focus will rest upon the distinction that can be drawn between legal and normative pluralism, while engagement with the latter will revolve around the emancipatory potential implicit to the instrumental approach adopted and the motivations underpinning said adoption. By separating out these two aspects of the concept of legal pluralism it is hoped that some further light will be shed on the idea of transfer – be it legal or normative – across state-internal, contextually-determined boundaries and normative spaces. At this juncture it should be noted that, while the focus of this chapter rests specifically upon intra-state arrangements pertaining to the interaction of State and indigenous normative orders, different legal spaces and arenas – supra-state, trans-state, inter-state, even (and perhaps controversially) *non*-state – offer further avenues for future investigation.

### *The Object of Legal / Normative Pluralism*

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<sup>14</sup> John Griffiths, 'The Social Working of Legal Rules' in (2003) 48 *Journal of Legal Pluralism & Unofficial Law* 84, 23



At the outset of this discussion concerning the character (object) of legal pluralism, it should be stated that this issue involves less consideration of the aspect of plurality and more that of legality. That is to say, the focus rests on the distinction that can be drawn between legal and normative pluralism or, rather, on the requirements that social norms are expected to meet in order to achieve the status of law within a particular jurisdiction. While different commentators impose different standards and set different thresholds for this<sup>15</sup>, Sarah Engle Merry's famous observation is no less pertinent here than it was twenty-five years ago, for '[w]here *do* we stop speaking of law and find ourselves simply describing social life, [and] is it useful to call these forms of ordering law?'<sup>16</sup>

To explain the importance of this point in terms of the overall argument it is necessary to revisit the categories established by the concept's founding father, John Griffiths, namely weak and strong legal pluralism. The weak form supersedes a legally-monist form but in a rather half-hearted kind of way – Griffiths describes it as 'the messy compromise [that] the ideology of legal centralism feels itself obliged to make with recalcitrant social reality'.<sup>17</sup> This weak form, which tends to be associated both with the intra-state paradigm and with post-colonial societies, has three main features: first, that it always remains in the gift of the (hegemonic) State; second, that the State receives some benefit from this compromise situation; and third, that it is invariably envisaged as being impermanent, a temporary solution for a difficult situation,

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<sup>15</sup> See, for example, Boaventura de Sousa Santos, *Towards a New Legal Common Sense* (2nd edn, Butterworths 2002)

<sup>16</sup> Sarah Engle Merry, 'Legal Pluralism' in (1988) 22 *Law & Society Review* 869, 878, emphasis added

<sup>17</sup> John Griffiths, 'What is Legal Pluralism?' in (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1, 7

which is fine in the meantime but only until a preferable alternative can be found.<sup>18</sup> Griffiths actually rejects this weak form as constituting legal pluralism at all – indeed, he dismisses all but the strong form, his understanding of which is extremely broad, effectively boiling down to the idea that *all self-regulation is law*. To put this notion another way, his understanding of law is that it is co-extant with self-regulation within the social.

While this is an intriguing point in terms of normativity, it appears, however, that such a drastic move has the effect of undermining any claim to legality that could be raised by an alternative normative order, or rather, that it empties out any *legal* claim. Strong legal pluralism in the Griffiths sense thus represents what is more accurately described as *normative* plurality because, within his conceptualization, law does not require any validation such as that demanded by the major proponents of the liberal (statist) legal-theoretical enterprise, either in the form of a Kelsenian *Grundnorm* or Hartian rule of recognition.<sup>19</sup> Weak and strong legal pluralism as conceptualized by Griffiths are thus differentiated by the extent to which alternative (social) norms are recognized by the State or not, and in terms of the latter, the degree to which these norms can exist at variance to those of the State without compelling it to act upon them in some way. The differences between Griffiths' two categories, therefore, concern plurality and plurality alone, with no specific consideration of legality; by designating the legal as co-extant with regulation in the social, he appears deliberately to signify a conceptual break with legally-monist theoretical approaches and those predicated upon 'state

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<sup>18</sup> James Tully discusses this idea in terms of 'internal colonization' in James Tully, *Public Philosophy in a New Key, Vol. 1: Democracy & Civic Freedom* (CUP 2008) 261-276

<sup>19</sup> In a more 'modest' account of legal pluralism, Nick Barber argues that a legal order can 'contain multiple rules of recognition that lead to the order containing multiple, unranked, legal sources'. See N.W. Barber, *The Constitutional State* (OUP 2010) 145

consent-centred formalism'.<sup>20</sup> This approach, by means of de-privileging the legal, causes the distinction between the legal and the normative to collapse.

While innovative, it is submitted that it is this broad conception of strong legal pluralism that has caused it to be such a contested and scrutinized concept,<sup>21</sup> which has in turn contributed to the 'stretching' or dilution mentioned above. Other subsequent proponents of legal pluralism have come at the issue from the opposite perspective, seeming to prefer the expansion of specifically legal character to include certain social norms and suggesting that such alternatives as, for example, soft law, social practices and self-regulation exist along a *spectrum* of legality. Indeed, this standpoint is often adopted in spite of the concession that forcing a legal character onto social norms has the effect of causing 'violence to be done to common understandings' and a loss of distinction between the law and other social rules, such as customs, practices and morals.<sup>22</sup> It is submitted that these two perspectives – on one hand the de-privileging of the legal and, on the other, its extension<sup>23</sup> – are representative of ideologically driven instrumental approaches to this issue, and that the standpoint adopted as to the *object* of legal pluralism is premised undeniably upon the way the concept is intended to be used. This utilization, or method, is the focus of the next section.

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<sup>20</sup> Ming-Sung Kuo, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury' in (2009) 20 *European Journal of International Law* 997-1004, 997

<sup>21</sup> The vital difference here is between the identification and the application of an order or feature as legal instead of merely normative. For an excellent overview of the debate on this issue, see Emmanuel Melissaris' *Ubiquitous Law* (Ashgate 2009), specifically chapter 2

<sup>22</sup> Brian Z. Tamanaha, 'The Folly of the Social Scientific Concept of Legal Pluralism' in (1993) 20 *Journal of Law and Society* 192

<sup>23</sup> Tamanaha takes issue with both of these approaches, arguing that state and non-state law norms are fundamentally dissimilar and thus cannot be accurately compared: 'Properly seen in terms of their different criteria of existence, state law norms and non-state law 'norms' are two starkly contrary phenomena, not at all alike. Stated more strongly, they are ontologically distinct.' *Ibid* at 209

## *The Method of Legal / Normative Pluralism*

In terms of legal pluralism's conceptual *method*, it seems rather futile to engage with anything other than an instrumental approach, although arguably the empirically grounded descriptive approach also remains an option.

Descriptive approaches, which in disciplinary terms are perhaps more anthropological than jurisprudential, tend to be neutral in their assessment, merely intending to identify instances of normative plurality and thus recognizing the existence of conflicting rules in different socio-legal spaces without engaging with issues of resolution or action. By contrast, instrumental approaches employing the concept of legal or normative pluralism are naturally more ideological, even political in nature, with the motivation and aims of the theorist often apparent from the outset.

While this variety of impetus and intention can be cited as a contributory factor to the increased fragmentation of the debates on legal and normative pluralism across a variety of *loci*, whereby incompatible theoretical applications are compared and contrasted despite being fundamentally at cross purposes with each other, this is actually not the main focus here. Rather, the more interesting point concerning instrumental approaches concerns the extent to which they facilitate the identification of (a certain degree of) emancipatory potential within the very notion of legal plurality. Implicit within the legal pluralist challenge<sup>24</sup> to the state centred formalist conception of monist legal order is a claim to the counter-hegemonic – the minority, the marginalized, the indigenous, the 'Stranger', and the 'Other' –

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<sup>24</sup> Interestingly, this challenge to law appears to take the *form* of law (however much that may be distorted), thus suggesting a turn *towards* law and a claim upon its emancipatory potential instead of a rejection of the legal paradigm.

which necessarily involves the rejection of the western, Westphalian, statist, liberal, authoritative, centralist and monist conception of law and legal order.

There are a number of ways of conceptualizing the issues raised by a pluralist conception, even if the arena is restricted to that of state internal situations as it is in this chapter. For example, and as discussed above, John Griffiths' argument is targeted at undermining the perceived hierarchy of the State legal order vis-à-vis alternative normative orders with the aim of removing State law from its elevated position in favour of a heterarchical constellation within a specific legal space. More concretely, and more recently, Keith Culver and Michael Giudice employ a legally pluralist approach to present their inter-institutional idea of 'intra state legality', which is 'a legal analogue of an internal political minority – insiders who nonetheless retain something of their outsider status',<sup>25</sup> and is theorized as existing within the State jurisdiction. In a third example, Iris Young utilizes legally pluralist reasoning to argue in favour of representation rights for minority groups, making the claim that such groups have been oppressed and silenced in democratic debate, and that representation rights ensure not just a voice but also an ear, thus facilitating participation in the shaping of state institutions.<sup>26</sup> While these examples are not intended to be exhaustive it is hoped that they illustrate the range of challenges laid at the door of the legally monist modern nation State, for so long untroubled in its hegemony, unopposed within its borders, and untrammelled in its employment and control of its own legal identifiers, structures, contours and practices. These challenges not only tug

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<sup>25</sup> Keith Culver & Michael Giudice, *Legality's Borders* (OUP 2010) 149-155

<sup>26</sup> Iris M. Young, 'Hybrid Democracy: Iroquois Federalism and the Postcolonial Project' in D. Ivison, P. Patton & W. Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (CUP 2000) 237-258

at the boundaries and contours of the State but also attack it at its very foundation, which is to say, the consensual basis upon which its power, authority and legitimacy are established.

This section on legal and normative pluralism has endeavored to emphasize the importance of distinguishing between the legal and the normative, to illustrate some of the possible applications of pluralist approaches, and to outline the extent to which these are motivated by the outcomes sought by the theorists employing them. At the heart of the concept, however, is the idea of normative contestation between and among normative orders within the boundaries of the nation State, *normative orders which are in themselves bounded*, whether that be on the basis of identity, community, nation, or participation. It is these intra-state normative borders that the next section will consider, with the aim of ascertaining the extent to which communication, interaction and transfer across these is possible.

### ***Negotiating Boundaries***

If it is to be posited that alternative normative spaces exist within the boundaries of the nation state, then subsequent boundaries or borders delimiting the interior and exterior of such spaces must be identifiable. 'Space' is used here in the loosest sense of the term, which is to say that it does not specifically correlate to a geographical, territorial or jurisdictional *locus* but rather a context or place that is constitutive of meaning, itself constituted by means of a boundary that separates this normative space from its

environment or surroundings.<sup>27</sup> The establishment of a boundary is premised upon the drawing of a distinction, although this assertion of alterity remains to all intents and purposes a neutral one until one side is selected or 'marked'<sup>28</sup>, whereby We are distinguished from Them, for example, and Them from Us. It is this 'marking' of the different spaces on each side of the border that gives rise to the context and thus the meaning. While this arises by means of a simple dichotomy, the 'distinguishing' and 'marking' of subsequent distinctions can result in innumerable spaces and contexts; indeed, it is the detachment of the notion of space from that of geography that represents the vital step here. This attenuation each from the other has the effect of providing for context as opposed to situatedness, thus allowing for overlaps and interpenetrations by and of these normative spaces from the perspectives of the individuals who operate within their context/s and boundaries.<sup>29</sup> This section will contend that it is the instigation of such boundaries that serve to represent those counter-hegemonic assertions that are facilitative of a normatively pluralist situation. To elucidate this point vis-à-vis the selected example of state-internal normative plurality and normative transfer across intra-state normative orders, it is necessary to look back to the genesis of those states now referred to as 'post-colonial' and the circumstances that gave rise to the situation now being critiqued.

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<sup>27</sup> Roger Cotterrell makes a similar distinction in terms of the delineation of boundaries in legal interpretation, which can refer to 'the fixing of boundaries of *meaning* ... or the extent of the *authority* of law or a legal system'. See Roger Cotterrell, 'Interpretation in Comparative Law' in *Law, Culture & Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 148

<sup>28</sup> This echoes the construction used in Luhmanian systems theory; see Niklas Luhmann, *Social Systems* (Stanford UP 1995)

<sup>29</sup> As Duncan Ivison observes, 'since individuals are situated in a range of different social, political and cultural contexts, some with significant moral and normative effects, these contexts must ... be acknowledged and accommodated.' See Duncan Ivison, *Postcolonial Liberalism* (CUP 2002) 161

From one perspective, the originary violence of the colonial project can be understood in terms of an omission, which is to say that there was a severe lack of participation by indigenous or sub-altern actors within the circumstances of the foundational. The effective dismissal of indigenous societies by their lands' colonizers as being insufficiently complex and sophisticated even to warrant recognition of their existence is well-known,<sup>30</sup> with the disgraceful legal fiction of *terra nullius* being given as the justification for what amounted to a barefaced land grab. A different view, however, is that the originary colonizing violence was the absorption of the indigenous normative order into that of the legally-monist colonial State. This process was a twofold one, combining the misconception of indigenous norms as (functionally) equivalent to the alien State norms and the a-contextual imposition of those norms on practices and relationships that were 'ontologically distinct'.<sup>31</sup> Even the subsequent halfway-house arrangements that come under the umbrella of the 'weak' form of legal pluralism maintained and perpetuated that initial subsumption – as discussed above, this was nothing more than a pragmatic solution given effect by the State in order to remove irreducible issues of legal conflict between itself and the indigenous normative orders.

Nevertheless, and in spite of colonial motivations concerning legal and administrative practicalities, it is submitted that this 'weak' step along the spectrum opened the door for the (re)assertion of a genuinely sub-altern

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<sup>30</sup> 'Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.' Per Lord Sumner speaking for the Privy Council in *Re Southern Rhodesia* (1919) 60 AC 211, 233-234

<sup>31</sup> Brian Z. Tamanaha, 'The Folly of the Social Scientific Concept of Legal Pluralism' in (1993) 20 *Journal of Law and Society* 209; see the full quotation, *supra* note 23



normative order within that alternative, newly-delimited 'space' of indigenous normativity. While this state-sanctioned practice lacked any genuine emancipatory character or potential, it can nonetheless be conceptualized as representative of a limited form of compromise between the two normative orders. That is not to say that recognition of the alternative normative order by a hegemonic one is required (or vice-versa, however unlikely); neither recognition nor acknowledgement are criteria of existence for either order, of course, but there are necessary for *interaction* and, importantly for the purposes of this investigation, for transfer. It is the boundary that is important here, for it is within and under these 'borderline conditions',<sup>32</sup> on the margins, that normative transfer occurs. As Niklas Luhmann puts it, 'boundaries do not mark a break in connections. [...] The concept of boundaries means ... that processes which cross boundaries ... have different conditions for their continuance after they cross the boundaries.'<sup>33</sup> It is to this movement or transfer of normative processes and/or features that the focus of this investigation will now turn.

### ***Distinguishing Transfer***

The three terms mentioned at the outset of this chapter – transfer, transplantation and translation<sup>34</sup> – related as they are by the common etymological root of the prefix *trans-*, all connote a movement or 'crossing'

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<sup>32</sup> Homi Bhabha uses the term 'borderline conditions'; see Homi Bhabha, *The Location of Culture* (Routledge 1994) 9

<sup>33</sup> Niklas Luhmann, *Social Systems* (Stanford UP 1995) 17

<sup>34</sup> While there are many other associated terms, namely transformation, transmission and transportation, the three listed above have been most frequently employed by comparative legal scholars and thus these three that will form the basis of this discussion.

from one position to another. However, despite this basic definitional commonality encompassing one form or another of the ‘transformation through travel’ of legal norms,<sup>35</sup> these terms have substantial differences in terms of their conceptual employment within the comparative law discussion, not least as ‘signifiers of different theoretical approaches and projects’.<sup>36</sup> While admittedly there may be a general and widespread guilt within the discipline in terms of becoming overly entangled with metaphors and semantics, the ongoing debates concerning the most fitting phrase to encapsulate these diverse processes of legal normative ‘movement’ at the very least draw attention to their complexity and variety. This volume engages with many of these well-known debates and so this section shall endeavor to avoid repeating any of these at length, short of that required for clarity; nevertheless, the conceptual differences between the three terms – transfer, transplantation and translation – do necessitate some further explanation in order adequately to justify the selection of transfer for employment within this investigation. This justification can be simply stated: not only does the concept of transfer have a more universal character and application than either that of transplant or translation but also, by incorporating a translation component within its process(es), it provides a more nuanced option for the purposes of investigating an area as complex as intra-state normative plurality. This conceptualization of transfer will be explored in this section by means of comparison with the other two, starting with transplantation.

### *Legal Transplantation*

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<sup>35</sup> Julia Eckert, ‘Who’s Afraid of Legal Transfers?’ in this volume, 1

<sup>36</sup> Günter Frankenberg, ‘Constitutions in Transfer’ in this volume, 2; see also Günter Frankenberg, ‘Constitutional Transfer: The IKEA Theory Revisited’ (2010) 8 I-CON 566

As Ralf Michaels explains earlier in this volume, the idea of ‘copy / paste’ intrinsic to the notion of transplantation is different from that of ‘cut / paste’, for the original feature remains unaffected by its recreation elsewhere,<sup>37</sup> regardless of whether the ‘copying’ can be viewed as a success or failure. Indeed, the extent to which retention of original ‘copied’ features in the newly established legal norm is achieved constitutes success is a question for another paper, although most comparative law proponents would argue that the processes of acceptance, reception and recontextualisation occurring subsequent to the ‘pasting’ necessitate some degree of alteration or adaptation.<sup>38</sup> That said, the transplantation of legal norms cannot be equated to their translation, for transplantation has a unilateral nature.<sup>39</sup> Whether law is conceptualized either as an instrument for social engineering or as a commodity to be sold,<sup>40</sup> there is rather an element of ‘trumps’ to the idea of transplantation, a sense of victory in competition, the vanquishing of a inefficient or outmoded legal feature in favour of a conquering champion – a Law 2.0, as it were. To put this a different way: while transplantation is interactive, it is not *mutually* so, which is to say that it lacks genuine

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<sup>37</sup> R. Michaels, ‘A New Look at Legal Transplants’ in this volume

<sup>38</sup> In his seminal text on legal transplants, Alan Watson goes as far as to state that the ‘usual way of legal development’ is that of copying or ‘borrowing’ plus adaptation: Alan Watson, *Legal Transplants. An Approach to Comparative Law* (Scottish Academic Press 1974) 7; for a more contemporary debate see also Pierre Legrand, ‘What ‘Legal Transplants’ and Roger Cotterrell, ‘Is There A Logic of Legal Transplants?’, both in D. Nelken & J. Feest (eds.) *Adapting Legal Cultures* (Hart 2001)

<sup>39</sup> M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart 2009) 63

<sup>40</sup> This arguably remains the case within a marketplace or ‘law as product’ conception whether or not the commodity is being bought or sold, as there is no requirement that the ‘seller’ be dominant and the ‘purchaser’ or recipient subservient.

reciprocity within that process of interaction.<sup>41</sup> For the interaction between normative orders to be reciprocal it must by definition be bi- (or even multi-) lateral, a requirement that transplantation, it is submitted, falls short of. By way of contrast, both transfer and translation can be said to meet this condition, although these must also – for the moment – be distinguished as distinctive concepts or, perhaps more accurately, as different processes.

### *Legal Translation*

Legal translation can be differentiated from transplantation and transfer by means of its core requirement – namely, translation entails that there be a translating *subject* situated in the space between the normative orders. The process of translation, by definition, requires the active and constructive input of a translator, this abovementioned translating subject, who operates as a conduit, a connection, or a mediator between two texts or spaces.<sup>42</sup> By means of the process of translation, therefore, the translator becomes the *de facto* ‘author’ of the new version of the legal feature, and it is this active additional *creative* aspect that separates translation, conceptually, from transplantation, which neither involves nor requires such a medium – that is to say, the position of the translating subject in the space between the ‘selling’ or

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<sup>41</sup> This issue is most overt in Alan Watson’s ‘rule-emphasizing’ conceptualization of legal borrowing and legal transplantation, whereby law is detached from society; see Alan Watson, *supra* note 38

<sup>42</sup> This is not to say that the task of translation is a straightforward one – on the contrary, it is an act of extreme complexity, as explained by Gilles Deleuze and Felix Guattari: ‘Translating is not simple act: it is not enough to substitute the space traversed for the movement; a series of rich and complex operations is necessary [...]. Neither is translating a secondary act. It is an operation that undoubtedly consists in subjugating, overcoding, metricizing smooth space, in neutralising it, but also in giving it a milieu of propagation, extension, refraction, renewal, and impulse without which it would perhaps die of its own accord: like a mask with a which could neither breathe nor find a general form of expression.’ See Gilles Deleuze & Felix Guattari, *A Thousand Plateaus* (Continuum 1987) 486

'sending' and 'purchasing' or 'receiving' normative orders means that the two processes are markedly different to what they would have been were such features merely transplanted from donor to recipient. The vital point here to note is the idea of an 'in-between space', as it were, a liminal or third space<sup>43</sup>, separate from either context A or context B, for it is here that the translator must necessarily be situated.

In terms of understanding these various forms of interaction between normative orders, the language of systems theory might be useful here, for through this it is possible to separate out the component parts of the interaction or communication.<sup>44</sup> Luhmann's theory of autopoietic systems utilizes communications as its systemic elements and presents these as a synthesis of three aspects, namely information, message and understanding<sup>45</sup>, which may of course be an inaccurate understanding or even *mis*understanding. By separating out these aspects, Luhmann serves to neutralize the central component, the message, decontextualizing it from its original setting and/or function and thus facilitating its understanding – in the form of its receipt, interpretation and recontextualization – within an alternative system. Leaving aside for the moment the questionable neutrality of the feature in and of itself, it is arguably possible to observe equivalences between this systems-theoretical conception of communication and the processes of transplantation and transfer. This does not, however, hold true

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<sup>43</sup> H. Bhabha, *The Location of Culture* (Routledge 1994)

<sup>44</sup> Communication in this sense is between social systems, of course, and not normative orders – this point is intended more as explanation of a particular construction instead of a genuine application of systems theory.

<sup>45</sup> '*Information, Mitteilung, Verstehen*'; see Niklas Luhmann, *Social Systems* (Stanford UP 1995)

for the process of translation, which is *specifically* facilitated by a translator or translating subject within a liminal space.

### *Legal Transfer*

The aspect that distinguishes transfer from transplantation, therefore, is the additional ‘step’ of translation inherent to it. More nuanced and sensitive than transplantation, more dynamic than mere translation, the concept of transfer has the characteristics of a *process*. Instead of a mere instance of movement, transfer rather denotes a reciprocal and interactive relationship that is simultaneously both place and progression – this final section will endeavor to explain this notion, starting with the idea of ‘place’ or, rather, ‘space’.

It is the involvement of a translating medium *within* the process of transfer that facilitates its conceptualization not only as an interactive process but also a reciprocal one. Indeed, it is submitted that this has the effect of making the concept of transfer even more ‘ecumenical’ by *liberating* it from the binary construction of import/export and similar.<sup>46</sup> Avoiding this ‘pervasive binary’, as mentioned above, is particularly important within an intra-state situation where the interacting normative orders are those of the State and indigenous peoples and societies, with their attendant power differential. It is, for example, this inequality in terms of the respective power-positions – the dominance of non-indigenous legal categories and concepts compared to the indigenous ones – that contributed to the criticisms encountered by Noel

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<sup>46</sup> Günter Frankenberg, *supra* note 5 (2010) 570, and generally. Günter Frankenberg’s IKEA theory, where there is a showroom, supermarket, or ‘reservoir’ of constitutional features ready to be picked off the shelf could arguably also be thought of as avoiding the usual binary construction, although this idea of a ‘storage space’ is very different to the liminal space argued for here.

Pearson and his concept of a 'recognition space' in respect of native title in Australia.<sup>47</sup> Although admittedly his argument did not concern legal transfer or any other movement between normative orders or contexts, Pearson argued that legal recognition was constituted within an *overlap* between the two distinct fields of Aboriginal law and Australian law, to wit, native title. While this is an interesting idea, it generated concern about the transformative potential of recognition and thus the effects of State law recognition of and upon indigenous norms,<sup>48</sup> in spite of arguments that this transformation was a two-way process and would lead to the indigenous norms also having an effect upon the non-indigenous Australian common law. Instead of arguing for a recognition space that remains within or, at least, bonded to each of these separate normative orders and contexts, therefore, this chapter proposes an interactive and reciprocal space, discrete from both (or all) original contexts. This in-between space is delimited by boundaries but *negatively* so – it is neither the marked nor the unmarked space but rather something and somewhere different. This translating space, as it were, introduces a more interactive aspect to the concept of normative transfer, and this exists in addition to that of 'progression' or 'movement' across boundaries.

These boundaries, of course, exist between and among intra-state alternative normative orders, and thus generate a situation of normative plurality replete with issues of contestation and interaction. While the translation 'step' inherent to the process of transfer creates a new liminal

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<sup>47</sup> Noel Pearson, 'The Concept of Native Title at Common Law', in G. Yunupingu (ed.) *Our Land is Our Life: Land Rights – Past, Present and Future* (Queensland UP 1997), 150-162, discussed in Duncan Ivison, *supra* note 29, 146-151

<sup>48</sup> See B.R. Smith, 'Towards an Uncertain Community? The Social Effects of Native Title in Central Cape York Peninsula' in B.R. Smith & F. Morphy (eds) *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU E-Press 2007) 117-134, 118-120

space, the 'movement' aspect of transfer itself generates those circumstances necessary for that space to become *productive*. This may not, on the face of it, seem to be a particularly substantial conceptual gain; nevertheless it is proposed that focusing not only on the outcomes of a process of transfer but also on the circumstances leading to such a process taking place provides additional insight – to make use once more of the terminology of the 'marketplace', what if it is not only the norm on the shelf that is worthy of attention but also the reciprocal and respective behaviors of the buyer and seller? Recognising this dual-aspect process of transfer is, consequently, more important than ever in circumstances of normative plurality, particularly where there is a power-differential asymmetry.