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The effectiveness and ineffectiveness of transplanting laws into Bermuda

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THESIS SUBMITTED FOR THE PhD DEGREE BY

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Abstract

This study examines the subject of transplantation of laws and rules generally, and the need to naturalise laws and rules to ensure that, once transplanted, they operate effectively for the end-user. Laws and rules must be naturalised to avoid the effectiveness of the transplanted law or rule being compromised. Save for one Order in Council from before the period being studied, the objects for examination are specific laws and rules transplanted to Bermuda between 2008 and 2012.

To test whether the objects for examination were effectively transplanted to the Island of Bermuda, the legal theories of Alan Watson, Pierre Legrand, Otto Kahn-Freud, Rudolf von Jhering, and Konrad Zweigert and Hein Kotz were chosen.

Effectiveness in relation to the operation of a transplanted rule or law occurs when it operates according to: (a) its intended purpose as determined by the perspective of the country or entity that first authored the rule or law; (b) its intended purpose as determined by the perspective of the recipient or host country prior to the impending; or (c) unforeseen but still beneficial purposes which may also include purposes (a) and (b).

This study asserts that the best way to achieve effectiveness is by ensuring that the transplanted law has been modified or naturalised, taking into account the donor country's or the recipient country's history and culture, thereby ensuring that the law is generally fit for purpose in the recipient country.

This study also asserts that the crucial question to be asked, in relation to legal transplantation, is from whose perspective one should look; that of the primary end-user or users or the ultimate end-user or users. This study asserts that it is only from the vantage point of an end-user (be they a primary or ultimate end-user) can one truly determine if a law or rule has been effectively transplanted.

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D.A.Q.R.

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Chapter 1. Introduction

This thesis examines the subject of transplantation of laws and rules generally, and the need to specifically naturalise laws and rules to ensure that, once transplanted, they operate effectively for the end-user. Laws and rules must be naturalised to avoid the effectiveness of the transplanted law or rule being compromised. Save for one Order in Council predating the period under examination, the objects for examination will be specific laws and rules transplanted to the Island of Bermuda between 2008 and 2012

Overview

This Chapter will state the hypothesis and research questions; will outline the candidate's motivation for undertaking the research giving background information about Bermuda and will give an outline regarding the general approach which is intended to be taken by the thesis;.

Aims of the Thesis, Scope and Definitions

The aims of the thesis, including its scope and Definitions, is to record that the main aim of the thesis is to test the hypothesis and to answer the Research Questions; that the period of study involves transplantation of Laws. Rules and Orders in Council in Bermuda from 2008 to 2012; include a Definition section to define key terms such as globalisation and transplantation.

Reasearch Method

In this study the reasearch method will state the reasearch method used, including the formulation of a hypothesis and research questions.

Structural Outline of the thesis

The structuarl outline of this thesis sets out a synopsis of each Chapter.

1.1 Motivation for research

Many Orders in Council since the 1950s have been used to extend UK legislation and treaties to Bermuda, but occasion have been at odds with Bermuda's North American focused-economy as the majority were more focused on the European Union (EU). They appeared to be used as conduits by which EU law was implanted into Bermuda's statute book.

Although ostensibly devices by which rules can be extended from the UK to Bermuda, a number of Orders in Council have clear origins within the EU. Given that Bermuda's economy is North American-focused and has no direct representation within the EU or the European parliament, this is problematic.

This study examined Orders in Council, case law, and legislation relevant to Bermuda. It is not a study into the specific subject of Orders in Council. Rather, it focuses on the transplantation of laws and rules, with close examination of only one Order in Council used by the UK to extend the Landmines Treaty to Bermuda (the Ottawa Treaty).

Orders in Council are statutory instruments issued by the UK government to, *inter alia*, extend UK legislation to Overseas Territories such as Bermuda. Although various UK governments have consulted Bermuda prior to such extension, consultation is not mandatory as UK legislation and treaties can be extended to Bermuda by Order in Council whether Bermuda wants it or not. This is in keeping with the historic colonial status that Bermuda has with the UK.

Pistor, Raiser and Gelfer[1] noted that it is hardly surprising that transplanted law often does not function as it does in the origin country if the law is imposed abruptly and without preparation, as happened in the post-Soviet transition countries in the 1990s that had neither the time nor the expertise to engage in careful assessment and deliberation of the models being offered. They also noted that the process of legal adaption was such that it hardly gives the receiving countries a chance to read, much less to understand or adopt the legal concepts embodied in the new statutes to specific conditions of their countries.

The second issue drawing attention to the subject was the plethora of criminal rules transplanted en masse by the Bermudian Government from Canada and the UK during the wave of gang-related murders in Bermuda from 2008 to 2012.

The third reason was the plethora of finance rules, also transplanted en masse from organisations such as the EU, the OECD, and G12 Countries during the world-wide economic recession between 2008 and 2012. During that period there was a rush by Bermudian legislators to implement finance legislation that would stop overseas financial

[1] Pistor, Raiser and Gelfer, Law and Finance in Transition Economies, 8 ECON. TRANSITION 325, 340 (2000).

entities including France and the OECD from placing Bermuda on their respective blacklists of countries, which would prohibit people or companies from other countries from trading with Bermuda-based financial and insurance entities, thus posing a very real risk of crippling Bermuda, as an offshore jurisdiction doing business with international business sectors.

Major financial institutions collapsed all over the world in 2008, and to stave off financial collapse or outright ruin, many OECD countries began to implement rescue plans such as bailing out banks, reinsurance companies and investment companies. As a result of the bailouts, many of these nations began to target countries that they perceived as tax havens, and thus partly or wholly responsible for the financial mess that the world's markets and financial jurisdictions found themselves in. Although many financial commentators have determined that the actual cause of the near financial meltdown of financial markets worldwide originated in the United States,[2] many OECD countries still have in their sights on countries perceived as tax havens, including Bermuda. As a result, Bermudian legislators now find themselves being forced into implementing legislation to prevent such blacklisting, which would result in the destruction of Bermuda as a major offshore financial jurisdiction, which may have been the intent of the OECD countries. However these actions may result in the same effect, as signs of a faltering international business sector are beginning to show, and many finance, insurance and reinsurance businesses are downsizing or leaving Bermuda altogether. The cumulative effect of the legislation being forced on Bermuda is that it is now becoming too expensive a place in which to do business as, since 2008, the Bermuda Monetary Authority (BMA) has greatly increased the volume of industry-related regulations, which in turn has meant that it has had to increase its ability to properly oversee the industries being regulated; the BMA will not be able to absorb these costs and will have to pass them on to those that are being regulated, who in turn will try and pass them onto their customers. Those customers will see that these costs are prohibitive and will seek cheaper jurisdictions in which to do business. All of this is being forced on Bermuda which, prior to 2008, prided itself as being of a culture of light regulation and being user-friendly to offshore businesses, and one where local regulators

[2] See: 'Le Monde' (Online) : Crise des"subprimes": le point de vue de deux economistes, 17/08/07.

felt that they knew and had adequate controls over those operating within Bermuda's finance, insurance and reinsurance industries.[3]

All of these rules and laws and the four theories on the transplantation of laws will be considered in this thesis in the context of existing and forthcoming laws and rules, including the Orders in Council and Tax Exchange Information Agreements (TEIAs).

1.2 The hypothesis of this thesis and the resulting research questions

The hypothesis of this thesis is that laws and rules cannot, unconditionally, be transplanted to Bermuda. The effectiveness of transplanted legislation requires crafting it to take account of the perspectives of the government or governments (i.e. the two governments in the case of a colonial relationship) that caused the legislation to be transplanted, and the people who will be affected by it. The research questions resulting from the hypothesis are:

- Can un-naturalised laws or rules be transplanted from one country or entity (i.e. G20, OECD, Canada, US, UK) to Bermuda while maintaining their effectiveness?;
- Can un-naturalised laws or rules be transplanted from one country or entity (i.e. G20, OECD, US, UK) to Bermuda via direct or indirect naturalisation and maintain their effectiveness?;
- Can un-naturalised laws or rules be transplanted from one country or entity (i.e. United Nations, UK) to Bermuda, with the sole determining factor being the utility of the laws or rules as determined by the UK parliament?;
- Can unatauralised and naturalised laws or rules be transplanted effectively from one country or entity (i.e. G20, OECD, Canada, US, UK) to Bermuda without there being a findinging that the law or rule satisfies the rule of law test (i.e. that the rule or law applies to all of Bermuda's inhabitants and is not applied in an arbitrary fashion)?

[3] 2012 Bermuda Legislature Hansard, in particular the speeches of the Minister of Finance and Premier Mrs. Paula A. Cox, Shadow Minister of Finance Mr. Bob E.T. Richards, and Deputy Shadow Minister of Finance Mrs. Patricia Gordon Pamplin.

1.3 Methodology

The act of transplanting laws or rules ('transplantation'), from one country or entity to another is something that has been done for centuries. Parliamentary counsel or legislative drafters, in particular, have used transplantation as a quick and easy means of finding ready-made legislation or rules as solutions for problem issues in their home jurisdictions; there is no need to reinvent the wheel. Such a simplistic approach serves to hide the hidden dangers of such a course, but it has often been adopted when drafters have rushed to find solutions for problems that their paymasters (i.e. the governments or entities that employ the Drafters) deem as requiring urgent solutions.

1.3.1 Documents examined

This thesis will rely on the written arguments of legal writers and academics expert in the field legal transplantation theory, especially in relation to law reform and its interplay with the science of comparative method. For the purpose of setting the background that will serve to help determine whether a transplanted rule or law has been transplanted effectively (i.e. naturalised), it will:

in relation to transplanted criminal rules:

- analyse articles written by people in Bermuda (although only one legal writer with an intimate knowledge of Bermuda as a jurisdiction was found), Canada, and the UK in relation to criminal laws and rules transplanted to Bermuda;
- analyse various Royal Commission reports and Bermudian government sponsored reports, as these are the best means of illustrating Bermuda's history and culture;
- interview Bermudian barristers who specialise in criminal defence work;

In relation to finance laws and rules:

- examine articles specific to the international finance industry generally;
- analyse various Royal Commission reports and Bermudian government sponsored reports, as these are the best means of illustrating Bermuda's history and culture;
- interview Bermuda-based people who specialise in the areas of international business or finance work in Bermuda;

In relation to the transplanted Order in Council relating to the Ottawa Treaty on land mines:

- analyse various Royal Commission reports and Bermudian government sponsored reports, as these are the best means of illustrating Bermuda's history and culture;
- in order to obtain a broader understanding of the practical effectiveness of the Ottawa Treaty as a whole, determine what, if any, concerns did the signatories and the prospective signatories have in relation to the practical application of the Treaty as a whole (aside from its laudable altruistic purposes);

In relation to Finance and or Tax related treaties transplanted from the OECD or its member states:

- interview Bermuda based people who specialise in international business or finance work.

The reason why written articles are being considered regarding criminal laws and rules transplanted to Bermuda from Canada and the UK is because it is from these jurisdictions that the subject laws have been transplanted. By using Bermuda as the subject of study, it is hoped that this thesis will add to academic research in this area, especially in relation to how laws and rules are transplanted (i.e. their effects and consequences) to countries such as Bermuda that still today exist as British Overseas Territories.

1.3.2 Proving the hypothesis: The use of six case studies and bias, generally

In order to prove the hypothesis, six case studies were created. Each case study has a Bermuda rule as its core for analysis. These Bermuda rules case studies were, save for one treaty,[4] selected from those enacted during the time period of 2007 to 2012 (i.e. a time period when Bermuda saw a large and simultaneous number of unlawful gang-related rules and treaty-related rules being added to its statute book). They are:

(i) s. 315F 'stop and search' of the Criminal Code Act 1907 (Bermuda);

[4] The 1986 US Tax Treaty was added as a case study because it was used as the foundation for the creation of other tax treaties between Bermuda and other countries- the TIEAs. To exclude the same as a case study would not allow one to understand the context in which the subject of tax has been dealt with by Bermuda and other countries that are specific to Bermuda.

(ii) s.29A 'warrant for detention without charge' of the Police and Criminal Evidence Act 2006 (Bermuda);
(iii) s.70JA and s.70JB 'unlawful gangs' of the Criminal Code Act 1907;
(iv) Tax Exchange Information Agreements ('TIEAs');
(v) USA- Bermuda Tax Convention Act 1986; and
(vi) Ottawa Treaty (or 'Landmines Treaty').

Do Case Studies Contain a Subjective Bias

There continues to be argument that case studies contain a subjective bias, imported by the researchers who create and utilise case studies for the purpose of research. In order to mitigate against the possibility of subjective bias on the part of the author of this study, thereby adding to the positive credibility of this study, the case studies used were randomly selected from within the period of 2008 to 2012 (a period in which Bermuda enacted a large number of civil and criminal law rules) and from within the context of Bermuda. In addition, at the time the case studies were selected by the author, he had no knowledge of the outcomes associated with the selected case studies after they were transplanted to Bermuda. The outcomes were, accordingly, only made known at the conclusion of interviews held with those persons who had operational knowledge of the case studies/ rules. Further as another means of mitigating against subjective bias, on the part of the author, reports initiated by the Bermuda Government (e.g. Royal Commission Reports) were relied upon to give the author the most recent historical and social context in which the case studies came into being. The facts set out in these reports were and are findings of fact, thereby dramatically reducing the author of this study's ability to import his own subjective bias (as well as dramatically reducing the import of subjective racial bias) into this study.

In relation to the chosen case studies (the subject rules), the author prepared and asked the same questions of the interviewees (e.g. asking them: to indicate their professional titles; indicate if they were aware of the case study (the rule); indicate what role if any that they play or played in the use of the case study; whether they were aware of the purpose for the case study coming into being and if such purpose had been met; what were the outcoomes of the case study's use). However the answers received were all different (mostly as a result of the roles they played in the case study's use and outcomes)- resulting in different follow-up questions being asked of the interviewees. Some interviewees were more forthcoming and candid than others. Some interviewees, although willing in the beginning to participate in the interviews, subsequently asked that the interview be stopped (on being reminded that the information being obtained would be used and published for PhD purposes) and that none of the information obtained from them was to be used- fearing political fallout or use of the information by competitors within the reinsurance market in

Bermuda and overseas). All of the persons interviewed by the author were known to the author prior to the interview. However, to mitigate against subjective bias, the interviewees were at all times interviewed within their respective professional work capacities-with interviews taking place either in their offices or inside a nearby vacant office board-room.. However, to ensure that the persons interviewed were aware that the author was not dealing with them in a non-professional or friend capacity, and again to mitigate against subjective bias, the author identified himself as a PhD Candidate and produced university issued photo ID to verify the same- at the beginning of each interview.

Again, in an attempt to mitigate against subjective bias, the questions and answers relied upon by the author were recorded in a bound notebook and read back to the interviewees exactly as they were asked and as they were answered, in order to have them corroborate that they were asked the subject questions and that the answers given were their answers alone. Immediately thereafter the interviewees were asked to date and append their signature on the last page of the recorded interview. With the exception of one interviewee, all interviewees were interviewed only once- although the authour did leave open the possibility of follow-up interviews to which the interviewees were in agreement to. The remaining interviewee was interviewed a second time for the purpose of gathering information to find out what was the recent outcome of an appeal to the Privy Council (Bermuda's final court of appeal)- an appeal that centered on one of the criminal rule case studies.

Within the subject of academic study, in relation to the use of case studies, there is a recognized 'misunderstanding about case-study research and it is that the method maintains a bias toward verification, understood as a tendency to confirm the researcher's preconceived notions, so that the study therefore becomes of doubtful scientific value'.[5] For example, it has been suggested that 'the case study suffers from what he calls a 'crippling drawback,' because it does not apply 'scientific methods,' by which Diamond understands methods useful for 'curbing one's tendencies to stamp one's pre-existing interpretations on data as they accumulate.'[6] It should be noted here that the aura of bias is of 'general application and applies to all levels of academic research and other qualitative

[5] Bent Flyvbjerg, "Five Misunderstandings About Case-Study Rearch, Qualitative Inquiry, Vol. 12, No. 2, April 2006, pp. 1-35.
[6] Ibid.

methods'.[7] It has been argued, too, that 'case studies ostensibly allow more room for the researcher's subjective and arbitrary judgment than other methods: they are often seen as less rigorous than are quantitative, hypothetico-deductive methods'.[8]

Awareness of bias in academic study

These criticisms were of use to the author of this study because they forced the author (the researcher) to be 'sensitized and aware of the existence of the issue of bias- in relation to academic research'. However, the critiques mentioned 'demonstrate (its been argued) a lack of knowledge of what is involved in case-study research'.[9] This is because it has been shown that the critique(s) 'are fallacious, because the case study has its own rigor, different to be sure, but no less strict than the rigor of quantitative methods. The advantage of the case study is that it can 'close in' on real life situations and test views directly in relation to phenomena as they unfold in practice'.[10]

It I has been shown that 'researchers who have conducted intensive, in-depth case studies typically report that their preconceived views assumptions, concepts, and hypotheses were wrong and that the case material has compelled them to revise their hypotheses on essential points. The case study forces upon the researcher the type of falsifications described above'.[11] Moreover, 'criticizing single-case studies for being inferior to multiple case studies is misguided, since even single-case studies 'are multiple in most research efforts because ideas and evidence may be linked' [12]

Counter-arguments

There are a number of counter-arguments that promote the use of case-studies. 'In a case study done by an alert social scientist who has thorough local acquaintance, the theory he uses to explain the focal difference also generates prediction or expectations on dozens of other aspects of the culture, and he does not retain the theory unless most of these are also

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[7] Ibid, pp. 3-4 .
[8] Ibid.
[9] Ibid, p. 5.
[10] Ibid., p.19.
[11] Ibid, 19-23.
[12] Ibid.

confirmed.[13] Experiences of social scientists confirm this. Even in a single qualitative case study, the conscientious social scientist often finds no explanation that seems satisfactory. Such an outcome would be impossible if the caricature of the single case study . . . were correct--there would instead be a surfeit of subjectively compelling explanations'.[14]

Further, it has been argued that 'it is falsification and not verification, which characterizes the case study. Moreover, the question of subjectivism and bias toward verification applies to all methods, not just to the case study and other qualitative methods. For example, the element of arbitrary subjectivism will be significant in the choice of categories and variables for a quantitative or structural investigation, such as a structured questionnaire to be used across a large sample of cases. And the probability is high that (1) this subjectivism survives without being thoroughly corrected during the study and (2) that it may affect the results, quite simply because the quantitative/structure researcher does not get as close to those under study as does the case-study researcher and therefore is less likely to be corrected by the study objects 'talking back.'[15] The author of this study found it most valuable to have chosen the method of interview, the qualitative interview, that allowed for the objects of study to be able 'to talk back'- thereby allowing for a free flow exchange of information, relevant to the case studies used,. The exchange allowed the author to dispel preconceived notions (e.g. the notion that the section 315F was of no benefit in stopping unlawful gang activity in Bermuda).[16]

'Here, too, 'this difference between large samples and single cases can be understood in terms of the phenomenology for human learning discussed above. If one thus assumes that the goal of the researcher's work is to understand and learn about the phenomena being studied, then research is simply a form of learning. If one assumes that research, like other learning processes, can be described by the phenomenology for human learning, it then becomes clear that the most advanced form of understanding is achieved when researchers

[13] Ibid, p.21.
[14]Ibid.
[15] Ibid, pp. 21-23.
[16] Ibid.

place themselves within the context being studied. Only in this way can researchers understand the viewpoints and the behavior, which characterizes social actors'.[17]

Valid descriptions 'of social activities presume that researchers possess those skills necessary to participate in the activities described:……. and it is right to say that the condition of generating descriptions of social activity is being able in principle to participate in it. It involves 'mutual knowledge,' shared by observer and participants whose action constitutes and reconstitutes the social world'[18].

'From this point of view, the proximity to reality, which the case study entails, and the learning process which it generates for the researcher will often constitute a prerequisite for advanced understanding.[19] In this context, one begins to understand Beveridge's conclusion that there are more discoveries temming from the type of intense observation made possible by the case study than from statistics applied to large groups. With the point of departure in the learning process, we understand why there searcher who conducts a case study often ends up by casting off preconceived notions and theories. Such activity is quite simply a central element in learning and in the achievement of new insight. More simple forms of understanding must yield to more complex ones as one moves from beginner to expert'.[20]

The 'misunderstanding--that the case study supposedly contains a bias toward verification, understood as a tendency to confirm the researcher's preconceived ideas—is revised as follows:

> The case study contains no greater bias toward verification of the researcher's preconceived notions than other methods of inquiry. On the contrary, experience indicates that the case study contains a greater bias toward falsification of preconceived notions than toward verification'.[21]

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[17] Ibid, pp 20-22.
[18] Ibid.
[19] Ibid, p. 21.
[20] Ibid.
[21] Ibid, pp 17-18.

1.3.3 Proving the hypothesis: Why the Bermuda rules were selected for analysis

Further, the Bermuda rules were selected to be a part of case studies because they also represent the two jurisdictions of rules that are used in Bermuda. For example, ss. 70JA, 70JB and 315F of the Criminal Code 1907 and s.29A of the Police and Criminal Evidence Act 2006 would amount to criminal disputes, to be decided within the criminal jurisdiction; disputes arising from the TIEAs, USA-Bermuda Tax Convention Act 1986 and the Ottawa Treaty would amount to civil disputes, to be decided within the civil jurisdiction.[22]

1.3.4 Proving the hypothesis: The use of the case studies and proving effectiveness

In order to properly analyze the small number of case studies used in this thesis, namely the Bermuda rules case studies, the author of this thesis figuratively placed them within the context of Bermudian society itself. This was first done by obtaining an historical understanding of Bermuda's most recent history, by way of the Royal Commission Reports and reports instigated by the Bermudian Government, and by obtaining the most recent understanding of the end-user practical understanding of whether or not the Bermudian rules were effectively implemented into Bermuda's statute book. To do so, the author of this thesis relied on the Qualitative Interview. Five Quantitative interviews were carried out to completion; three were commenced but were terminated part way by the author and or the interviewee because of the interviewee's concern about political reprecussions (at the instigation of the Bermuda Government) and concern that what was being recorded by the author may be used to compete against their own reinsurance company and or political reprecussions (at the instigation of the Bermuda Government and the regulatory body, the Bermuda Monetary Authority). All Qualitative Interviews were conducted within either an office (their office) or boardroom setting (the author's office boardroom but with the agreement of the interviewee and the author's head of department). The Author made great efforts not conduct the Qualitative Interviews in a public setting (such as a restaurant), to ensure that the interviews were as candid as possible- without fearing that someone may overhear us or disrupt us during the interviews. For the purpose of the case studies dealing with the Bermuda criminal law rules, The author of this thesis conducted interviews with the Deputy Director of Public Prosecutions and the Superintendent of

[22] S.7 Supreme Court Act 1905

Police (Intelligence Division). For the purposes of dealing with the Bermuda civila law rules, The author also conducted interviews with three Senior Attorneys with practical knowledge of these rules. Three interviews were aborted due to concern about the information given in the intervew being used by rival reinsurance companies in Bermuda and overseas. These latter interviews were with certain leaders within the Bermuda reinsurance industry.

Effectiveness

The benchmark for determing effectiveness is the existence of the rule of law. In other words one must determine if the transplanted law or rule to Bermuda applies to all of the inhabitants pf Bermuda. To determine this, the case studies were tested to determine if they had been unconditionally: (a) transplanted; (b) transplanted but ultimately for another purpose; or (c) not transplanted From this the next step was to determine if the transplanted law or rule applied to Bermuda's inhabitants equally or was not applied in an arbitrary fasshion- thereby offending the rule of law.. This determination must be satisfied in order to comclude the rule of law exists, and where it does exist, effectiveness has been satisfied. Doing so, however, serves to identify a problem. The problem is that many laws are created to have application to to a country's population[23] generally but are also created to have application a class or classes of people or even to one person within a country. There are also instances where a transplanted law or rule was intended to apply to all of a country's inhabitants but in practice was only applied in select areas where certain people tend to pass or congregate (e.g. unlawful gang members). This in turn begs the question of: In these instances where a transplanted law or rule is only applied to a class of people (be they in a particular region or area or say a city or highway) does this mean that these laws or rules are not effective- falling foul of the rule of law?

1.3.4.1 What is a Qualitative Interview?

Firstly, it is important to indicate here that there are generally three types of interview: 1. structured; 2. semi-structured; and 3. unstructured. Moreover:

[23] Bermuda Constitution Order 1968.

> 'the structured interview is at the quantitative end of the scale, and more used in survey approaches. The rest of the scale, semi-structured and unstructured, is the area occupied by qualitative researchers, with the interviews characterised by increasing levels of flexibility and lack of structure'.[24]

1.3.4.2 Why it was decided to use Qualitative Interviews

The author of this thesis opted to use qualitative interviews because they allowed for: [25]

(i) an interactional exchange of dialogue (between author and the person being interviewed, in a face-to-face context);

(ii) a thematic, topic-centered, and narrative approach where the author was able to introduce topics, themes or issues he wanted to cover (such as the Bermuda-specific rules and topical issues surrounding them while keeping in mind the historical and cultural relevance of the Royal Commission Reports and reports instigated by the Bermudan Government on Beremuda's race issues andculture issues), but with a fluid and flexible structure; and

(iii) a perspective regarding knowledge as situated and contextual, that required the author of this thesis as the researcher to ensure that relevant contexts were brought into focus, thereby allowing situated knowledge to be produced. Meanings and understandings were created by way of an interaction between interviewer and interviewee, which is effectively a co-production, involving the construction or reconstruction of knowledge.

1.3.4.3 Qualitative interviews: the names of the people being interviewed

It is important to note here that the label or title given by a researcher to the people who are being researched 'often indicate ways of thinking about them and how they are understood as relating to the interview, and consequently reflect the philosophical stance of the researcher'. Terms for those being researched have included subject, respondent, informant, interviewee and participant, the sequence here suggesting a movement from

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[24] Rosalind Edwards and Janet Holland, What is Qualitative Interviewing?, pp. 2-3.
[25] Ibid.

passive to active. The title 'subject' is typical of the close-ended, structured interview, matched by an interviewer. Historically:

> 'respondent and informant have been associated with ethnographic methods, where key figures are sought when researching particular groups or cultures, to provide useful information on the community being studied. Participant emerges from this field approach too, and applies specifically to the researcher in a method typical of ethnography: participant observation'.

The researcher in this case is still an 'outsider', albeit hoping to become more of an insider, or more accepted, by participating in the activities of the group being researched,

> 'who is expected to introduce no biases into the research and data, and deliver objectivity by asking the same questions in the same way'. Interviewee is matched by interviewer, the similarity of terms suggesting more equality in the research relationship. Participant takes this further, and carries with it from feminism and other interpretivist positions certain understandings of the part played by researched and researcher'.
>
> 'All those who appear for the interview, ignoring as far as possible the subjectivity of the subject'.
>
> 'Both researcher and researched bring with them concepts, ideas, theories, values, experiences and multiply intersecting identities, all of which can play a part in research interaction in the qualitative interview'.

In addition, changes over time in the terms used for participants in research reflect changes in the underlying philosophical positions adopted. Broadly, they chart movement from the notion of the neutral interviewer, standardisation and exclusion of bias at the heart of more positivist approaches, to ideas of reflexive construction, difference and shifting positionalities of researcher and researched that have emerged from feminist, post-modern and interpretivist stances.[26]

For the purposes of this thesis, the author has used the term 'interviewee'- thereby maintaining a level of equality between interviewer and interviewee (this was to prevent

[26] Rosalind Edwards and Janet Holland, What is Qualitative Interviewing?, p. 93.

against the possibility of intimidation on the part of either party and thus skewing the vale given to the information gathered by way of the qualitative interview).

1.3.5 Proving the hypothesis: Why certain transplant theorist were chosen

The transplant theorist chosen for this thesis were chosen because they were the principal persons who gave rise to the now current legal academic debate on the subject of legal transplants. More recent theorist, who either support, refute or present neutral arguments that are sympathetic to the two opposing arguments relative to legal transplantation, have also been relied upon- albeit under the primary headings of Professors Alan Watson and Pierre Legrand..

1.3.5.1 Why Professors Watson's and Legrand's theories were chosen

For the purposes of determining whether un-naturalised laws or rules can directly or indirectly be transplanted from one country or entity to Bermuda, I turned to the comparative law *albeit this thesis is not about comparative law), wherein I found the legal transplants theory, a theory that finds its origins in comparative law. Although legal transplantation has been taking place for many years, the subject of legal transplants really began to emerge as a theory in 1974 by way of Professor Alan Watson's book titled: *Legal Transplants: An Approach to Comparative Law*[27] and after Professor Pierre Legrand's counter article titled: *The Impossibility of Legal Transplants*.[28] Although several legal transplant theorists have written articles subsequent to the writings of Professors Watson and Legrand, the writings of Professors Watson and Legrand still remain central to the legal transplants theory arguments. It is for this reason that I have chosen to remain reliant on these core theories of Professor Watson and Professor Legrand for the purposes of testing and proving my hypothesis and using information obtained by way of qualitative method interviews.

1.3.5.2 Why Kahn-Freud theory was chosen

Within the Comparative Law, in relation to legal transplants theory, the comparative law theorist are divided generally in favour of the theories of Professor Alan Watson or that of

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[27] 1st Ed.
[28] 4 MAASTRICHT J. EURO. & COMP. L. 111 (1997).

Professor Pierre Legrand. Professor Otto Kahn-Freud appears to have been the first to acknowledge the practical realities associated with the use of legal transplants. He opined that 'we cannot take for granted that rules or institutions are transplantable' and that 'any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection'. Moreover he stated that 'the consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.[29]

It is because Professor Kahn-Freud was to realise the practical realities associated with transplanting a law or rule from one country to another (i..e. there is no certainty that the transplanted law or rule will operate effectively once transplanted), that I have chosen his transplant theory as one by which to test the hypothesis of this thesis.

1.3.5.3 Why Professors Konrad Zweigert and Hein Kotz's theory was chosen

Professors Konrad Zweigert and Hein Kotz's theory was chosen for the purposes of testing the hypothesis of this thesis because their theory is a unique addition to the legal transplants theory debate. Specifically, their 'better solutions theory' not only requires one to consider if there are better solutions to the proposed transplanted law or rule, it also has embedded into it a test for determining the same. Specifically, the requires:

(i) problem definition; and
(ii) solution identification.[30]

Such a test is unique within the legal transplant debate, as it is the only definitive test that can be applied for the purposes of determining if a transplanted law or rule has been effectively transplanted.

[29] On Uses and Misuses of Comparative Law, 37 MOD. L. REV. 1 (1974), pp. 1-27.
[30] Zweigert and Kotz, Introduction to Comparative Law (3 ed. 1998) 34.

1.3.5.4 Why Professor Rudolf von Jhering's theory was chosen

The decision to use Professor Rudolf von Jhering's theory, as a means of testing the hypothesis of this thesis, was made because his theory is also unique. Rather than being a theory made in the abstract, his theory directs that the user of his theory focus on seeking out the utility of a transplanted rule or law.[31] This is to say that one must try an determine if the law or rule can be successfully used for any given purpose. Arguably, this includes seeking a purpose other than the intended purpose of the transplanted law or rule.

This test, too, is unique within the legal transplant debate, as it is the only definitive test that can be applied for the purposes of determining if a transplanted law or rule can be used for its intended purpose or an unintended purpose.

1.4 Discussion of concepts: Bermuda as end-user

Bermuda was chosen for testing this thesis because there has been no academic study of how these theories apply to Bermuda or its people, although the question of transplantation was considered by Seidmans in a similar colonial context specific to the Republic of China and the former British colony of Hong Kong.[32] This will make a significant contribution to academic study in this area of legal theory. This research has found that, not only is transplantation problematic for counties like Bermuda whose laws are founded on the common law tradition, but also for countries like Aruba whose laws are founded on the civil law tradition, being a former Dutch colony.[33]

1.5 Why the subject for research was narrowed

The focus of this study was narrowed to Bermuda's criminal and finance and reinsurance laws because, from 2008 to 2012, domestic and international events caused these areas of law to rapidly escalate in respect of the volume and frequency of legislation that was drafted to help Bermuda to deal with these events. In 2008 a 'perfect storm', of negative

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[31] Ralf Michaels, The Functional Method of Comparative Law, p. 348.

[32]

[33] C-145/04 *Spain v UK* C-300/04 *M.G. Eman, O.B. Sevinger v College van burgemeester en wethouders van Den Haag*, Judgments of 12.9.2006, concerning the British territory of Gibraltar and the Dutch territory of Aruba respectively.

occurrences, occurred. First, the worldwide recession began to be felt, precipitated by collapses of international banks and investment companies. As a result, Bermuda was labelled as a 'tax haven' and cause of the collapse of international banks and investment companies. Indeed, a US Democratic Party election broadcast in the lead up to the American Presidential election of 2012 branded Bermuda as a tax haven and put Bermuda in the cross hairs of its biggest trading partner, the United States.

The second event was that Bermuda, previously generally peaceful, was rocked by a spate of shootings and gang-related murders.

To address these problems, a plethora of additional legislation was demanded by international bodies to deal with perceived acts of money laundering and solvency threshold deficiencies for insurance and reinsurance companies. A raft of criminal law was also needed to help address the increasing perceived lawlessness.

1.6 Bermuda's legal or constitutional system

Bermuda's legal system is based on English common law, the doctrines of equity, and Bermudian statute law dating back to 1612.[34] Its highest courts are the Court of Appeal (consisting of the court president and at least 2 justices), the Supreme Court (consisting of a chief justice, 4 puisne judges, and 1 associate justice). The Judicial Committee of the Privy Council, located in London, is the court of final appeal. The selection and term of office of judges in Bermuda is determined by the Governor of Bermuda. Further, the judges are selected by the Judicial and Legal Services Commission and tenure is based on terms of appointment. There are also two subordinate courts: the commercial court (which began in 2006); and the magistrates' courts.[35] The existence and function of the judiciary are codified by way of the Bermuda Constitution Order 1968.[36]

In regards to its Government, Bermuda has a bicamerial Parliament or Legislature, consisting of a Senate (the upper chamber) and and a House (the lower chamber). They under the Bermuda Constitution Order 1968 are permitted to make rules for Bermuda-

[34] 25 Int'l Bus. Law. 86 1997.
[35] CIA The World Fact-book at: https://www.cia.gov/index.html
[36] Chapter V, ss. 73 to 80.

including rules such as Orders in Council that are used to extend treaties to Bermuda thus making the extended treaties a part of Bermuda's legal system or legal order (in some instances Bermuda not not do anything to give effect to the treaties while in other instances such as in the Adoption of Children Act 2006), a rulle was required to be enacted by Bermuda in order to give effect to the underlying Convention on Protection of Children and Co-operation.[37][38] All rules enacted by the Legislature, including rules to give effect to treaties, require Royal Assent by way of Bermuda's Governor. The position and role of the Governor is also prescribed by the Bermuda Constution Order 1968.[39]

The role and function of the Executive (Ministerial responsibilities including the Governor's functions as part of the Executive) are also codified within the Bermuda Constitution Order 1968. [40]

The fundament rights and freedoms afforded to the citizens of Bermuda under law are also prescribed by way of the Bermuda Constitution Order 1968.[41]

However, the UK Government retains the right to: make rules for Bermuda (by way of UK Acts of Parliament but extended to Bermuda typically by way of Order in Council but not always[42]); suspend or revoke all or part of the Bermuda Constituion Order 1968. These powers are reserved to the UK Government by way of the parent Act to the Bermuda Constitution Order 1968.[43]

The Public Service (the Civil Service) is also prescribed by way of the Bemruda Constituion Order 1968.[44]

Accordingly, it is by way of Bermuda's legal system that the Bermuda rules at issue would have to be interpreted and enforced- thereby assuring (as best as possible) the legal effectiveness of any transplanted rules.

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[37] Chapter III, ss. 26 to 51.
[38] s. 46(2)(a).
[39] Chapter II, ss. 17, 20, 21, 22, 23, 24, and 25
[40] Chapter IV, ss, 56 to 72.
[41] Chapter I, ss. 1 to 16.
[42] Colonial Laws Validity Act 1865.
[43] Bermuda Constitution Act 1967, s. (1),(2),(3) and (4).
[44] Chapter VI, ss. 81 to 90.

1.6.1 Bermuda's legal system: the legal profession

The legal profession of Bermuda or the Bermuda Bar follows many English traditions (for example, advocates wear wigs and robes in court). Unlike England (which still maintains a distinction between barristers and solicitors) Bermuda has a fused legal profession, which is similar to the Canadian and some Australian jurisdictions. All lawyers admitted to practice in Bermuda (called 'Barristers and Attorneys of the Supreme Court of Bermuda') have the right of audience before the Bermuda courts. Admission to the Bermuda Bar is restricted to persons possessing Bermudian status who have been admitted to another Commonwealth Bar and have completed twelve months' pupillage, and to non-Bermudians who are entitled to practice in another Commonwealth jurisdiction, who have been resident in Bermuda for twelve months, and who possess a valid work permit. However, English Queen's Counsel may be openly admitted in appropriate cases.[45]

Still, one can make the argument that the effective use of a rule (be it in the form of a convention or in the form of a statute) is ultimately dependent upon international political will alone (in the case of a convention) or domestic political will alone (in the case of a statute).[46]

However such an assertion has the effect of excluding the significance and function of the judiciary (with the assistance of legal arguments made by lawyers), in instances where persons seeking to rely on a rule are unsure of its meaning generally or, specifically, unsure of its meaning or nuances as part of a dispute between parties. As alluded to previously, some of the functions of the judiciary include: interpreting the meaning of international (i.e. conventions) and domestic (statute) rules generally; and providing resolution to disputes that are founded on the interpretation of international and or domestic rules.

Accordingly, it would be the members of the Bermuda Bar who would be called upon to assist the Bermuda Judiciary in determining if a transplanted rule has been transplanted effectively.

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[45] http://www.aswlaw.com/

[46] Martin de Jong, INSTITUTIONAL TRANSPLANTATION AND THE RULE OF LAW: HOW THIS INTERDISCIPLINARY METHOD CAN ENHANCE THE LEGITIMACY OF INTERNATIONAL ORGANISATIONS, pp. 317-318.

1.7 Means of transplanting laws and rules to Bermuda

The transplantation of laws and rules to Bermuda occurs when:

- the Bermuda Government uses laws and rules from other jurisdictions (e.g. in the form of criminal legislation and finance legislation);[47]
- the UK government extends laws or rules to Bermuda (i.e. by way of Orders in Council);[48]
- the EU, via UK Order in Council, extend EU regulations to Bermuda via[49]; and
- the OECD by forced imposition to Bermuda impose finance related obligations upon Bermuda (i.e. in the form of finance legislation and dual or multi-party finance agreements such as Tax Information Exchange Agreements (TIEAs)).[50]

These occurances of transplantation are also indicators of how laws and rules are received ('reception') by Bermuda, For a greater understanding of what is meant by 'reception', and how it relates to the concept of transplantation, see heading '1.9 The Reception of laws or rules by Bermuda within this thesis.

1.7.1 Definitions

Transplantation is the act of copying a law or rule from one country or entity and using it in Bermuda.[51]

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[47] For example: Criminal Code Act 1907 which finds its origins in Australia; Companies Act 1981 which finds its origins in the UK.

[48] For example: The Bermuda Constitution Order 1967 whereby the Westminster parliament made and extended a written Constitution to Bermuda but retaining the right to amend the same by way of the Westminster parliament.

[49] For example: The Bermuda Copyright Act and Copyright Act Regulations.

[50] For example: Basel II Reinsurance (solvency) Regulations; Proceeds of Crime Act (prohibition against money laundering and seizure of laundered funds); TEIAs between Bermuda and member states of the EU, G20, and OECD.

[51] For a general introductory overview of the meaning of 'transplantation' of laws or rules or the 'borrowing' of laws or rules, see. Maria Gaitan, P.R, 'The Challenges of Legal Transplants in a Globalised Context: A case study on working examples', University of Warwick, October 2014; Alan Watson, 'Legal Evolution and Legislation', (1987) Brigham Young University Law Review 353 (1987).).

A ‘law’ is:

- civil law (which includes case law relative to the issue of taxation) and criminal case law (which includes case law relative to the issues of terrorism and unlawful gangs);
- reinsurance and tax regulatory policy; and
- tax exchange information agreements/treaties (‘TIEAs’);

A ‘rule’ means:

- legislation but specific to criminal, finance and tax laws;
- legislation but specifically in the form of the chosen land mine related Order in Council (that are, collectively, criminal and international sanction focused); and
- reinsurance and tax regulatory policy that has been translated by way of legislation.

‘Direct naturalisation’ means the cumulative acts of:

- taking a body of laws from one country (the ‘host’), for the purpose of resolving a problem in another country (the ‘transplantee’);
- removing elements from the body of laws that would cause the laws not to work, effectively, on being transplanted to the transplantee; and
- adding elements to the body of laws, unique to the transplantee, thereby allowing it to work effectively for and within the transplantee’s statute book.

‘Indirect naturalisation’ means:

- the act of allowing a transplantee, via the parliamentary process, to have a say or give direct input, during parliamentary debates, regarding a specific body of laws, that is to be imposed on a transplantee by a host country (i.e. the UK) or host entity (i.e. the EU).
- This is to ensure that transplanted laws, being imposed on a transplantee, effectively work once transplanted.

1.7.2 Definitions- legal culture, cross fertilisation of legal systems, and misc. rule making participants

Legal culture

Legal culture is a 'complex interraltionship on four levels:

1. the level of valuses, beliefs and attitiudes towards law;
2. patterns of behavior;
3. institutional features;
4. the body of substantive as well as proceedural law'.[52]

- **Cross fertilisation of legal systems**

  The cross fertilisation of legal systems can be best illustrated by the fact that 'all legal systems contain ideas, concepts, structures and rules born in other legal soils, movings and cross-fertilising. All systems are mixed in the sense that even when the nation state is regarded as the only source of law, systems have mixed sources, that is, the element that combine to form a system are from different legal sources...These normative systems may also reflect differeing socio-cultures..'.[53]

- **Rulemaking (within the common law system)- The participants**

Within most common law jurisdictions, such as Bermuda, rules are in practice created, implemented, and tested with the assistance of four entities: Lawyers; Parliamentary Counsel; Members of Parliament (which includes policy makers on behalf of the Government); and the Judiciary.

1. The Lawyers (and their role)

The role of lawyers is best described by way of 'the Basic Principles on the Role of Lawyers …formulated to assist Member States of the United Nations in their task of promoting and

[52] Irma Johanna Mosquera Valderrama, Legal Transplants and Comparative Law, p. 271.
[53] Orucu E,, Mixed and missing systems: A conceptual search, studies in legal systems, p. 432.

ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice'.[54]

1.a Duties and responsibilities of lawyers

According to the Basic Principles:

> 'lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice and the duties of lawyers towards their clients include:
>
> (i) advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
> (ii) assisting clients in every appropriate way, and taking legal action to protect their interests;
> (iii) assisting clients before courts, tribunals or administrative authorities, where appropriate.[55]

Also, lawyers, in protecting the rights of their clients and in promoting the cause of justice, are required to:

> 'seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession'. Lawyers are also obligated to 'loyally respect the interests of their clients'.[56]

Governments are also required to:

> 'ensure that lawyers: (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) not suffer, or be threatened with, prosecution or administrative, economic or other sanctions

[54] Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990.
[55] Ibid.
[56] Ibid.

> for any action taken in accordance with recognised professional duties, standards and ethics'.[57]

Moreover:, 'where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities'. Further, lawyers are not be identified with their clients or their clients' causes as a result of discharging their functions' on behalf of their clients.[58]

Here too the Basic Principals also mandate that:

> 'no court or administrative authority before whom the right to counsel is recognised shall refuse to recognise the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles' and that 'lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority'.[59]

The Basic Principles also impose a duty on relevant competent authorities, to ensure that:

> 'competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time'.[60]

Further the Basic Principals require governments:

> 'to recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential'.[61]

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[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.

According to the Basic Principles, lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession'.[62]

On the subject of professional lawyers associations, the Basic Principles dictate that lawyers:

> 'be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity' and that 'the executive body of the professional associations be elected by its members and exercise its functions without external interference'.

Moreover, these professional associations of lawyers are obligated to

> 'cooperate with governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics'.[63]

However for the purposes of regulating the behaviour of lawyers , the Basic Principals mandate that professional bodies establish codes of conduct through their

> 'appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms'.

Charges or complaints made against lawyers in their professional capacity are to 'be processed expeditiously and fairly under appropriate procedures. Lawyers, in such cases,

[62] Ibid.
[63] Ibid.

'are to be afforded the right to a fair hearing, including the right to be assisted by a lawyer of their choice'.[64]

Disciplinary proceedings against lawyers, according to the Basic Principles, are to be 'brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review'.[65]

Finally, the Basic Principals mandate that:

> 'all disciplinary proceedings are to be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles'.

Accordingly, in the case of lawyers and by way of the Basic Principles, it is clear that lawyers play a major role in the protection of client fundamental rights. Here, too, lawyers also play a key role in testing the validity of enacted or transplanted rules by way of legal argument before members of the judiciary. It is important to note the role of Parliamentary Counsel, too, as they, also lawyers, are charged with drafting or writing rules.

2. Parliamentary Counsel (and their role)

It should be noted here that Parliamentary Counsel are also trained lawyers and that they play a vital role. This role is one where 'they participate in the start or conception of an Act of Parliament'. Moreover, It is 'their primary function to express legislative policy in a language free from ambiguity'. In other words Parliamentary Counsel are responsible for 'transforming government policy into law'.[66]

In the performance of this function, 'governments expect Parliamentary Counsel to ensure that the governments' policies are given legal effect' and , in turn, 'a government expects Parliamentary Counsel to express legislative intention as accurately as possible, capable of

[64] Ibid.
[65] Ibid.
[66] Document No. 11 The Role of Parliamentary Counsel in Legislative Drafting; May 2000, United Nations Institute for Training and Research (UNITAR).

one interpretation, delineating the intention that the government intends that law to have'.[67]

In addition, 'governments expect that Parliamentary Counsel will ensure that a Bill as drafted is in conformity with all existing legislation'. The Bill, too, 'should not be in any conflict with the Common Law or the Customary Law. Perhaps most importantly a Bill should not be in conflict with (the fundamental rights found within) a Constitution. In other words once a Bill has become an Act or rule of Parliament it 'should not stand on its own' but 'It should form part of the law as a whole'.[68]

3. Parliament (and its role)

The 'expectations of Parliament or Legislature in the case of Bermuda, in regard to a Bill's content or wording, is that the Bill 'should be self-explanatory' and that should be 'arranged in a manner that allows for orderly debate'. The primary function of Parliament 'is to pass legislation for the public whose affairs, approaches and aspirations will be governed' by the enacted rule. The public, too, expect the rule 'to be intelligible, precise, and free from ambiguity'.[69]

The expectations of the public 'stem from the fact that there are interests other than those of the government concerned with the quality and the vitality of legislation'. Moreover it should be noted here that:

> 'the policy of a piece of legislation may have its genesis from the public through the manifestations of political parties. The manifesto of a political party is an undertaking that, should it gain political power, it would introduce legislation to give effect to its policies and philosophies, cultural, economic, social or otherwise'.[70]

[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.

The election of the members of a political party to office 'is considered an endorsement of the philosophies that motivate that political party'. Therefore, 'the public expects to see legislation that reflects the policies and philosophies it has endorsed'.[71]

Departmental officials are responsible for the administration of 'legislation passed by Parliament', thereby becoming 'another source of legislative policy'. However during the iuse of rules departmental officials may 'discover defects and discrepancies' in the rules. A body of rules (legislation) 'may also have become obsolete or unworkable'; there may be 'gaps' in the existing body of rules which need to be filled in. In such cases, 'Departmental officials make recommendations as to how the defects and the discrepancies require alteration'. [72]

Interest or pressure groups may also be:

> 'the source for the initiation of legislative or rule making policy. In such cases, they would seek to use rules 'as a means to an end for the achievement of their purposes'.[73]

'Commissions of Inquiry and Committees of Inquiry, too, act as sources of the origin of policy'.[74]

It is 'classic theory that Parliamentary Counsel do not initiate policy'. This is to say that 'they are only technicians whose function is to translate policy into law'. Policy issues, therefore, 'are the preserves of others'. Crucially, one must appreciate that 'the translation of policy into law requires a vivid understanding of the policy'. Unfortunately this results in 'the inevitability of Parliamentary Counsel getting involved in policy considerations'.[75]

Vitally:

> 'the training given to Parliamentary Counsel, their vast knowledge of the existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have

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[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.

> to be consulted on policy issues and from which they need to advise and to warn'.[76]

Further 'Parliamentary Counsel are not glorified amanuenses'. Still:

> 'the ability to discern the thin dividing line between policy and [use], between practice and procedure, between the motive and the motivation, between the problem and the solution of the problem make Parliamentary Counsel candidates for early participation in the policy issues that lead eventually to the drafting of legislation'.[77]

In this role, 'it is important that Parliamentary Counsel do not usurp the role of a policy maker'. They have 'an interest in substantive policy' and have the requisite expertise'. Parliamentary Counsel, too, 'must appreciate their own limitations' and 'should not seek to dictate policy'. Only by 'recognising these facts' can they, as seasoned legal advisers, help to shape policy. In this regard, 'tact must tend talent as their duty demands diplomacy'. Purposes 'must be measured by philosophical pragmatism'; 'causes and cures must be considered' for the purposes of achieving 'effectiveness and common sense'. These factors are the means by which 'Parliamentary Counsel can 'contribute in improving substantive policy'.[78]

4. The Judiciary (its independence, its role and its role in making the common law)

The independence of the judiciary is required 'to be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'.[79]

The judiciary is required to 'decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, Roles of the judges. Further, the judiciary is 'the third pillar of the state. In identifying and applying the

[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.

common law, it is a primary actor. In giving effect to legislation it is more than an agent of the legislature. Rather it is a junior partner, mediating by interpretation'.[80]

Fundamentally, 'the judiciary stands as a counter-weight to the other two pillars: the legislature and the executive. Each needs the other, even if they are sometimes in healthy tension. The judiciary ensures that the pillars stay within their spheres and act in accordance with the law. Greater executive activity has given this role greater prominence. The judiciary also stands for certain values which may be 'prominently expressed in a constitution by way of a fundamental rights Chapter. Others have been established by constitutional case law of the Privy Council and local appeal courts'.[81]

Institutionally, 'there must be a due separation of powers. The judiciary must be able to operate independently of the other two branches. That should be guaranteed at the highest constitutional or legal level.[82] This principle has been held to underlie Westminster model constitutions, in a series of remarkable cases from all over the Commonwealth.[83] It was described in them as 'a characteristic feature of democracies', 'based on the rule of law''.[84]

Separation of powers 'means security of tenure, normally until a defined retirement age. Unlike the current English position, Westminster model constitutions still distinguish in this respect between a senior judiciary, who enjoy such security, and lower levels, such as magistrates, who do not, since they may enjoy only short-term engagements. Security also means freedom from significant disciplinary sanctions save after a judicial process for good cause, appropriate facilities, adequate guaranteed remuneration, and control over core judicial activities, such as listing and deployment. In some systems, judges also have their own budget and greater control over courts and their management, despite the administrative burden. Promotion at least should also be on objective, non-political

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[80] The Role of Judges in a Representative Democracy Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas by Lord Mance 24 February 2017
[81] Ibid.
[82] Opinion No 1 (2001) of the Council of Europe's Consultative Council of European Judges ('CCJE'), para 141
[83] *Liyanage v The Queen* [1967] 1 AC 259, *Hinds v The Queen* [1977] AC 196; Ahnee v DPP of Mauritius [1999] 2 AC 294; *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837; *DPP of Jamaica v Mollinson* [2003] UKPC 6; [2003] 2 AC 411 and *The State v Khoyratty* [2006] UKPC 132
[84] The Role of Judges in a Representative Democracy Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas by Lord Mance 24 February 2017

grounds. Some countries operate politically based systems for initial, and some even for appellate, appointments, though I myself do not see that as a model to follow. Inevitably, some of these pre-conditions can only be fulfilled with the cooperation of the legislature and/or executive'.[8586]

However, individually, a judge must also be both honest and incorruptible and independent of the parties and issues before him.[87] Lord Bingham of Cornhill observed in in the case of Mollinson: 'Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, has recently been described as 'a characteristic feature of democracies'.[88]

A more basic pre-condition for the effective exercise of the judicial role 'is acceptance by society at large and mutual institutional understanding, indeed dialogue – even if sometimes rather tense - with the other pillars of the state. The common law only established itself by taking account of the needs, attitudes and values of the communities and individuals it serves. The other side of the coin is that all three pillars of the state need to be sensitive to and respect each other's roles.[89]

However that may be, 'a better model for the co-existence of the three pillars is found in Lord Hope's attractive dictum in *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at paragraph 25;

> 'In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey at p 3 likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. In *Pickin v British Railways Board* [1974] AC 765, 788A-B Lord Reid observed that for a century

[85] Ibid.
[86] The Role of Judges in a Representative Democracy Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas by Lord Mance 24 February 2017

[87] Ibid.
[88] Ibid.
[89] Ibid.

> or more both Parliament and the courts have been careful to act so as not to cause conflict between them. This is as much a prescription for the future as it was for the past.'[90]

This then begs the question of how then is the judicial role to be defined? In *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, 890-891, at paragraph 50, Lord Steyn quoted from Windeyer J4. who had said:

> 'The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law. Nevertheless it has long been settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function which belongs exclusively to the courts: …'punishment for its commission, is a function which belongs exclusively to the courts: …'.

Therefore:

> 'such as in the case of Liyanage, the legislature usurped the judicial role, when it legislated ad hominem to change procedure and redefined criminal offences to assist the prosecution of individuals allegedly involved in an attempted coup d'état. In Hinds, it did so, when it transferred judicial power to a New Gun Court, the majority of whose members did not qualify as judges under the Constitution. In Khoyratty the JCPC upheld the Mauritius Court of Appeal's decision that, since the grant or refusal of bail is an essentially judicial function, a constitutional amendment removing any right to bail pending trial in terrorism or serious drugs cases (which could mean for years) was not merely contrary to the separation of powers, but so antithetical to the concept of democracy as to infringe the most deeply entrenched provision of the Constitution of Mauritius, section 1, providing that Mauritius shall be a sovereign democratic state'.[91]

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[90] Ibid.

[91] The Role of Judges in a Representative Democracy Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas by Lord Mance 24 February 2017

If the legislature must not impinge on the judicial sphere, one may say that judges should avoid law-making and should stick to identifying and applying the law. And this is certainly an important general distinction. Law-making is essentially political, while identifying and applying the law is the role of the courts. Judicial decisions may have political implications, but that does not make them political. They are decided on legal argument and a legal basis. We were at pains to draw attention to this in Miller, and it is critical that it should be appreciated.[92]

But it will already be clear – from what I have already said about the judges' responsibility for the common law and for the interpretation of statute law – that applying the law is not an exercise in logic or mathematics. Indeed, pace Oliver Wendell Holmes, who said: 'The life of the law has not been logic; it has been experience', the life of the law is not just past experience, it is often closely related to an assessment of the future consequences of what will be decided.[93]

For a long time and many centuries, judges down-played the implications of their role. Indeed, in the interests of legal certainty or perhaps for fear of undermining their authority, they denied it. According to what is called the 'declaratory' view of the common law, in its most traditional guise, the common law never changed. The judges merely revealed it from time to time. In the late 17th century, Sir William Blackstone, first Vinerian Professor of English law at Oxford, and later a colleague of Lord Mansfield on the bench, argued that the common law was rooted in Saxon law. Over 200 years later, Lord Esher MR, later Viscount Esher, subscribed to a similar view to Blackstone's, saying in Willis & Co v Baddeley [1892] 2 QB 324, 326:

> 'This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not been authoritatively laid down that such law is applicable'.[94]

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[92] Ibid.
[93] Ibid.
[94] Ibid.

Put in these extreme terms:

> 'the declaratory theory, with its natural law overtones, was a useful protective device. It avoided questions about the legitimacy of judges to develop the law. The modern press encourages us to think about such questions. It asks who these unelected judges are, but does not always consider whether we might be worse off if judges were elected, or how the common law would have developed to meet modern needs without judicial activity'.[95]

It is nearly 50 years ago since Lord Reid openly acknowledged extra-judicially that it was a fairy tale to suggest that judges do not make the common law. He made the following statements in this regard:

> '[Judges] will consider the implications of [a] decision, and will ensure that it is consistent with the general purpose and scheme of the law or principle …. concerned……
>
> Judging is thus not a science, but a discipline. The good judge is loyal to well-established approaches and methods of reasoning. But she or he may in the last analysis have to exercise an important judgment as to the relevant weight of different and sometimes competing considerations, in deciding in which sense to state or restate the legal position.'[96]

This is not to say that the declaratory theory has no continuing use. It is a way in which we explain why a development in the law or an over-ruling of a prior authority affects the case in which it occurs and all other cases, past or present – rather than having purely prospective effect as a change for the future. In that respect, the theory amounts to a pragmatic acknowledgement of the possibility of judicial error or second thoughts. The law is occasionally prone to that risk, like any other human institution'.[97]

If 'judging is a discipline, not a science, what are the disciplinary controls? The exhibition notice mentions loyalty to well-established approaches and methods. These are epitomised

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[95] Ibid.
[96] Ibid.
[97] Ibid

by the common law use of precedent and analogy. They help ensure consistency, the hallmark of any system of law or equitable adjudication. But it can also have dangers. In the USA, when oil and gas started to attract litigation, courts initially invoked the rule of capture, which applied to wild animals. They soon found this an unhelpful analogy. David Hume in *An Enquiry concerning Human Understanding* accurately described experiences:

> 'If direct laws and precedents be wanting, imperfect and indirect ones are brought in aid; and the controverted case is ranged under them by analogical reasoning and comparisons, and similitudes, and correspondencies, which are often more fanciful than real.'

Judge Posner in *The Problems of Jurisprudence* has noted that a proliferation of precedents may be a warning, rather than an encouragement. They may show that the rule to which the precedents relate has proved an irritant – producing a blister, rather than a pearl'.[98]

What then where there is no direct precedent and no helpful analogy?

> 'As even Lord Esher accepted, judges have often to consider what or whether a common law rule applies to a particular, perhaps novel situation. The common law tends to develop incrementally and cautiously, to that extent perhaps even experimentally in a scientific way. The process has been attractively compared by Professor Ronald Dworkin with the production of a chain novel by a series of different novelists, each adding a chapter, with the task of achieving as much overall coherence as possible and, one might add, with the final chapters perhaps providing some generalised key to all that preceded'.[99]

The process is particularly evident in the field of tort. *Hedley Byrne v Heller & Partners* [1964] AC:

> 'drew on prior authority to identify a general principle of liability for negligent misrepresentation causing financial loss in contexts of proximity akin to contract, where one party had to the knowledge of the other justifiably relied on the other's representation. But sometimes the law is too quick. *Anns v Merton LBC* [1978] AC 728 generalised the liability of local

[98] Ibid.
[99] Ibid.

> authorities towards owners of houses suffering from the effects of negligence by local authority building works inspectors performing their statutory duty. Within 13 years the principle was found to operate in an unsatisfactorily haphazard way, and was overruled in *Murphy v Brentwood* DC [1991] 1 AC 398. A recent attempt to resuscitate it by reliance on the state's duty to respect and protect private life was rejected in *Gresty v Knowsley DC* [2012] EWHC 29 (Admin)'.[100]

The exhibition notice also mentions the judicial role in assessing the weight of different considerations, when deciding how to state or restate the law. Two recent UK Supreme Court cases illustrates this process. In *Patel v Mirza* [2016] UKSC 42, the Court restated the law of illegality, moving away from Lord Mansfield's inflexible rule that no-one can rely on illegality, with the result that loss lies where it falls. *In Willers v Joyce* [2016] UKSC 33 & 34, the Supreme Court accepted a general right to claim damages for malicious pursuit of a civil action.[101]

The judge's role, in relation to contract law, is to give effect to the parties' intentions, derived from the words used in the light of the terms of the contract as a whole and the surrounding circumstances known or taken to have been known by the parties when they made the contract – excluding evidence of contractual negotiations. Some academics think that recent Supreme Court and Privy Council case law shows a continuing tension between literalist or textualist and purposive or consequentialist interpretation of contractual language. Since judges on both sides of this case law insist that there is nothing between them in principle, it is a matter of impression whether any difference exists in the actual decisions they reach.[102]

Traditionally, courts relied on technical rules of textual construction, some still useful. But today the courts approach parallels in an elevated way that of contractual interpretation. The courts examine the words used in the context of a scheme as a whole and against the background of whatever is identified as the 'mischief' which the statute sets out to address. A purposive construction is increasingly supported by reference to general principles which it is assumed that the legislature will have intended to observe. There is a

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[100] Ibid.
[101] Ibid.
[102] Ibid.

presumption against any intention to legislate with extra-territorial effect; a presumption against penalisation of any activity by doubtful words; and, most importantly, a conception of fundamental common law rights – e.g. the right to liberty, the right to free speech, the right not to incriminate oneself and the right to legal professional privilege in respect of one's communications with a legal adviser. In *R v. Secretary of State for the Home Department ex Parte Simms* (A.P.) Lord Hoffmann said:

> 'Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'.[103]

In *Ex p Simms*, it was decided in the UK context, where Parliament is sovereign. Since October 2000, this principle has a statutory homologue, since UK courts are obliged to interpret legislation as far as possible consistently with the ECHR. However. in the Bahamian Constitution with its fundamental rights Chapter III, this Chapter prevails over any contrary provision (article 2) and enables the courts to make such orders as it considers appropriate to enforce or secure such rights. But the principle in ex p Simms still represents a first port of call, often enabling the courts to avoid inconsistency with fundamental principles, whether or not located in a constitution.[104]

There is also the 'sometimes controversial role of judges in a representative democracy: that is, in relation to public and constitutional law issues. In *Matadeen v Pointu* [1998] UKPC 9, the JCPC noted that:

> 'constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values.

[103] Ibid.
[104] Ibid.

> Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the *South African Constitutional Court in State v. Zuma* [1995] (4) B.C.L.R. 401, 412: "If the language used by the lawgiver is ignored in favour of a general resort to `values' the result is not interpretation but divination."[105]

In a constitution, society expresses its commitment to enduring principles of which judges are to be the future guardians, whatever may from time to time be the vicissitudes of majoritarian or political opinion. It is easy to protect the interests of the majority or the popular. But, as Justice Iacobucci observed in *Vriend v Alberta*: 'The concept of democracy is broader than the notion of majority rule, fundamental as that may be'. Where the law matters is when it protects the legitimate interests of unpopular minorities, including those strongly suspected of committing or intending very serious misdeeds. Those interests include due process and freedom from punishment without a finding of guilt. Thus, when it comes to the fight against terrorism, as the former Chief Justice of Israel, Aron Barak, said: 'Sometimes, democracy fights with one hand tied behind its back. Nonetheless, it has the upper hand'.[106]

A major achievement of common law courts over the last forty years has been the modernisation and formulation of judicial review principles. Generally expressed statutory powers must be exercised only for the purposes for which they were created. Decision-makers must observe due process, acting fairly and reasonably. Expectations about procedural steps such as consultation, and, more controversially, expectations about

[105] Ibid.
[106] Ibid.

substantive rights may have to be respected: see most recently *United Policyholders Group v Attorney General of T+T* [2016] UKPC 17. All these are judicially led developments.[107]

34. Courts also review decision-making for its substantive reasonableness. Traditionally this has been only in the diluted Wednesbury sense, that censures decision-making which no reasonable decision-maker could have reached. But increasingly it has been recognised that the intensity of review may increase, depending on the nature of the interests at stake, and their suitability for judicial review. The emergence of fundamental rights chapters, charters or conventions has also introduced the concept of proportionality, which the common law has started to pick up in allied areas: see e.g. *Kennedy v The Charity Commission* [2014] UKSC 20. On the other hand, courts have recognised that they are not and should not act as primary decision-makers. To repeat Justice Jacobucci's words: 'In carrying out their duties, courts are not to second‑guess legislatures and the executives.' Judicial activity depends on the context. On issues of liberty, freedom of movement, speech or religion, courts can claim a special expertise. On issues about the use of public resources or economic judgment, the elected legislature or executive is better placed.[108]

However, in none of these cases is it legitimate for the executive to submit that it is undemocratic for the courts to become involved. In *A (FC) v Secretary of State* [2004] UKHL In a case about the potentially indefinite detention of aliens suspected of terrorism, the Attorney General submitted that, just as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public, since this called for an exercise of political and not judicial judgment.[109] Rejecting this submission, Lord Bingham said:

> 'I do not in particular accept the distinction which he [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ….. that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.

[107] Ibid.
[108] Ibid.
[109] Ibid.

> The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.'[110]

Judges in a representational democracy are not therefore ciphers or agents of past history or of the current legislature. Even in states like the UK without a written constitution, they have a significant role in defining the practical impact of what the legislator decides. A fortiori in a state like The Bahamas, where the role is fortified by a written constitution.[111]

What then are the values to which we should aim to give effect in interpreting and applying a Constitution or any other law? The matter was well put by Dickson C.J. in R. v. Oakes, [1986] 1 S.C.R. 103, at p. 136:

> 'The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.'[112]

Independence and accountability are, as one Canadian commentator put it, 'rather testy friends'. Judges cannot be directly or personally accountable like agents or contractors for mistakes or faults in the judicial decision-making. But ensuring as much accountability as possible is an important part of the judicial role. This in turn links with Chief Justice Barak's theme about inculcating law into society, and ensures that, despite any unanswered conundra, all elements of society will continue to coexist under the rule of law.[113]

1.7.2.1 Judges and issues affecting small jurisdictions

Small Social Pool

Although judges tend to be 'selected from a small pool of legal professionals within those jurisdictions that are of the common law tradition, the pool tends to be smaller in the case

[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.

of small jurisdictions or small island jurisdictions'. For example, in the case of the Isle of Man, 'there are frequently events at which business leaders, judges, ministers, politicians, senior civil servants and professionals with a high local profile gather together'. Moreover these events are 'often significant events and attendance is frequently required so everyone tends to end up in the same place'. In such cases 'a judge must be hyper vigilant to ensure he is not inappropriately or accidently lobbied or questioned by a politician, minister or business leader, or worse still, a litigant in pending proceedings'. Further, 'the judge must always be on guard to ensure that the separation of powers and the judge's independence and impartiality are maintained'. These issues are not unique to small jurisdictions but they become amplified due to the smallness of the small jurisdictions.[114]

When 'socialising in the local community, doing the everyday things that everyone does, it is at these that I am being judged – even at 'local coffee shops, restaurants, sporting events, art exhibitions, cinemas, yoga classes'.[115]

One judge suggested that in such cases that 'the rule for judicial survival in a small country with a small social pool, in addition to compliance with the relevant judicial code of conduct, is to be acutely conscious of the need to be, and be seen as, independent and impartial and to see issues from each other's perspectives and act accordingly. It also helps to keep to safe uncontroversial subjects'.[116]

Recusal

It is generally accepted that in small jurisdictions that there tends to be 'a relatively small social pool of business leaders, ministers, politicians and judges, the percentage chance of the judge knowing or having links to the litigants involved in a case can increase'.[117]

Such a scenario has been recognised as being very probable by the Judicial Committee of the Privy Council in in the case of *Grant v The Teacher's Appeals Tribunal* [2006] UKPC 59. In this case the Court considered the issue of recusal and 'indicated that they were mindful

[114] The role of a judge in a small common law democratic country (A lecture delivered by Deemster Doyle at the Oxford Union on 28 June 2017 as part of the Small Countries Financial Management Programme), p.2
[115] Ibid.
[116] Ibid, pp.2-3
[117] Ibid.

of the problems which face judges in a community of the size and type of Jamaica (i.e. a small country) and other comparable common law jurisdictions'.[118]

In large and small jurisdictions judges may sometimes have to recuse themselves. However such recusals 'can put a strain on a potentially restricted number of judges in a small country'. In such cases 'the law of recusal has to be applied robustly but with pragmatism and sensitivity in small countries'. Aside from these practical problems 'judges must maintain their objectivity, impartiality and independence by being prepared to step down from a case where necessary'. [119] Unfortunately, as has been recognised by the courts, that 'it would be dangerous or futile to attempt to define or list the factors which may or may not give rise to judicial recusal'.[120]

1.8 Legal transplantation

The transplantation of laws is the taking of established laws and institutional structures from one country and replicating it in another. It is something that has been done since Roman times during which Roman jurists equated *ius gentium* (which applied to colonised people) with *ius natural* (law that should be observed by humanity).[121] The Romans considered universal laws of nature capable of linguistic expression through universal legal codes, and that differences between legal systems denied universal human attributes. Natural law codes based on Roman morality were superimposed over indigenous cultural beliefs and practices.[122]

Large scale transplantation also occurred, without colonialism or reunification during the Cold War when the United States and the Soviet Union used legal transfers as a weapon in their struggle for military and political supremacy in the world. It also occurred in the

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[118] *Grant v The Teacher's Appeals Tribunal* [2006] UKPC 59; . The role of a judge in a small common law democratic country (A lecture delivered by Deemster Doyle at the Oxford Union on 28 June 2017 as part of the Small Countries Financial Management Programme), pp.2-3.
[119] The role of a judge in a small common law democratic country (A lecture delivered by Deemster Doyle at the Oxford Union on 28 June 2017 as part of the Small Countries Financial Management Programme), p. 4.
[120] Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at paragraph 25
[121] Ellen Goodman (1995), *The Origins of the Western Legal Tradition*, Federation Press, Sydney, 131-39; Barry Nicholas (1962), *An introduction to Roman Law*, Clarendon Press, Oxford, 54-59.
[122] See: Ashgate, 3

reunification of East and West Germany at the end of the Cold War.[123] It can be done voluntarily, it can be imposed, or it can be part of an international legal harmonisation project.[124] Prior to its displacement by rights-based law over the last two centuries, natural law legitimised European colonisation. According to the natural law doctrine, all people had a right to salvation and colonial laws were in theory not permitted to abrogate indigenous cultural practices and laws.[125] However France's transplantation of laws to Vietnam, as noted by Ashgate, 'frequently ignored this tolerant formulation and invested central authorities with power to regulate or prohibit local customs'.[126]

The transplantation of laws can be done without any change to the wording used in laws, to state institutions, or to commercial legal models. Developing countries have, over the years, been urged by law and development scholars to copy the modern institutional features of Western countries, in particular judicial independence, legal education, the rule of law and rights-based commercial laws. By doing so, these scholars have ignored Weber's caution that laws develop over time by interacting with local socioeconomic environments, processes that induce path dependent development.[127] The desire to harmonise treaties, founded on the evolutionary convergence theory, is another motivator for countries or international bodies such as the World Trade Organisation to rely on the transplantation of laws.[128] Examples of imposition on state institutions include the European conquest and colonisation of North Africa and Australia, which involved not only the displacement of indigenous populations but also the transplanting of state institutions, religious orders, mercantile economies and architectural preferences.[129] There is also a growing body of literature that indicates difficulties in transferring commercial legal models beyond cultural, political and economic borders. For example, attempts to transplant US corporate

[123] Ibid, 4
[124] Ibid, 3.
[125] Ibid, 4.
[126] Ibid.
[127] David Trubek (1972), 'Toward a Social theory of Law: An Essay on the Study of Law and Development', 82 Yale Law Journal.
[128] Lawrence Friedman (1996), 'On the Merging Sociology of Transnational Law', 32 Stanford Journal of International Law, 65, 70-72.
[129] Peter Fitzpatrick (1992), 'The Mythology of Modern Law', Routledge, London, 107-11.

governance laws to the Russian Federation failed to induce corporate governance accountability and other anticipated benefits.[130]

It can be done with minor cosmetic change, altering the wording but leaving the intent of the laws undisturbed, or after major changes, thereby adapting or naturalising the law so that it fits within the new country's culture and statute book.

Various terms and metaphors have been used in attempts to describe and explain the process of transplantation, including legal harmonisation, unification, borrowing and convergence, which emphasise a compatibility and co-evolution of legal systems[131] and the transfer of law or legal systems into host countries.[132] As Ashgate acknowledges, metaphors are only suggestive and this makes it difficult to find or use one absolute term to describe all types of legal transfer.[133] Here, too, words such as 'reception', (usually used in relation to the receipt of treaties by countries from entities such the United Nations) denote the last leg of the transplantation process (i.e. the law or rule is received at the other end of the transplantation process by Bermuda). However, these metaphors are symbolic of the the transplantation process. For example:

a. A to B (A equals Canada or any country Bermuda seeks to transplant a law or rule from to Bermuda; and B equals Bermuda)= the law or rule is equally borrowed, received by or transplanted to Bermuda as all of these metaphors are symbolic of the sending, moving or taking of a rule or law from one location and placing it in another;

b. A to B to C, in relation to treaties,: (A equals the United Nations or any entity that creates a treaty for dual or multi-party use or application; B equals the UK being the parent country responsible for its own treaty obligations as well as that of Bermuda (it being a colony of the UK) by way of the colonial relationship that exists between Bermuda and the UK; C equals Bermuda) = the treaty/ the rule is received by the

[130] Bernard Black (2000), 'Russian Privatisation and Corporate Governance: What went wrong?, 52 Standford Law Review, 1731, 1752-57.
[131] Ashgate, 'Law Reform by Legal Transplantation', p. 9-10.
[132] Alan Watson (1993), Legal Transplants: An Approach to Comparative Law, 2nd Ed, University of Georgia Press, Athens, Georgia, 21.
[133] Ashgate, 'Law Reform by Legal Transplantation', p. 10.

UK and, by way of enabling rules [an enabling Act and an Order in Council which is created by way of the enabling Act), is transplanted to Bermuda where Bermuda receives the Treaty as part of its domestic law.

Accordingly, all of these metaphors speak to or are a part of the same thing- the transplantation of a law or rule from one entity to a country/ Bermuda. Therefore, whenever the words borrow(ed), received (receptionion) is used , they are to be read as being part of the transplantation of laws or rules process- transplantationthis .

1.8.1 Transplants in private and public law

The transplant debate is limited to western private law which makes its relevance to comparative law uncertain (NB. This thesis is not about the comparative law. It only deals with the subject of the transplantation of law, a subject that is affiliated with comparative law). Also uncertain is whether or not there is or is not a distinction between public law and private law. With the exception of Watson,[134] none of the other legal theorist acknowledge the following points:

1. that there is a distinction between public law and private law;

2. that there is no distinction between public law and private law; or

3. that in either case, the extent the public law and private law debate serves to buttress or to undermine their respective legal transplant theories, if at all.

It is therefore questionable as to whether or not the subject legal theories are valid tools for determining whether a law or rule has been effectively transplanted, especially where public is concerned.

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[134] See: Alan Watson, Legal Transplants (1974)

1.8.2 Illustration of a distinction between public and private law

The law of contract and of tort determine the ways in which people that follow the common law tradition (including Bermuda and the United Kingdom) interact with each other. In contrast, constitutional law not only determines that ways in which people that follow the common law tradition interact, it also represents the ultimate will of the ultimate sovereign, the people themselves. This approach appears to be one based on theory only.

1.8.3 Illustration that there is no distinction between public and private law

The making of a distinction,[135] between public and private law is wholly irrelevant to the organisation of modern society. The problem in trying to make such a distinction can be best illustrated thus:

> 'The major sphere of social life passes from the private to the public, not merely in the sense that more and more activity is state activity, but in the sense that more and more private activity becomes public in its scale and its effect, in the sense that the oil company is felt to be as public as the state electric utility, the private hospital and the private school, with their growing need for massive state subsidies, as public as the municipal hospital and the state school'.[136]

1.8.4 Distinction between public and private law, Judicial interpretations

In an attempt to tackle what appears to be a fluid distinction between public and private law, Lord Wilberforce has concluded that:

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[135] Modern Law Review Vol. 43, May 1980, p.256

[136] Kamenka and Erh-Soon-Tay, 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology in Feudalism, Capitalism and Beyond (1975), p.133.

> 'The Attorney General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent special interest) cannot seek to enforce, and private, is fundamental in our law. To break it, as the plaintiff's counsel frankly intended us to do, is not a development of the law but a destruction of one of its pillars. Nor in my opinion, at least in this particular field, would removal of the distinction be desirable. More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horison, is a decision which the Attorney-General alone is suited to make'.[137]

In the same case, Lord Diplock concluded that:

> 'My Lords, at the heart of the issues in these appeals lies the difference between private law and public law. It is the failure to recognise this distinction that has in my view led to some confusion and an unaccustomed degree of rhetoric in this case'.

Due to the existence of conflicting statements or dicta, that there is and that there is not a distinction between public law and private law, it is not possible to determine whether or not the subject legal theories have been undermined or if they are of no relevance to subject of transplantation at all, with the latter statement potentially having some gravitas because, in the English common law tradition, it is becoming increasingly difficult to distinguish a difference.

1.9 The Reception of laws or rules by Bermuda

The reception of laws or rules by Bermuda takes place in four ways: common law reception; voluntary reception; veneration reception; and necessity reception. Reception means 'those instances where legal phenomina of one legal culture or system are consciously and wilingly adopted into another legal system'.[138] 'Legal phenomina' means

[137] Gouriet case ([1977] 3 W.L.R. 300

[138] Max Rheinstein, "Types of Reception," 5 Annales de la Faculte de Droit Istanbul 31 (1956).

instances where 'human interactions result in legal regulation'- the creation of laws or rules.[139]

Common Law reception

Common Law Reception or the 'Doctrine of reception' in common law means the process by which the English Common Law is applied to a British Colony. The doctrine is best described as follows:

> 'Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force... But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country'.[140]

Bermuda was discovered by the Spanish in 1505 but from 1615 to 1684 Bermuda was colonized by English colonist and administered by the Somers Isles Company- an English incorporated company. As a result of the colonization of Bermuda by the English they, in accordance with doctrine of reception in common law, brought with them the English common law. Section 5 of the Bermuda Constitution codifies the common law doctrine by making all laws existing at the time Constitution came into effect (i.e. English Common Law, UK statute law applicable to Bermuda, and Bermuda common law and statute law), Bermuda's law.[141] Today, Bermuda remains a common law jurisdiction.

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[139] Ronald J. Allen, LEGAL PHENOMENA, KNOWLEDGE, AND THEORY, p.731
[140] Lord Blackstone, 'Commontaries on the Laws of England, Book I , chapter 4, pp. 106-108.
[141] s. 5(1) Bermuda Constitution Order 1968.

Voluntary reception

Voluntariness of the process 'is considered an essential condition for reception. This is to say that 'no genuine reception occurs if a legal phenomenon is imposed upon another nation (or country in the case of colonies) by force'.[142] An example of voluntary reception, in the case of Bermuda, is Bermuda's adoption of the unlawful gangs rules from Canada.

However, under certain conditions 'imposed reception may transform into a voluntary process and become genuine reception'[143]. This 'does not mean that the transformation of imposed reception into voluntary reception should be an inevitable historical reality everywhere at any time'[144].

Veneration reception

Veneration reception is one example 'which occurs if alien norms, institutes or a whole system is adopted for their venerated position and prestige of cultural background'.[145] An example of veneration reception, in the case of Bermuda, can be found in the form of the anti-land mines treaty adopted by Bermuda by way of Order in Council. In this example, the prestige garnered would be the fact that Bermuda can be seen as one of the countries of the world who recognize the devastating effect that these weapons of war have on non-combatant civilian populations- most notably in relation the maiming of children.

Necessity Reception

Moreover, in the case of necessity reception, 'different motivation is the basis for necessity reception which occurs where there is an apparent need for a change of legal system in one culture and another existing culture provides an opportunity to satisfy the need'.[146] An example of necessity reception, in the case of Bermuda, can be found in the form of the unlawful gangs rules transplanted from Canada to Bermuda by Bermuda.

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[142] Marju Luts, Jurisprudential Reception as a Field of Study, JURIDICA INTERNATIONAL. LAW REVIEW, UNIVERSITY OF TARTU (1632), pp. 2-6.
[143] Ibid.
[144] Ibid.
[145] Ibid
[146] Ibid.

The classifications of reception

Still, it is important to indicate here that the 'classification of reception into veneration reception and necessity reception 'is somewhat contradictory'[147]. This is because 'it is obvious that veneration reception can never occur if there is no need for it in the recipient culture and, in the case of necessity reception, it is only natural that legal phenomena of a prestigious origin would be adopted'[148]. Therefore, 'these aspects do not constitute classes of reception in the strict sense of the word'. The 'venerated status of and need for a transfer of a certain legal phenomenon should, accordingly, be considered essential conditions for reception like the awareness and voluntariness conditions of the process mentioned above'.[149]

Distinction between reception and transplantation

It is necessary, too, to recognize that there is a distinction between reception and transplantation. Reception having already been defined, transplantation has been argued to be 'a process whereby a legal phenomenon transfers to another geographic area or culture together with people'. Here, too, the 'transfer of a law or rule from a mother country to overseas lands during their colonisation could also be considered legal transplantation'[150]. However, such an interpretation of transplantation is 'too restrictive'- as it excludes examples or definitions of what amounts to transplantation.[151]

There are many other scenarios where one could argue to be examples of transplantation. For example there is the additional example where 'a norm of another legal culture is established in a different legal climate by enacting legislation regardless of its original use background may also be interpreted as a mere transplantation of a legal phenomenon'.[152] Transplantation also occurs 'where a legal theory is taken to another geographical area. As in the case of imposed reception or voluntary reception, an original transplantation may

[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.

become true reception: of course not among the group or nation which is the carrier of transplantation but among the legal culture surrounding it in the new area'.[153]

Marju Luts, Jurisprudential Reception as a Field of Study, JURIDICA INTERNATIONAL. LAW REVIEW, UNIVERSITY OF TARTU (1632), pp. 2-6.

The laws of Bermuda come in two forms. The first are laws made for Bermuda by the UK as part of the UK's colonial good governance obligations, or as a consequence of the UK's membership of supranational bodies such as the EU or UN. The second are laws made for Bermuda by the local legislature.

1.9.1 Laws made for Bermuda by the UK

As Bermuda is an Overseas Territory of the UK, the UK has the authority to make laws for Bermuda, and yet Bermuda has never had a directly elected or nominated person in the House of Commons or the House of Lords. At best, Bermuda has had a former Governor sit in the House of Lords who, from time to time, has championed matters concerning Bermuda.[154]

1.9.2 Treaty reception by Bermuda from the UK

A Treaty, according to the Vienna Convention of the Law on Treaties, is:

> 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[155]

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[153] Ibid.
[154] UK Immigration and Education Acts allowing citizens of the Overseas Territories to regain UK Citizenship and to take advantage of education opportunities in the UK and Lord David Waddington's (former Governor of Bermuda).
[155] Vienna Convention on the Law of Treaties, 1155, U.N.T.S, 331, 8 I.L.M. 679.

The Convention serves to codify international law in relation to what is and is not a treaty, but only in regards to treaties entered into between nation states. Only a few treaties have within their text the word 'treaty', and words such as convention, protocol, and agreement are often used as alternatives.[156]

In the UK, treaty making, is subject to the royal prerogative and so the sole responsibility of the Executive, and parliament plays no part.[157] However, where a treaty requires amendments to be made to legislation or the use of public funds, that is subject to parliamentary scrutiny.[158] Once a treaty to which the UK is a party has been made, it is frequently concluded without any need for ratification. Treaties are only ratified in instances where, within the text of the treaty, there is a requirement for ratification. That may happen where domestic legislation is needed or needs to be amended to give effect to the treaty, or where there is a strong political content that warrants the involvement of parliamentary scrutiny in the adoption of a treaty.[159]

All treaties entered into by member nations of the United Nations, which includes the UK, must be registered with the United Nations in accordance with Article 102 of the United Nations Charter. This is to discourage member states from entering into secret treaties.[160]

Bermuda, as an Overseas Territory of the UK and not an independent state, does not have the authority to enter into treaties unless expressly permitted to do so by the UK, which generally enters into treaties on Bermuda's behalf. Where the UK intends to extend a treaty to Bermuda, it is the its general policy to consult Bermuda beforehand, giving Bermuda adequate time to consider the effect of the treaty's extension. However, the UK is under no obligation to do so.[161]

Orders in Council, which are a form of a statutory instrument, are often used to affect the UK's constitutional obligations (which include the reception of treaty obligations) by extending UK legislation and treaties to overseas territories, including Bermuda. Where

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[156] Treaties, House of Commons Factsheet P14, House of Commons Information Office (Revised August 2010).
[157] Maer and Gay, 'The Royal Prerogative', House of Commons Library, 30 December 2009.
[158] Ibid.
[159] House of Commons Information Office, Treaties, House of Commons Factsheet 14, (Revised August 2010).
[160] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 102.
[161] Statutory Instruments, House of Commons Factsheet 17 Legislative Series (Revised May 2008).

legislation or treaties have been extended to Bermuda, notification is published in the Official Gazette of Bermuda unless there is a need to enact local legislation to give effect to the legislation or treaty being extended. If there is such a need, the Bermudian legislature will enact the legislation and present it to the Governor of Bermuda, asthe Sovereign's representative in Bermuda, for assent. Once assent has been obtained, the legislation becomes law.

1.9.3 Naturalisation

Naturalisation of laws or rules may be either direct or indirect (see Section 1.7.1). By not having naturalised a law or rule effectively, Bermuda may damage its reputation as a safe place to conduct international business. It may also, in the case of finance laws or rules, make it difficult to provide effective financial products and services as part of Bermuda's contribution to the global financial market place. Naturalisation, or the modification of a tranplated law or rule so that it works effectively for domestic use, is necessary for ensuring that the modified law or rule is effective. For the purposes of this thesis, naturalisation incorporates the bench mark variable of the rule of law (i.e. in order for a transplanted rule or law to work effectively it must not be arbitrary).

1.10 Cultural history, Bermuda's predominantly black population

This subchapter is relevant to the case-studies because the cultural history of the UK and Canada, specifically in relation to visible minorities, acted as a major indicator as to whether their criminal rules would work effectively (e.g. in relation to stop and search, unlawful gangs). Bermuda's cultural history ironically played a similar role on par with that of Canada and the UK. This is inspite of the fact that black Bermudians are the majority race in Bermuda. In this thesis it has been determined that effectiveness is to be determine by how the rule of law is implemented and acted upon. See Chapter of this thesis on effectivess as it relates to the rule of law.

Bermuda's cultural history, and in particular the cultural history of its predominantly black population, has attracted little academic attention. As a result there are very few academic sources[162] that record the slavery, racial segregation and racial unrest that have existed in

[162] See: Barbara Harris's book; Eva Hodgson's Book; Black Power in Bermuda by Quito Swan.

Bermuda. Other than a few works, one has to rely on archival records and news reports. As a result of the small number of academic sources, little is known about these chapters of Bermuda's cultural history, and thus they are often overlooked by law makers for Bermuda such as the UK Government or OECD, or in Bermuda by successive Bermudian governments when transplanting laws to Bermuda from external sources.

None of the inhabitants of Bermuda – black or white – are of indigenous origin. The minority white population came from Europe, mainly the UK, Portugal and the Azores. The ancestors of Bermuda's white English speaking inhabitants first arrived in Bermuda, by accident, during the time of England's colonisation of North America. The white Portuguese speaking inhabitants arrived in Bermuda rather later. Oddly enough, the Portuguese inhabitants were treated as a separate race of people and were not considered by the established English white minority as being of white European ancestry, and thus not on par with them as Europeans. Indication of such a disparity exists in the form of various census forms, where Portuguese was classified as a race and not as a place of origin,[163] and Portuguese whites in Bermuda were, for many years, treated as second class citizens.

The majority black inhabitants of Bermuda have their origins in the former British island colonies in the Caribbean such as Jamaica and St. Kitts, having been brought to the Caribbean from Africa by the British as slaves to harvest agricultural goods and (unique to Bermuda) to build ships, including warships for the Royal Navy, using lumber harvested from the very strong Bermudian cedar trees.

Slavery ended in the British Empire in 1833 and officially in Bermuda in 1834,[164] but racial segregation replaced it and did not officially end in Bermuda until 1968. Even then, economic disparity along racial lines replaced it, and exists in Bermuda to this day, with the white minority population remaining the greatest benefactors of Bermuda's financial success in terms of buying power, employment, and post-secondary education, particularly in comparison to the black male population.[165]

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[163] Illustrated copy of old Bermuda Census Forms and Immigration Form from Department of Immigration and Bermuda Archives.
[164] Slavery Abolition Act 1833.
[165] See: 2011 and 2012 Bermuda Census.

This economic disparity, seen by a number of its black inhabitants as linked to Bermuda's post-colonial status, has resulted in racial friction and unrest in Bermuda which led to rioting in 1953 and 1977. The recent outbreak of gang related violence is thought by many prominent people in Bermuda to be the result of a shrinking illicit drug trade market (a market valued at $1 million)[166] resulting in a fight between gangs for control over the shrinking market. This same illicit drug trade has also been deemed to be the third (but unofficial) pillar to Bermuda's economy, resorted to by which those who have been refused entry to the other two pillars, tourism and international business.[167]

History and culture are embedded in laws, and it is these variables that help to determine if a law has been effectively naturalised for the purpose of transplantation.

1.11 Globalisation

The term 'globalisation' first emerged in the 1990s. It , globalisation,[168] has been argued to be 'the increasing worldwide integration of markets for goods, services and capital'. As part of globalisation, many financial centres including Bermuda have found themselves poaching finance laws from other financial centres as a means of resolving domestic fiscal problems, and to enable them at least try to remain one step ahead of other competing financial centres, or avoid having finance laws imposed on them by external entities. In the case of Bermuda, the main external entities responsible for imposing such laws on it are the UK, because of the colonial relationship it has with Bermuda, and the EU, due to the UK's membership. By Bermuda willingly or unwillingly taking part in globalisation, the example of its participation in globalisation is very reminiscent of legal pluralism. Indeed, the example of Bermuda's participation in globalisation may also be an example of globalised legal pluralism.[169] Generally, the term legal pluralism is used to describe the distinctive nature or features of the interaction of between conflicting official legal systems or

[166] See: Bermuda Police Service statistical estimate on the financial value of the illicit drug trade in Bermuda
[167] See: RG Magazine; interview with Defence Counsel Mr. Mark Pettingill (who became Bermuda's Attorney General post the 17th December, 2012 Bermuda General Election).
[168] See: Dictionary of International Business Terms 3rd Ed.
[169] Ralf Michaels, Global Legal Pluralism, Duke University, School of Law, p.1

between an official legal system and one or more of the normative systems. The interplay between these legal systems, according to Brian Tamanaha, 'is complex and multisided'.[170]

In an attempt illustrate the various elements of legal pluralism, and to avoid confusion, this study adopts Tamanaha's five roughly-composed groupings in an attempt to bring some structure to the term of legal pluralism:

1.11.1 Official or positive legal systems

These systems are characteristically linked to an institutionalised legal apparatus of some kind; they are manifested in legislatures, enforcement agencies, tribunals; they give rise to powers, rights, agreements, criminal sanctions, and remedies. This category encompasses the entire panoply of whatever is typically regarded as law-related or legal, ranging from traffic laws to human rights. Citizens of the EU, for example, are subject to laws and regulations generated locally (municipality or township), at district or state levels, at national levels, at the level of the EU, and internationally. These versions of official law are not completely reconciled with one another, and many are based on separate institutional structures with potentially conflicting jurisdictions and norms.[171]

In the Bermuda context, residents are subject to the laws and regulations generated locally (by way of the municipalities of the City of Hamilton[172] and the Town of St. George[173]), at the domestic level (by way of Bermuda's lower chamber the House of Assembly and its upper chamber the Senate), at the EU in terms of the EU directives that are extended to Bermuda by the UK by way of Orders in Council, and internationally by way of the treaties that are extended and made a part of Bermuda's laws, also by way of Orders in Council.

1.11.2 Customary normative systems

These systems include shared social rules and customs, as well as social institutions and mechanisms, from reciprocity, to dispute resolution tribunals, to councils of traditional

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[170] Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, Sydney Law Review, 2008 [Vol. 30:375], p. 397
[171] Ibid, p. 397
[172] Incorporated by way of the Municipalities Act 1923
[173] Ibid.

leaders. In some locations the terms indigenous law or traditional law are also used. These terms (and their local translations) are labels usually invoked in post-colonial societies, and have limited application in other contexts. The notions of *customary* or *traditional* or indigenous societies were marked (for various purposes) as distinct from the transplanted norms and systems of the colonisers [...] these are not sociological notions, but rather constructed labels and categories created for specific purposes in the circumstances of colonisation and its aftermath. Once created, these labels have been carried over and continue to the present in some form of coexistence with (or within) official legal systems.[174]

1.11.3 Religious normative systems

These systems are in some societies an aspect of and inseparable from customary normative systems, and both can be considered aspects of culture (hence the term *cultural*), yet religion merits separate mention for the reason that it is often seen by people within a social arena as a special and distinct aspect of their existence. Religions typically are oriented toward the metaphysical realm, and religious precepts usually carry great weight and significance for believers within a social area. [FN p.399 Tamanaha]

In Bermuda, although it is not a theocracy, religion does play a major part in its normative systems (e.g. the churches overwhelming opposition to same-sex marriage[175] and to the admission of casino gaming).[176]

1.11.4 Economic/ capitalist normative systems

These systems consist of a range of norms and institutions that constitute and relate to capitalist production and market transactions within social arenas. This ranges from informal norms that govern continuing relations in business communities (including reciprocity, and norms that discourage resort to official legal institutions in situations of dispute), to norms governing instrumental relations, to standard contractual norms and practices, to private law-making in the form of codes of conduct, shared transnational

[174] Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, Sydney Law Review, 2008 [Vol. 30:375], p. 397
[175] 'Same-sex marriage referendum Bermuda facing legal challenge', Caribbean 360 (Online), May 24, 2016 ed.
[176] 'Rev Tweed: We need a discussion on gambling', The Royal Gazette (Online), October 18, 2013 ed.

commercial norms, arbitration institutions, and so forth, including shared beliefs about capitalism (such as *market imperatives*). Like customary and religious normative systems, many of these norms are not seen as legal norms; a subset of these economic or capitalist norms and institutions are recognised and incorporated by official legal systems; while others are independently recognised as having a *legal* status. The new *lex mercatoria*, the body of law and institutions relating to transnational commercial transactions, is illustrative of this category.[177]

In the Bermuda context Bermuda's international business sector (e.g. the financial sector and the international reinsurance sector), in particular the manner in which businesses within the international business sector relate to each other, would fall within this category of systems.

1.11.5 Community/ cultural normative systems

This system is, indeed, the vaguest of the five illustrated systems. This is because it is an imagined identification by a group of a common way of life, usually tied to a common language and history and contained within geographical boundaries of some kind, but there can be *communities* of interaction existing purely on the internet comprised of people from around the world. At the local level, communities consists of thick, shared norms of interaction that constitute and characterise a way of life, including customs, habits mores, but at the broader level of the nation (or beyond) the bonds that constitute a community can be much thinner and mainly defined by a perceived identity. In its thinnest manifestation (which can nonetheless exert a powerful influence), the norms that bind and define the community may not be definite or reiterated enough to be considered a *system* in the same sense that that applies to the other systems. The typical claim of community is to have some special connection (descriptive and prescriptive) to or entitlement to support by official state legal systems. Further, under certain circumstances communities can coincide with and be defined in religious or customary terms (or a combination of the three).[178]

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[177] Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, Sydney Law Review, 2008 [Vol. 30:375], p. 398.
[178] Ibid, p.399.

These five groupings should not be viewed as complete, and there may be others that could be added to this list.

1.11.6 Globalisation- The reason for the growth of legal transplants in the world economy

Globalisation is 'often seen as the main reason to explain the egrowth of legal transplants in the world economy'.[179] This is because globalisation serves to 'bring laws and legal cultures into a more direct, frequent, intimate, and often complicated and stressed contact. It influences what legal professionals want and need to know about foreign la, howthey transfer, acquire and process information, and how decisions are made'.[180]

1.11.7 The newly emerging concept of global legal pluralism

It has been argued that it now appears to be a newly emerging concept of global legal pluralism. Michaels, however, is uncertain as to whether the concept of global legal pluralism is simply:

> '(a) a continuation of traditional legal pluralism;
>
> (b) the broadening of focus to include transnational, supranational, and international law in the collection of legal orders; or
>
> (c) something qualitatively new'.[181]

1.11.8 Globalisation and why legal transplantation takes place

Globalisation, often seen as the main reason to explain the growth of legal transplants in today's world economy:

> 'brings laws/ rules and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It 'influences what legal

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[179] Irma Johanna Mosquera Valderrama, Legal Trasnplants and Comparative Law, p. 264,
[180] Ibid, p. 264.
[181] Ralf Michaels, Global Legal Pluralism, Duke University, School of Law, pp. 1to 2.

> professionals want and need to know about foreign law, how they transfer, acquire and process information, and how decisions are made'.[182]

Moreover Globalisation, as a phenomena, has been argued as creating:

> (a) as a result of the increasing cultural contact a number of traditional practices, whole ways of life and worldviews disappearing; and
>
> (b) at the same time globality leads to the emergence of new cultural forms…everywhere cultural traditions mix and create new practices and worldviews.[183]

1.12 Structure of the thesis

This thesis has seven chapters.

In **Chapter 1**, the overall framework of this thesis is formulated and presented.

Chapter 2 provides the literature review for this study.

Chapter 3 sets out the theoretical framework which is woven throughout this thesis, thereby serving to strengthen its inner core. It will present the main argument of the thesis, exploring law reform and the four legal theories used to test the hypothesis of this thesis, and give an indication of the emergence of the concepts of 'history' and 'legal culture' as core variables.

Chapter 4 seeks to test the validity of the four legal theories introduced in Chapter 2, pointing out their strengths and weaknesses, particularly in relation to s 315F of Bermuda's Criminal Code Act 1907 and s 29A of Bermuda's Firearms Act 1973. This chapter is also used to illustrate that a country's history and culture are imbedded into its laws and can, perhaps unintentionally, cause the intent behind the creation of a countries laws to become lost, negatively affecting certain groups of a country's people.

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[182] Irma Valderrama, Legal Transplants and Comparative Law, p. 262.
[183] Joanna Breidenbarch, The Dynamics of Cultural Globalisationm, p. 262

Chapter 5 continues to test the validity of the four legal theories, this time in relation to TEIAs between Bermuda and members of the OECD, particularly France, as well as those between Bermuda and the US. It also examines the appearance of economic intimidation exacted by a large country or countries against a smaller country, which arises because of the ill-defined and emotive concept of 'tax haven'.

Chapter 6 completes the testing, using the UK's Landmines Act 1998 and Landmines Act 1998 (Overseas Territories) Order 2001 (the vehicle for transplanting the Ottawa Treaty from the UK to Bermuda) as a tool. It also explores the problem of competing independent national, political and military interests in the relationship that exists between Bermuda and the UK, especially in relation to the competing independent national, political and military relationship that Bermuda and the UK have with the US.

Chapter 7 proposes solutions for the specific cultural and historical economic, legal, and social problems that are at the crux of this thesis and that currently affect Bermuda. Using the Bermudian experience with gang culture, which is akin to a Bermudian version of terrorism, it also proposes solutions to solve the global phenomena of the male foreign terrorist fighter. In doing so, the author not only seeks to use this thesis as a means of assisting Bermuda in finding solutions to these problems, but also to put forward solutions for the world to use (including bodies such as the United Nations) for resolving the phenomenon of the foreign terrorist fighter, most notably in countries world such as Belgium and France.

Chapter 8 contains the conclusions. It explores how laws are transplanted, the meaning of effectiveness, and the problems associated with trying to determine effectiveness and from whose perspective effectiveness is be to be observed and determined. It also explores shortcomings in the research, and opportunities for further study.

Chapter 2. Literature Review

The subject of legal transplantation has been the subject of continued debate since the 1970s. Much of the academic debate has centred on the possibility of transplantation and not on its effectiveness, particularly from the perspective of the end-user. Many legal academics have written about the subject of legal transplantations, but the two most prominent are Professor Alan Watson and Professor Pierre Legrand. Other notable contributors are Professors Otto Kahn-Freud, Rudolf von Jering, Konrad Zweigert, and Hein Kotz.

2.1 Watson's theory

Watson coined the term legal transplantation in the 1970s to refer to 'the moving of a rule or a system of law from one country to another'[184] and has written extensively on this subject. He draws on examples of transplanted laws from the Roman era, as recorded by Louvain,[185] the Saxon era,[186] law from the 17th century,[187] and the work of Johannis Voet, first published, 1698.[188] He also uses feudal law to indicate that 'borrowing' need not be of statute law alone. He makes special mention of Boehmer (1715-1797) and his *Principia Iuris Feudalis* (Göttingen):

> 'The *sources of common* German feudal law are the *feudal* law of the Lombards received throughout Germany, universal *German feudal customs*, the *common law of the empire* contained in imperial sanctions, in Roman and in canon law'.

Watson argued that this:

> 'indicates a strongly held belief that throughout the Empire feudal law was one and the same, even if not identical from one state to the next. The lesson must be that through transplants law becomes similar, even if not identical, in many jurisdictions: and that lawmakers rely heavily on foreign law for

[184] Alan Watson, Legal Transplants: An Approach to Comparative Law, Edinburgh, 1974, p.4.
[185] Ibid.
[186] Ibid.
[187] Ibid, p. 5
[188] Ibid.

> their own changes, whether as legislators, judges or jurists'. Also under the heading of feudal law, Professor Watson refers to Thomas Craig who wrote '*Ius Feudale',* published in 1655. He asserts that Thomas Craig's aim was to 'show the fundamental similarity of the subject in Scotland and England'.[189]

He asserts that 'feudal law may not have been , and it was not , the same throughout Western Europe, but it was much more alike because of the *Libri Feudorum* and the consequent legal transplants'.[190]

The third example he uses in support of his legal transplant theory, is the early history of the French *code civil* in Belgium in which Belgium's annexation to France in 1797 resulted in the French *code civil* coming into operation in 1804. He notes that after the French domination of Belgium ended, the *code civil* continued to be the law of Belgium. From this example he asks (for the purposes of challenging Professor Pierre Legrand's assertion that 'legal transplants are impossible') 'how can that be, since before the imposition of the *code civil* Belgium was a land of numerous local customs?'[191]

In support of his legal transplant theory, Professor Watson relies on the contents of the book published by the Belgian jurist, E. R. N. Arntz (published in Brussels in 1875) entitled *Cours de Droit Civil Français*. The book, meant for a Belgian readership, had 'references to some new French law'. Also in spoort of his legal transplant theory, Professor Watson relies on the 1879 second edition publication by Arntz, this addition having references to all Belgian and French law because 'of the success in France of the first edition'.[192]

Drawing on the 20th century example of Turkey, Watson concludes that 'until recently, Turkey was usually regarded as the most extreme example of a modern legal transplant'.[193] He draws on the writings of Turkish law professor Esin Örücü, who stated:

> 'What is regarded today as the theory of 'competing legal systems', albeit used mainly in the rhetoric of 'law and economics' analysis, was the basis of the reception of laws that formed the Turkish legal system in the years 1924 ,

[189] Ibid, pp. 6-7.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid, p.6-7.

> 1930. The various Codes were chosen from what were seen to be 'the best' in their field for various reasons. No single legal system served as the model. The choice was driven in some cases by the perceived prestige of the model, in some by efficiency and in others by chance. Choosing a number of different models may have given the borrowings 'cultural legitimacy' as the desire to modernise and westernise was not beholden to any one dominant culture. It would have been possible to choose Switzerland or Germany and borrow solely from one of these jurisdictions. It was instead the civil law, the law of obligations and civil procedure from Switzerland, commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France that were chosen, translated, adapted and adjusted to solve the social and legal problems of Turkey and to fit together. Choice means taking one option as opposed to another, and the existence of choice is what differentiates a reception from an imposition. Thus, the difference between reception and imposition is related to the existence or absence of choice. On this criterion alone, the Turkish experience. is a substantial and thorough experience in 'reception'.[194]

Watson notes that, historically, 'Turkish academics had most of their training in universities in the countries from where the receptions came and that [...] the fitting of all models to the Turkish situation was indeed undertaken by academics so trained'. Language training and translations, Watson asserts, were extensive. In the early years of Turkey's existence, Watson notes that 'Swiss, Austrian and German academics also contributed to the new legal system as a consequence of historical accident and thus greatly helped the imported system to take root'.[195] In conclusion, and in support of his legal transplant theory, he notes that:

> '(a) The main draftsman of the civil code, Mahmut Esad Bozkurt, had studied law in Switzerland. That was the law he knew. The general opinion of scholars is that this fact is the main reason for the choice of Swiss law for the base of the Turkish civil code;
>
> (b) What was borrowed was not just the Swiss codes, but their court decisions and academic opinion. What can be, and is, borrowed is not just statutory rules; and

[194] Ibid, p.7.
[195] Ibid.

> (c) As Örücü has indicated, there was a continuing relationship between Turkish law and European codes: European professors were appointed to teach Turkish law (through interpreters); prospective Turkish legal academics (and others) studied law in continental Europe'.[196]

Turning to the states of the former Soviet Union, Watson examines the civil codes or drafts of the states of that former country. He states that 'ninety seven percent of the draft of book 2 of the new Armenian civil code, Obligations, is taken straight from the Russian civil code and makes special reference to the fact that the drafts were written in Russian – not in Armenian.[197] The code was to come into effect only after the publication of a commentary and that Armenian commentary would be based on the Russian.

Finally, Watson considers a type of legal transplant, in relation to the international sale of goods – the 1988 UN Convention on Contracts for the International Sale of Goods. He argues that 'it was long felt that transnational mercantile transactions would be greatly helped if there was a uniform contract law that crossed national borders'. Watson argues that:

> '…the Convention when it came into force did not represent the law of any nation state. But since 1988 it has been enacted as law in 54 countries: an enormous example of a legal transplant. Of course, it may be argued that the needs of transnational business make this a special case. Of course I agree. But that does not alter the fact that 'foreign' law could be accepted in many countries. Naturally enough, it was noticed that judicial interpretation in different countries could result in different results. (I would point out though, that even by accepting the Convention the 54 countries bring their national law on the subject much closer together). A first step in harmonising the law is to hold that domestic proceedings do not transform this Convention (and others) into domestic law, hence the domestic interpretative techniques are not applicable. This approach has been widely successful, but as yet with notable exceptions.18 The interpretation of the

[196] Ibid.
[197] Ibid.

> Convention is not uniform within the 54 countries but there is a wide measure of agreement'.[198]

Watson's argument is strong, but none of the examples he uses deals with the issue of reception by the respective end-users, especially in relation to the laws and rules that were imposed by way of conquest (e.g. Roman Law, the imposition of French Law on the people of Belgium). He also offers no indication of how effective these laws or rules were for the people on which they were applied. His indication can be interpreted to mean that because there is indication that legal transplants have taken place that there is no need to consider the issue of reception by the actual end-users (i.e. for the purposes of determining if a legal transplant has been effective).

Watson's theoretical framework appears to be developmental. Developing countries have, over the years, been urged by law and development scholars to copy the modern institutional features of Western countries, in particular judicial independence, legal education, the rule of law and rights based commercial laws. By doing so, these law and development scholars have ignored Weber's caution that laws develop over time by interacting with local socioeconomic environments, processes that induce path dependent development.[199]

The relationship assumed by Watson between theory and practice is that the laws and rules can easily be transplanted from one jurisdiction to another. His statements that 'law is different from bread because in all its manifestations it is an element of the state' and 'the state is responsible for its coming into being, for its application and for its efficacy' takes into account to the role of one end-user (the state) but completely ignores the role the ultimate end-user (the people that live within the jurisdiction of the state), resulting in a very simplistic view of legal transplants.

Watson does review other writers' theories but in over simplifying them he minimises the practical side effects associated with transplantation, inferring that they are immaterial. He also refers to literature that opposes his view point, primarily that of Legrand.

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[198] Ibid.

[199] See: David Trubek (1972), 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', 82 Yale Law Journal. 'Basic Needs' theorist have determined that neoliberal markets produced harsh outcomes in that states did not redirect welfare income to their poor inhabitants. See also Gunnar Myrdal (1968), 'Asian Drama: An Inquiry into the Poverty of Nations', Pantheon, New York.

Watson's conclusion that laws and rules can be transplanted is a valid assertion insofar as the act of transplantation has been demonstrated as possible, but fails to address regional variations and other factors, and makes no assessment of whether the transfer can be efficient and effective. The strengths of his approach is founded on the fact that he is able to give examples of successfully transplanted rules and laws. Its weakness is that it does not take into account whether they were done successfully with specific reference to the end-users. The strength of this theory is also weakened because it doesn't consider the 'better solutions theory', which is founded on functionality; 'the legal system of every society faces essentially the same problems',[200] and therefore the objects for comparison should be diverse legal solutions to those societal problems.[201] Inherent in functionalist analysis are two primary elements; problem definition and solution identification.

In contrast and according to Zweigert and Kotz, this means that only rules which perform the same function and address the same real problems can profitably be compared, causing functionality to be:

> '…the basic methodological principle of all comparative law….From this basic principle stem all other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparison and so on'.[202]

From this principle is derived comparative law,[203] allowing functionalism to provide advice on legal policy by suggesting how a specific problem can best be solved under given social and economic circumstances.[204] They see comparative law as a means by which to discover models for preventing or resolving social conflicts, and:

> 'providing a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world

[200] Zweigert and Kotz, *Introduction to Comparative Law* (3 ed. 1998) 34.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Ibid.

> can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system'.[205]

The first argument against the functionalist theory is from Whitman, who believes that it is unreliable because of the proposition that all societies view life as presenting the same social problems.[206] Hyland, also finding the functionalist theory wanting, challenges the idea that the social issues the law is asked to resolve are so similar as to present a constant across legal systems.[207] Hill questions the basis on which comparative lawyers are qualified to make evaluations of different legal systems.[208] He believes that functionalists think they can make such judgments because the method used is an objective one, but Hill argues that different legal solutions require value judgments about fairness and justice, and that functionalism cannot provide a basis for making these kinds of judgments.[209]

There is also the issue of for whom a legal rule is functional. This is to say that:

> 'Societies are not monolithic; they are composed of diverse individuals and groups. Thus it is difficult to speak of societal functions per se. Instead we must speak in terms of which individuals and groups define the intended consequences of a legal institution. Functionalism proposes neither an answer nor a general approach'.[210]

Abrahamson cautions against using the functionalist theory because there is a tendency to assume that different societies face similar problems and a tendency to imply the ability to make objective claims about which legal solutions to those problems are superior.[211]

Functionalism has been argued to be the mirror image of Watson's theory- something that Watson disagrees with.[212] The drawbacks to functionalism or the functionalist approach

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[205] Ibid, 15. Schlesinger, von Mehren and Merryman, all espouse the same 'better solutions' impulse theory.
[206] James Q. Whitman, The Neo-Romantic Turn, in Comparative Legal Studies: Traditions and Transitions 312 (Pierre Legrand and Roderick Munday eds, 2003).
[207] Richard Hyland, Comparative Law: A Companion to Philosophy of Law and Legal theory 184, 188 (Dennis Patterson ed, 1996), 189.
[208] Jonathan Hill, Comparative Law, Law Reform and Legal theory, 9 OXFORD JOURNAL OF LEGAL STUDIES 101 (1989), 102.
[209] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1887.
[210] Ibid, 1888-1889.
[211] Ibid, 1889.

are best illustrated by Ralf Michaels. The functionalist approach, arguably, has three elements. First, "law matters": law has predictable consequences on society. Second, those effects are, in principle, the same in any society. Third, based on this knowledge, law reformers can pick the best laws in order to bring such consequences about.[213]

Among the three elements of this approach, Michaels argues that 'the first and the last elements 'are less controversial than the second'. However he asserts that 'the first element, namely that law has an impact on society, can hardly be denied in general[214] The third, 'namely that law reformers can pick the best laws in order to bring about the best consequences, Ralf Michaels argues is more contentions, but still widely supported. Without this assumption, law reform would be futile. It is the second step—the idea that laws yield the same outcomes anywhere, and that therefore one solution is the best for any society, that is the most problematic'.[215]

This, Ralf Michaels argues, 'is a kind of legal functionalism, even if that is not always said openly.'[216] But it is a very peculiar kind of functionalism.[217] First, 'in insisting that one solution fits the problems found in every legal situation, it ignores one core element of functionalism in comparative law, namely functional equivalence—the insight that, in different systems, different legal solutions may respond to similar problems'.[218] Second, 'in viewing law as a tool, it represents a specific kind of functionalism, namely instrumentalism'.[219] 'Functionalism takes an observer's perspective on the relation between institutions and societal needs; it incorporates also unrealized needs and unrealized ("latent") functions'.[220] Instrumentalism, Ralf Michaels contends, 'adopts a participant's need: here, the societal need is necessarily known, and a legal rule is aimed at responding to this need—whether successfully, or not'.[221] Third, 'although instrumentalism could develop different solutions for different societies, the one size- fits-all approach, in

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[212] Richard Abel, Law as Lag: Inertia as a Social Theory of law, 80 MICH. L. Rev. (1982), p. 785.
[213] Ralf Michaels, "One Size Can Fit All" – On the Mass Production of Legal Transplants, p. 9.
[214] Ibid.
[215] Ibid.
[216] Ibid
[217] Ibid.
[218] Ibid.
[219] Ibid.
[220] Ibid
[221] Ibid.

proposing one solution for every society, must deny the relevance of context, or of the specific character of the legal problem to respond to'.[222] Ralf Michaels concludes that 'this is sometimes called the law of the hammer ("If all you have is a hammer, everything looks like a nail")'.[223]

The Watson theory also fails to consider 'casual inference theory'. This is founded on the proposition that:

> 'Whenever it is proposed to adopt a foreign solution, which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it'.[224]

Indeed, Watson fails to offer any guidance on how, unlike the casual inference theory, is it to be implemented or by what means

Whytock contends that the first question can only be answered 'by having an understanding of the actual effects of a legal solution on a specified outcome in the country of origin'. And to answer the second question, he contends that 'one must have some understanding of the likely effects of a similar legal institution in a country that adopts it'.[225] As a legal theory for use as a tool of legal reform, Whytock cautions that:

> '…when legal origins scholarship drifts from testing to attempting to establish causal claims, comparative legal scholars should be wary. Moreover, functionalist comparative legal scholarship would benefit from more methodological diversity than legal origins scholarship in its quest to take causality seriously. None of this is to suggest that all comparative legal scholars should ask causal questions or make causal claims about legal institutions; but when they do, they should be explicit about the process by which they make their causal inferences'.[226]

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[222] Ibid.
[223] Ralf Michaels, "One Size Can Fit All" – On the Mass Production of Legal Transplants, pp.9-10.
[224] John Henry Merryman, The Loneliness of the Comparative Lawyer 486 (1999).
[225] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1893.
[226] Ibid, 1897.

Watson's theory is also weakened by its failure to consider the context in which a law exists. Whytock suggests that, of the functionalist theories, the 'laws context theory' should be taken seriously because, and as Tushnet has noted:

> 'Every society's law is tied to so many aspects of that society, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more, that no functionalist account can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience of others'.[227]

It is uncertain whether there is a distinction between public and private law. Watson is the only theorist who acknowledges, albeit in a glossed over manner, the existence of such a distinction, but does not fully address whether or not there is a distinction between public and private law, or whether the debate serves to enhance legal transplant theories.[228] It is therefore questionable whether the legal theories are valid tools for determining whether a law has been effectively transplanted.

Again, and unfortunately, Watson's theory does not appear to specify how or when a law or rule can transplanted- effectively or otherwise.

2.2 Legrand's theory

Legrand's assertion, that legal transplants are impossible, is clearly defined. He asserts that:

> '(1) if one agrees that, in significant ways, a rule receives its meaning from without and if one accepts that such investment of meaning by an interpretive community effectively partakes in the ruleness of the rule, indeed, of the *nucleus* of ruleness, it must follow that there could only occur a meaningful 'legal transplant' when both the propositional statement as such *and* its invested meaning **,** which jointly constitute *the rule* **,** are transported from one culture to another; and

[227] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', (1999) 108 Yale L.J. 1225, 1265.
[228] See paragraph 1.8 of this thesis for further discussion on the subject of public law and private law.

> (2) given that the meaning invested into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen'.[229]

Legrand argues that:

> 'in linguistic terms, one could say that the signified (meaning the idea content of the word) is never displaced because it always refers to an idiosyncratic semi cultural situation. Rather, the propositional statement, as it finds itself technically integrated into another legal order, is understood differently by the host culture and is, therefore, invested with a culture-specific meaning at variance with the earlier one (not least because the very understanding of the notion of 'rule' may differ). Accordingly, a crucial element of the ruleness of the rule **,** its meaning **,** does not survive the journey from one legal system to another'.[230]

Legrand, in support of his assertion, asks 'could *law* travel if it was not segregated from society?' To answer this question Legrand turns to the writings of Max Weber who asserts:

> 'A comparative study should not aim at finding 'analogies' and 'parallels', engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences'.[231]

He also relies on Eva Hoffman, who concludes:

> 'you can't transport human meanings whole from one culture to another anymore than you can transliterate a text […because] in order to transport a single word without distortion, one would have to transport the entire language around it'. Indeed, 'in order to translate a language, or a text,

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[229] Pierre Legrand, The Impossibility of Legal Transplants, p.116 to 117.
[230] Ibid.
[231]Pierre Legrand, The Impossibility of Legal Transplants, p.111; Max Weber, The Agrarian Sociology of Ancient Civilisations, transl. by R.I. Frank (NLB, 1976) at p.385.

> without changing its meaning, one would have to transport its audience as well'.[232]

The relationship between the words that constitute the rule in its bare propositional form and the idea to which they are connected is arbitrary in that it is culturally determined. Thus, there is nothing to show that the same inscribed words will generate the same idea in a different culture, particularly if the words are themselves different because they are in another language. As the words cross boundaries there is a different rationality and morality to underwrite and affect the borrowed words: the host culture continues to articulate its moral inquiry according to traditional standards of justification. The imported form of words, therefore, is inevitably ascribed a different, local meaning which makes it a different rule. As the understanding of a rule changes, so does its meaning, and as the meaning of the rule changes, the rule itself changes.[233]

To illustrate his point that laws or rules cannot be transplanted, Legrand, paraphrasing J.A. Jolowicz, states:

> 'the addition of a litre of *green* paint to four litres of yellow does not give us the same colour as the addition of a litre of *red* paint to four litres of yellow'.

Legrand's focus on the role of the end-user results in a very convincing argument. Due to his assertion that legal transplants are impossible and the existing empirical indication that support a contrary argument, his assertion does not appear convincing.

Legrand's theoretical framework is developmental. By way of his assertion that 'legal transplants are impossible', and calling for the need to consider the end-user in assessing effective transplantation, this lends itself well to the process of drafting legislation, especially in regards to drafting legislation for developing countries.

In reaching his conclusions, Legrand evaluates the literature in the field, in particular that by Alan Watson, but concludes that 'legal transplants are impossible'. His research, in so far as it examines the impact that history and culture has on the effectiveness of a transplanted law or rule, is accurate, but does not recognise that there are exceptions to his assertion.

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[232] Eva Hoffman, Lost in Translation (Minerva, 1991) at p. 175.
[233] Legrand, The Impossibility of Legal Transplants, p.117.

The strength of Legrand's study is that it takes into account the role that end-users play in the reception or rejection of laws or rules within any given society. It is, however, limited because it does not consider Zweigert and Kotz 'better solutions' theory.

Like the Jhering theory, the best solutions theory is founded on the functional or functionality. This is to say that 'the legal system of every society faces essentially the same problems'[234] and, therefore, the objects for comparison (by way of the comparative method) should be diverse legal solutions to those societal problems.[235] Inherent in functionalist analysis are two primary elements:

1. problem definition; and

2. solution identification.

What does this mean? Arguably, this means that only rules which perform the same function and address the same real problems can profitably be compared, causing functionality to be:

> '…the basic methodological principle of all comparative law….From this basic principle stem all other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparison and so on'.[236]

From this principle is derived what is called applied comparative law,[237] allowing functionalism to provide advice on legal policy by suggesting how a specific problem can most appropriately be solved under given social and economic circumstances.[238] In using comparative law, Zweigert and Kotz see comparative law as a means by which to discover models for preventing or resolving social conflicts, and:

> 'providing a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world

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[234] Zweigert &and Kotz, *Introduction to Comparative Law* (3 ed. 1998) 34.
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] Ibid.

> can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system'.[239]

Abrahamson cautions against using the functionalist theory because there is a tendency to assume that different societies face similar problems and a tendency to imply the ability to make objective claims about which legal solutions to those problems are superior.[240]

The Legrand theory also fails to consider, in tandem with the 'best solutions theory, the casual inference theory. This is founded on the proposition that:

> 'Whenever it is proposed to adopt a foreign solution, which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it'.[241]

Whytock contends that the first question can only be answered 'by having an understanding of the actual effects of a legal solution on a specified outcome in the country of origin'. And to answer the second question, he contends that 'one must have some understanding of the likely effects of a similar legal institution in a country that adopts it'.[242]

As a legal theory, for use as a tool of legal reform, Whytock raises the caution that:

> '…when legal origins scholarship drifts from testing to attempting to establish causal claims, comparative legal scholars should be wary. Moreover, functionalist comparative legal scholarship would benefit from more methodological diversity than legal origins scholarship in its quest to take causality seriously. None of this is to suggest that all comparative legal scholars should ask causal questions or make causal claims about legal institutions; but when they do, they should be explicit about the process by which they make their causal inferences'.[243]

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[239] Ibid, 15. Schlesinger, von Mehren and Merryman, all espouse the same 'better solutions' impulse theory.
[240] Ibid, 1889.
[241] John Henry Merryman, The Loneliness of the Comparative Lawyer 486 (1999).
[242] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1893.
[243] Ibid, 1897.

Another waekness of Legrand's theory is that it does not indicate if the theory is:

(a) applicbale to private law;

(b) applicable to public law; or

(c) applicable to public and private law.

Further, Legrand's theory fails to indicate whether:

1. there is a distinction between public law and private law;

2. there is no distinction between public law and private law; or

3. in either case, the extent the public law and private law debate serves to buttress or to undermine their respective legal transplant theories, if at all.

It is therefore questionable as to whether or not the Legrand theory is a valid tool for determining whether a law or rule has been effectively transplanted, especially in the instance where public is the subject of examination.[244]

2.3 Legrand: The role of judges in the transplantation of rules

In regards to the role of judges, specifically in relation to their function in the interpretation and transplantation of a rule, Legrand appears to be adverse to judges being allowed to use their discretionary powers (afforded to them by way of statute and the common law) to determine how best to determine issues of interpretation and transplantation of a rule- in this case a French rule. Although he provides a best ways example by which future judges can interpret foreign rules,[245] he is dismissive of the judges that do not align with his methodology. The detailed analysis of the cases studies, as read with the subchaters on the role of judges, show that ultimately it will be the judges (assisted by lawyers) who will be

[244] See paragraph 1.8 of this thesis for an expanded discussion concerning the distinction between public and private law.
[245] Mastercard International v FIFA, decided on 7 December 200

responsible for the effective transplantation of rules to Bermuda- in those instances where there is ambiguity concerning the purpose of a rule and its provisions.

2.3.1 The case of *Bodum*

Legrand's aversion is evident in his critique[246] of the majority decision of *Bodum v La Cafetière*.[247] *Bodum* was a case decision regarding proof of foreign law. Two out of the three judges:

> 'took the view that they ought to forgo expert testimony and proceed to ascertain French law themselves by reference to English-language materials available to them in the United States and on the basis of these texts only'

with the third judge of the panel disagreeing with the approach being taken by his fellow judges. In his critique, Legrand stated his goal to be one where he provides:

> 'a mapping of the judgment from the standpoint of its epistemological commitments as it deems itself able to identify the relevant foreign law while perplexingly confining itself strictly to publications in the local language available locally'.[248]

By way of his critique he inferred that the judges involved in the decision appeared to have 'judicial disdain for expert testimony on foreign law'[249] and suggested that this was perhaps 'striking a welcome democratic chord in reaction to the elitism that can be said to animate the cult of the expert' but went on to claim that 'the majority of the court in effect succumbed to truculent theoretical banalisation in the form of an empiricism that proves as naïve as it is reductionist, as mechanical as it is ethnocentric'. Legrand then went on to determine that 'the salient epistemological stakes of the case at issue manifested themselves' in at least five guises.

There being no thoroughly depersonalised gaze – no 'raw' descriptivism, then, being possible — the court's election to follow a particular approach in order to ascertain foreign law must be expected to have an impact on what foreign law is finally held to be stating on

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[246] Pierre Legrand, Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris, JCT, 8:2
[247] *Bodum USA, Inc v La Cafetière, Inc*, 621 F 3d 624 (2010)
[248] Pierre Legrand, Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris, JCT, 8:2, p. 344
[249] Ibid, p.

any given issue. In other words, one always reads foreign law pursuant to identifiable epistemic circumstances such that no enunciation of it can happen independently of the interpretive scenario being staged to achieve a formulation of it. To describe is to inscribe. Now, the identification of foreign law as positing 'this' rather than 'that' can be assumed to play a key role in the actual outcome of the case.

Meanwhile, a decision to retain one approach towards the articulation of foreign law rather than another reveals assumptions pertaining to the judge's disposition vis-à-vis the foreign. Specifically, the selection of given interpretive protocols points to a certain attitude in terms of how much recognition of the foreign and how much respect for the foreign one is prepared to concede.

The majority view is to be located within a series of judicial decisions epitomising the vexed political relationship that US courts, including the US Supreme Court, have been experiencing with foreign law, as judges have oscillated between motions of introjection into the local polity and strategies of rejection, between the motifs of mutation and repulsion. Though judgments like *Atkins v Virginia*, *Lawrence v Texas* and *Roper v Simmons* have been amenable to the ascription of normative value to foreign law as persuasive authority (thus in Roper, the court expressly referred to the corroborative character of foreign law), *Bodum* is operating a retrenchment in as much as a majority of the court is only prepared to countenance a heavily 'Americanised' rendition of the foreign.

Somewhat more philosophically, the recognition and respect a court proves willing to grant foreign law – or the measure of validation of the foreign a court is prepared to defend – is revealing of the views a judge holds as regards the fraught boundary between the self and the other (or, at the minimum, between the self-in-the-law and the other-in-the-law). Is one disposed to treat foreign law on par with local law (that is, as an alter ego)? Or will one approach the foreign in a way that suggests a susceptibility to the hierarchisation temptation, or perhaps to an imperialist haunting, such that local law is deemed superior or exceptional vis-à-vis foreign law?

Ultimately, and once more from a predominantly philosophical perspective, a judge's attitude concerning foreign law tells about the fashioning of self-definition. How one addresses alterity signals, in significant ways, what kind of person one is. For example, it is

meaningful that as the circuit court in *Bodum* is asked to ascertain French law, it gives effect to its understanding of it based strictly on English language materials at hand in the United States rather than strive to realise a French lawyer's vision of French law'.[250]

In order to support his assertions, Legrand relied on the American decision, in particular the method by which the court reached its decision, of *Mastercard International v FIFA*, the United States District Court for the Southern District of New York.

2.3.2 Mastercard International v FIFA: Legrand's prescribed solution on how things ought to be done

In the case of *Mastercard International v FIFA*, the United States District Court for the Southern District of New York, the Judge also addressed the issue of expert testimony concerning the interpretation and application of a foreign rule law in the State of New York, albeit dealing with the example of Swiss law which governed the contract being determined by the court. In this case, according to Legrand, Judge Preska's approach to the matter was 'exemplary'. Legrand found it to be 'a good illustration of how things are done and a fine model of how they ought to be done' and, by inference, an indicator of how courts should approach the issue of using expert witnesses in relation to interpreting foreign laws. Specifically he cites the following passage of the Judge's judgment to support his thesis:

> 'The key passage is well worth reproducing at length: The Court's interpretation of Swiss law […] is based on the expert declarations submitted by both parties. Upon review, the conclusions of Dr Franz HG Werro are found to be the most persuasive and informative, and it is the 'persuasive force of the opinions' expressed that is conclusive under Rule 44.1. […] Dr Werro has published numerous articles on contract law and is a professor at the Faculté de droit, University of Fribourg, as well as a tenured professor at Georgetown University Law Center and, as demonstrated by his curriculum vitae, is eminently qualified to opine on the issues presented. His opinions and conclusions are adopted in their entirety. In addition, the opinions and conclusions of Dr Hans Caspar von der Crone are persuasive and thus are adopted in their entirety. D Caspar von der Crone is a professor of private,

[250] Pierre Legrand, Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris, JCT, 8:2, p. 344- 346

> commercial, and corporate law at the University of Zurich, has numerous publications in these areas, and is similarly qualified to opine on the issues presented. […] One of FIFA's Swiss law experts, Dr Wolfgang Wiegand, who does have a background in contract law, agrees with Professor Werro on many of the governing principles of Swiss law, even though he comes to different conclusions. To the extent that Dr Weigand agrees with Professor Werro as to the law, his conclusions are accepted. His conclusions and his plentiful advocacy – as opposed to expert opinion – are rejected as unpersuasive. […] Another of FIFA's Swiss law experts [is] Professor [Carl] Baudenbacher (an apparent expert on competition law with little, if any, known expertise on contract law) […]. […]Professor Baudenbacher's opinions are rejected for lack of apparent expertise in contract law and because they are not persuasive. […] Another FIFA expert [is] Dr Alfons Burge, a professor of 'Roman law' (the historical underpinning for civil law) in Germany with no apparent credentials as an expert on Swiss contract law […]. […] Professor Burge's opinions are rejected for lack of apparent expertise in contract law and because they are not persuasive. […] Another of FIFA's experts [is] Dr François Dessemontet […]. […] Professor Dessemontet's opinions are rejected as wholly unpersuasive'.[251]

In this instance, the judge was satisfied that, on the basis of the various affidavits filed with the Court, she had been able to reach the requisite understanding of Swiss law. Even allowing for the fact that the various experts had been retained by the parties and that they were therefore presumably interpreting Swiss law in a way not unduly unfavourable to their clients, Judge Preska felt competent to pronounce that some interpretations offered were more convincing in interpretive yield than others. She claimed with confidence that one reading of Swiss law in particular, that of a Professor Franz Werro, was especially helpful. Meanwhile, she did not hesitate to reject expert testimony she found inadequate – and to state her dissatisfaction.

Legrand points out that: 'all along, Judge Preska is not so much engaging in dialogue with Professor Werro as she is negotiating or transacting with him. Each of the two protagonists speaks a specific language (I use the word in the broadest sense). Indeed, each is pursuing a monologue. Legrand was even prepared to surmise that at no point did Judge Preska

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[251] Pierre Legrand, Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris, JCT, 8:2, p. 371

presume that she eliminated the knowledge gap between Professor Werro and herself. Legrand asserted that it:

> 'cannot but be clear to Judge Preska that try as she may, she can never make it such that she will somehow turn herself into a Swiss-educated, French-speaking and Schwyzerdütschspeaking law professor and lawyer like Professor Werro – who, in addition to his eminence as a Swiss academic regularly cited by the Swiss supreme court ('Tribunal fédéral'), also enjoys an enviable reputation as a foremost comparatist both on the European and North- American scenes'.

Legrand postulated that 'Judge Preska realised that the two horizons would never merge, that any reaching of Professor Werro's position on her part would always have to be postponed or infinitely deferred'. Indeed, there is the radical privacy of Professor Werro's act of mental understanding of Swiss-law-as-it-is-lived-in-Switzerland so that his appreciation can never be found as such in Judge Preska's mind'. Again, he asserts that Judge Preska is 'inevitably coming to Swiss law as a comparatist, that is, as a 'second perso[n]'. These interlocutors, Legrand contends, must therefore fail to make complete contact with each other: between them, 'there is initially the space and the time of an infinite difference, of an interruption incommensurable with all the attempts at passage, at bridge, at isthmus, at communication, at translation, at trope, and at transfer'. Legrand asserts further that a realisation of the limits of the decoding or deciphering she could bring to bear on the matter (of interpreting Swiss law) at issue must in fact have become clearer to Judge Preska the more she delved into Swiss law'. This was to say that, as the saying goes, the more she understood the less she understood. Legrand believed that, because there can never be interpretive closure, a gap will thus remain – an ever-so-slight misunderstanding, perhaps – such that the re-presentation of Swiss law Judge Preska is able to iterate will inevitably disclose a US inflection, an autobiographical touch. In other words, according to Legrand, Judge Preska's Swiss law is ultimately Swiss-law-as-it-is-apprehended-in-the-United-States, a different construct from Professor Werro's Swiss-law-as-it-is-lived-in-Switzerland. 'In effect, Judge Preska's opinion offers what anthropologists might call 'accultured' Swiss law'.

On Legrand's interpretation of her judgment, Judge Preska is making her living decision, being aware of the options, antinomies and paradoxes before her and she feels that she has to let Swiss-law-as-it-is-lived-in-Switzerland speak in the clearest voice possible, which he contends obviously is not to be found in occasional English-language texts available on the US scholarly market'. Legrand goes on to assert that in her view, recourse to expert testimony allows her significantly to reduce the knowledge gap separating her law-world from Professor Werro's to the point where she can eventually regard herself as sufficiently competent credibly to adjudicate on the contract at issue on the basis of what Legrand

argues she takes to be a workable approximation of Swiss-law-as-it-is-lived-in-Switzerland. To her credit, Legrand contends, Judge Preska seeks to edge her way nearer to that Swiss law, which is the Swiss law that governed the litigants' contract'. Appreciating, on Legrand's reading of her judgment, that the parties did not want a US judge to gloze Swiss law – or, at least, that they would have expected her to do so as little as possible – Judge Preska uses Professor Werro's expert testimony to transport herself, metaphorically speaking, to the verge of Swiss-law-as-itis-lived-in-Switzerland so as to put herself in a position to apply that law, as much as is possible from her vantage, to the contract before her. Throughout the proceedings, Legrand considered that Judge Preska remained keenly aware how an integral feature of the Swiss law Professor Werro stages in her courtroom is its relation to absence: the fact is that Swiss-law-as-it-lived-in- Switzerland is not present in New York State.

Returning his analysis of the ruling of Chief Judge Easterbrook and Judge Posner, Legrand contends asserts that their alternative course of action to Judge Preska's decision involves the collection by their law clerks – not, obviously, by they themselves – of whatever publications in English available in the United States can be garnered regarding the point of foreign law at hand. Legrand argues that, problematically, however, that:

> 'this gathering can be expected to reveal undue circumvention of foreign law in some regards and excessive indiscriminateness in other ways'. In both senses, Legrand asserts, 'the law clerks' motion 'yok[es] [foreign law] by force into a frame of reference alien to [it]''. The first difficulty is that 'the assemblage of material is bound to be limited'.

Further, Legrand contends that:

> 'since Chief Judge Easterbrook and Judge Posner insist that accounts of foreign law must remain nonpartisan, their law clerks will presumably have proven reluctant simply to track references from the parties' self-serving briefs, an avoidance strategy which will, in effect, have left them to conduct their own inquiry very much in the light of the research patterns familiar to them since law school (and, in particular, since their law-review years)'.

Again in reference to the judicial law clerks and their functions, Legrand asserts that 'the clerks will have been searching the usual US databases and the habitual electronic library catalogues' and argues that 'for a law-review article or a book to be identified as relevant, it will therefore first have had to appear on the clerks' computer screens as the search was being conducted'. Legrand then goes on to argue that, with the possible exception of some Canadian (or Puerto Rican?) content, all non-English material will have found itself excluded from the electronic investigation'.

Legrand further asserts that 'a number of non-US publications, though available in English, will similarly have been ignored (by the law clerks) if they do not happen to be registered in leading US databases'. As examples, Legrand cites 'the London-based Journal of Comparative Law which, at the time of the *Bodum* judgment he argues, was still more than two years away from being accessible through the retrieval systems known to US law clerks'. Legrand contends that 'Chief Judge Easterbrook and Judge Posner's sources on the French law of contractual interpretation confirm my assumptions' as 'their references include three law journals, all three published in the United States'. Moreover he asserts that 'they feature four books, all of them released by English-language publishers with a strong commercial presence in the United States whose texts can therefore reasonably be expected to be available in US law libraries'. Because of this, Legrand asserts that 'whatever research is conducted by law clerks is (therefore) constrained'. 'With the possible exception of an English-language publication available in the United States written by a US lawyer claiming experience in the practice of law in France', Legrand contends that 'French-law-as-it-is-lived-in-France can be expected to be absent from the law clerks' databases'. In other words, Legrand asserts, 'the bulk of the material generated out of their electronic searches is bound to qualify as French-law-as-it-is-apprehended-in-the-United-States – at best, therefore, to register as epiphenomenal French law'. On account of the normative implications mentioned by Legrand, he asserts that 'the court's goal must be to ascertain French law- as-it-is-lived-in-France, and that these restrictions cannot but give serious cause for concern'.

Legrand notes what he finds to be a second difficulty 'for in a manner that is at least as troublesome, the law clerks' investigations also reveal themselves as in discerning'. For example, Legrand asserts that 'in *Bodum* the clerks seem prepared to collapse all the authors they had found to have written in English regarding the matter of French law at hand whoever happened to be available in the United States, without any apparent willingness or ability to organise them according to what Legrand calls 'merit'. Legrand asserts here that 'not all authors command equal intellectual authority' and argues, too, that 'the same can be said regarding publishing outlets'.

2.3.3 The standing of legal publications

Legrand argues that while it would be silly to dismiss a contribution simply because it appeared in a lesser-known journal, he argues that that it 'remains the case – as every academic must know – that the editorial bar is higher in certain venues than in others, an assertion one can easily test empirically'. Legal publications are important as a tool from which judges can determine a law or rules intent. However they are not slavishly bound to adhere to a legal publication's content. [252]

2.3.3.1 The standing and quality of legal publications

Legrand presents the question, for rhetorical consideration, whether or not there is 'a threshold level of quality – a basic standard of credibility – that a text ought to meet before a law clerk undertakes to treat it as a source worthy of reference by the court' and queries as 'to what signals of reliability will the clerk retain in the course of assessment'; 'by what yardstick will she (the law clerk) evaluate such signals'; 'what specific competence do law clerks bring to bear on the matter'; 'do they know the writers writing in English on French contract law who happen to be available in the United States'; 'are they familiar with the reputation these authors enjoy amongst their peers (i.e. in the case of other foreign specialists on French law) or possibly with the standing in which they are held in France'; 'do law clerks know the French writers having been translated into English'; 'can they vouch for the translators'; 'and how much 'French law' or 'French contract law' content must there be to a text on 'civil-law culture' (referring to Judge Posers dicta) before it is deemed to warrant selection?'

2.3.3.2 Knowledge of French law as it is lived

More significantly, Legrand queries, how much knowledge of French-law-as it- is-lived-in-France can the law clerks muster in order to bridge the potential gap between the law as it is described in print and as it unfolds in practice in France?'

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[252] Pierre Legrand, Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris, JCT, 8:2, p. 371

2.3.3.3 Are the legal resources current or dated?

In order to reassert his concerns about the role of the law clerks, Legrand raises concern about the publication dates of the texts used by the law clerks. Legrand asserts that 'in *Bodum*, a 2010 case, some references were to texts published in 1986, 1992 and 1997' and argues that If the statements deemed pertinent in these publications were pitched at a certain level of generality, one can understand how they could reasonably be found to have stood the test of time'. However, Legrand argues that 'such assertions would also be susceptible of proving less useful in terms of the concrete needs of the court in the case being litigated. It is simply unclear in the light of what criteria the Chicago [sic. New York] law clerks addressed this tension'.

2.3.3.4 Matters considered by the Judge

Legrand went on to argue that 'though this be 'the age of the law clerk', he was 'prepared to accept that judges may themselves sift through the material submitted by their clerks – a parsing, however, that can only take place within limits given the size of the judicial docket'. Still, Legrand went on to argue that some of the questions he's raised herein 'are bound to confront judges not unlike the way in which they will have challenged their clerks:

1. Does a US judge know the authors writing in English on French contract law;
2. Is a US judge familiar with the reputation these individuals enjoy amongst foreign specialists in French law or in France;
3. Does a US judge know the standing in France of the French writers being translated into English;
4. Is a US judge aware of French legal practice in a way that would allow for the law in print to be put into perspective?'

In addition to these questions raised, Legrand raised concern over the matter of indiscriminateness that he contends 'cannot be underestimated. Without wanting to designate any of the English-language references in *Bodum* in particular, he found that 'the normative force injected into some of texts by the court to be unwarranted'. To buttress this assertion, Legrand does so by way of the following analogy:

> 'In the course of their surveys, some of the overrated books and articles I have been discussing also address US law. Now, assume Chief Judge Easterbrook and Judge Posner had been adjudicating on a matter of US rather than French law. Would it have occurred to them, or to their law clerks, to refer to any of these texts as authority on US law? The answer, it seems to me, must be that it is extremely unlikely that those texts would have recommended themselves to the two judges. Why, then, ought those self-

same writings to be regarded as authoritative on French law? On what basis are they deemed adequate to the task of speaking for French law?

2.3.4 Theoretical versus practical application

It must be noted here that although Legrand presents these questions for consideration, these questions, and in particular the answers to them, ought to be considered to be rhetorical in nature and, therefore, not capable of being used as absolutes for the purposes of determining with certainty how or when judges should rely on certain legal experts or legal journals- for the purposes of interpreting transplanted foreign rules. As the common law and administrative law legal maxim states, 'each case must turn on its own facts'.[253] This is to say that there may be occasions when the questions raised by Legrand (and the resulting answers) can be used as bench marks by judges. Still they should not, for the reasons stated, be referred to as absolutes.

2.3.5 Legrand: further suggestions on how best to interpret foreign rules

On his reading of the case of *Bodum*, Legrand surmises 'that the judges in the majority 'appear genuinely to believe that the reading of a handful of law-review texts and summaries in English – some approximately twenty years old, others not directly concerned with France – will have allowed them to understand enough French contract law to be in a position to make a judicious application of it to the matter at issue and that as they are deciding the case while acting on that conviction, irrespective of how much sense of rectitude they bring to bear to their the atricalisation of French law' that they are 'courting, at the very least, a perception of arrogance'.[254] He argues that 'at their hands, it seems, French law is falling prey to a form of cultural hegemony one might style 'anglobalisation' (the domination of a certain Anglo-American configuration of thought and technology) pursuant to which US law journals, US databases and English-language books available in the United States are anointed as the exclusive vehicles through which French law must manifest itself in order to acquire its badge of legitimacy in the eyes of the

[253] MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Limited and another (Appellants) [2017] UKSC 59
[254] Pierre Legrand, Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris, JCT, 8:2, p. 377

court'.[255] This is to say, according to Legrand, 'French law finds itself having to meet US expectations' and that 'it must become commodified, so to speak, as a US product and can only be allowed to exist pursuant to that specific design'.[256] He argues, in effect:

> 'that the court's encounter with French law is unfolding well within the US legal episteme: it remains intracultural, the familiar language and the congenial publications being hypostatized as the canon of relevance within which the negotiation with otherness-in-the-law is to occur. But to compel French law to express itself only through English-language, US-based, materials – to force it within that regulatory structure, which becomes an exclusive framework of preponderance – is necessarily to engage in a misrecognition of it. It is inevitably to perpetrate an act of interpretive violence against it. In sum, it is undeniably to appropriate it and compel it to become a stranger to itself'.[257]

Legrand, however, seems to be suggesting here that the majority judges in the case of *Bodum* ought to have adopted similar procedural rules, that exist in France or the within the Civil law system for the purposes of determining what evidence can and cannot be allowed by the court for the purposes of determining the matter to be decided by the court. Proceedural rules are intended to be used by judges as a means of giving them guidance on how best to deal with certain legal situations. because procedural rules do not match those in existence in jurisdiction a rule has been transplaned does not mean they are defective. It does mean that judges are able to use their own courts rules as a means by which they can try and give effect to thow now transplanted rule (in the current case, within the United States and the State of new York).[258]

2.3.5.1 Procedural rules

Yes, in the case of *Bodum* the judges in the majority did rely on various English text, articles, etc. for the purposes of interpreting French law. Moreover, they exercised their discretion to determine whether to rely on these English text translations of French law

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[255] Ibid.
[256] Alan Watson, Sources of Law, Legal Change, and Ambiguity, Penn. State Press. (Ebook) 2016
[257] Ibid.
[258] Alan Watson, Sources of Law, Legal Change, and Ambiguity, Penn. State Press. (Ebook) 2016

and or to rely on expert evidence of French law experts. They were given the latitude to do so using the dual existence of decided case law and procedural rules.

As the learned Chief Justice explained in his judgment in *Bodum*:

> 'although Fed. R. Civ. P. 44.1 (the first procedural used by the court) provides that courts may consider expert testimony when deciding questions of foreign law, it does not compel them to do so—for the Rule says that judges 'may' rather than 'must' receive expert testimony and adds that courts may consider 'any relevant material or source'. Judges should use the best of the available sources'.[259]

2.3.5.2 Use of the American Rule 44.1

The Chief Justice states further that the Committee Note in 1966, when Rule 44.1 (the rule used for determining whether to admit expert evidence and other forms of evidence) was adopted, explains that a court 'may engage in its own research and consider any relevant material thus found. The court may, the Chief Justice asserts, 'have at its disposal better foreign law materials than counsel have presented, or may wish to re-examine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail'.[260] He further states that sometimes federal courts must interpret foreign statutes or decisions that have not been translated into English or glossed in treatises or other sources. Then experts' declarations and testimony may be essential'.[261]

The Chief Justice states further that:

> 'French law, and the law of most other nations that engage in extensive international commerce, is widely available in English. Judges can use not only accepted (sometimes official) translations of statutes and decisions but also ample secondary literature, such as treatises and scholarly commentary. It is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code, or the law of Puerto Rico, whose origins are in the Spanish civil

[259] Ibid.
[260] *Bodum USA, Inc. v La Cafetière, Inc*, United States Court of Appeal for the Seventh District, No. 09-1892, p. 8.
[261] Ibid.

> code. No federal judge would admit 'expert' declarations about the meaning of Louisiana law in a commercial case'.[262]

When determining what forms of evidence are to be or can be admitted into evidence, the courts also have to consider matters such as cost implications. Trying to establish foreign law through experts' declarations, according to the Chief Justice:

> 'is not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. Published sources such as treatises do not have the slant that characterises the warring declarations presented in this case. Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations'.[263]

2.3.5.3 Reference to Article 1156 of the French Code Civil

According to the Chief justice, 'Article 1156 says that courts must seek the parties' 'common intention', which means their joint intent, not one side's unilateral version. As a means of satisfying himself in this regard the Chief Justice took into account evidence of the Defendant whereby he 'offered the contract's negotiating history, which French law takes to be a more reliable indicator of intent than the litigants' self -serving declarations. [264]

2.3.5.4 Reference to Article 1341 of the French Code Civil

Further, the Chief Justice, for the purposes of deciding the case and giving effect to the intent of the parties to the contract, referred to Article 1341 of the (French) Civil Code which 'forbids evidence about what negotiators said to one another—often called parol evidence in the United States—when the value of the dispute exceeds 5,000 francs (roughly 800 euros). The value of the dispute between the Plaintiff and Defendant exceeded 5,000 francs, so what the negotiators said to each other, according to the Chief Justice, is irrelevant under Art. 1341. This constraint illustrates the proposition that although

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[262] Idib, p. 8.
[263] Ibid.
[264] Ibid, p. 9.

> 'as a general rule, French and German law do not limit the admissibility of relevant external materials in the process of interpretation . . . this does not mean that it is easy for a party to induce a court to rely on extrinsic evidence in order to 'add to, vary or contradict a deed or other written instrument'. On the contrary, civilian systems are acutely aware of the need to strike a balance between the desire to achieve a materially 'right' outcome on the one hand, and the struggle for legal certainty on the other. As a consequence, they are extremely reluctant to admit that the wording of a contract concluded in writing might be overridden by other factors . . . . Extrinsic evidence can, however, be used for the purposes of interpreting a written document that contains internal contradictions or is otherwise unclear'.[265]

2.3.6 Kahn Freund: Procedural rules and transplants

On reading Legrand's interpretation of the case at issue, he appears to be trying to import French procedural rules into the American legal system. However, It should be noted here that, in contrast, Kahn Freund recognised that procedural rules are extremely difficult to transplant. He saw such rules as 'the spinal column to a legal system' and something difficult to displace'.[266] He argued further that procedural law constitutes:

> 'a highly organic species of law, whose enduring force results not from a broad constituency among the population, but from a highly committed, albeit relatively small elite group of stakeholders comprised of judges and lawyers'.[267]

Reference to and consideration of Articles 1156 and 1341 by the American Chief Justice in the case of *Bodum* was arguably his attempt to transplant these rules from France to the State of New York which, based on Kahn-Freund's arguments, would have been extremely difficult.

Legrand's theory contributes to this study by its strong emphasis on the role that end-users play in regards to the acceptance or rejection of laws and rules. His assertion that legal transplants are impossible also contributes to this study because such a bold assertion

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[265] Ibid, pp.10-11
[266] Basil C. Bitas, Comparative theory, Judges and Legal Transplants, (2014) 26 SAcLJ, pp. 53-55
[267] Ibid.

prompts examination of the veracity of the assertion. By way of this study it has been determined that Legrand's assertion, that legal transplants are impossible, is incorrect, illustrated by way of the exceptions to the same found within this study.

2.4 Kahn-Freud's theory

The third legal theorist is Otto Kahn-Freud. He concludes that a transplanted law or rule will always be liable to rejection by a recipient jurisdiction, and equates the act of transplanting a law or rule to the act of transplanting an organ from one human body to another. In particular he stated:

> 'legal transplants like surgical transplants have the risk of being rejected and that it is dangerous to transplant a law (or rule) that is culturally and vitally attached to a particular society because all jurisdictions have a unique and different social construction'.[268]

His focus on the issues of unknown variables (specifically in relation to the role the end-user may play in determining whether a law or rule has been transplanted effectively) is convincing. This is because any known and unknown factor can cause borrowed or transplanted legislation to work or not work successfully.

Kahn-Freud's theoretical framework is developmental. In recommending that the makers of legislation exercise caution before they borrow a law or rule from another country, while collectively calling for a need to consider the end-user, it lends itself well to the process of drafting legislation, especially for developing countries.

The relationship assumed by Kahn-Freud, between theory and practice, is that they are one and the same, each demanding the exercise of caution by the makers of legislation before they decide to transplant a law or rule.

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[268] Otto Kahn-Freud, On the Uses and Misuses of Comparative Law, Modern Law Review, Vol. 37, January 1974, No. 1, pp. 5-6.

Kahn-Freud has critically evaluates literature in the field, in particular literature written by Alan Watson. However, while doing so, he gives great deference to the dated legal theory of the legal scholar Montesquieu, which in turn causes Kahn-Freud's theory to appear dated as well.

Current views or interpretations of Kahn-Freud's theory

The more current views, post Kahn-Freud, can be found in academic writings of, Milhaupt and Pistor, Orucu, Cotterrell, Dolowitz and Marsh, and Rose.

Milhaupt and Pistor

This 'represents the new and more sociologically oriented, scholarship on legal transplants'.[269] She argues further that 'the nature of legal demand for the transplanted law and the process by which it is incorporated into the host country's institutional structure are important for how the legal transplant will function in future'.[270] She therefore argues that 'they move even further than Kahn-Freund in their vision of what the result of legal transplantation is'. She also asserts that 'these authors assumed that effectiveness of legal transplants will vary depending on how well the local interests adapt transplanted rules, norms, or institutions to local circumstances'.[271]

Orucu

Here, too, 'the local interests are also important for Orucu. She suggested that the role of domestic actors in 'tuning' of the legal transplants after their transposition is the key for success together with other conditions, such as extensive similarities in structure, substance and culture. Her argument is distinct in the emphasis she placed on the importance of social action after the transposition'.[272] Different from other scholars, Orucu appears to have 'a more nuanced view on a so-called non-acceptance or rejection of legal transplants. She distinguished two kinds of possible mismatch between the recipient

[269] Beata Kviatek, 'Explaining Legal Transplants', p. 109
[270] Ibid.
[271] Ibid.
[272] Ibid.

system and legal transplants, a socio-cultural and a legal-cultural, which in turn produce a variety of 'semi-acceptance'.[273]

Cotterrell

Cotterrell, similar to Orucu, legal scholarship in this area focuses 'on actors and argues that legal transplantation is facilitated or deterred by action of particular 'communities' (ideal types): community based on affective ties; community based on common location, experience or traditions; community based on shared values and beliefs; and instrumental community.[274] Therefore, 'the influence of traditional community (the so called community based on common location, experience or traditions) on law should be at its strongest, when other types of community are least involved – 'when beliefs, interests or emotions are not engaged, all that remains is the legal rule'.[275] This clearly demonstrates that 'Cotterrell looked at the whole process of legal transplantation and not just the results of the transfer'.[276]

Dolowitz and Marsh

Dolowitz and Marsh, being 'the proponents of the policy transfer approach, listed a number of possible sources that can produce restrictions or, on the contrary, facilitate the adoption of legal transplants. They identified past policies, which interact with existing and new policies, and structural and institutional conditions as conditions constraining the adoption of legal transplants'[277]. In varied ways, 'similarities in ideology cultural proximity, availability of economic resources, bureaucracy were identified as conditions that increase a feasibility of the transplantation'. [278] She further asserts that 'the identified conditions refer to the different phases of a broadly defined transplantation process and vary from

[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] Ibid.

'the motives for engaging into policy transfer' to 'institutional and structural characteristics of the recipient country'.[279]

Rose

According to Kviatek Rose, who 'introduced the lesson drawing approach, provided, probably, the most elaborated list of conditions that shape the legal transplantation process'.[280] These conditions, according to Kviatek, 'fall into three groups: transferability, adoptability, and applicability'.[281] She therefore argues that 'transplantation is easier, when: (1) policy programmes [legal transplants] are less context dependent, (2) organisations for service delivery in the recipient country are substitutable, (3) resources available to develop the programmes are similar in the recipient country and the country of origin, (4) 'cause and effect structure' of the programme [legal transplant] covers areas of interdependence between the transplant exporting and the transplant importing countries, (5) programme [legal transplant] is likely to produce a small change, (6) there is a consensual political culture'.[282] Kviatek contends further that the 'adoption of policy programmes [legal transplants] is easier, when: (1) there are no conflicts about the ends of the programme and the means used to achieve these ends, (2) there is mobilised support for the lesson to be drawn, but there is no opposition, (3) there are conditions under which political opposition to a lesson can change'.[283] Finally, 'six conditions increase the applicability of policy programmes [legal transplant]: (1) a clearly defined objective of the programme to be transplanted, (2) existence of a single goal of the programme to be transplanted, (3) the programme to be transplanted has a single design, (4) it is based on tested social, political, and technical knowledge, (5) there is flexibility in relating the elements of a programme to be transplanted, (6) political leaders are committed.[284]

Hall

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[279] Beata Kviatek, 'Explaining Legal Transplants', pp. 109-110
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Beata Kviatek, 'Explaining Legal Transplants', p. 110

Hall, an advocate of social learning approach, distinguished two key conditions that, according to him, shape the learning outcome: (1) past experience and (2) policy-relevant knowledge. The latter is deeply influenced by the policy discourse, which is constructed out of a dialogue among different political and social actors – politicians, officials, the media, organised interests, and experts. p.110

Does Otto Kahn-Freud include literature opposing his point of view?

Kahn-Freud does include in his study literature opposing his point of view. This may be because his theory is a response to the legal theories put forward by Professors Watson and Legrand, whereby Kahn-Freud finds himself neither agreeing or disagreeing with theories of these Professors.

Is the research data valid– i.e. based on a reliable method and accurate information?

Kahn-Freud's research data is primarily founded on academic theory and not much in terms of practical examples (i.e. by giving examples of laws or rules that have been accepted or rejected on being transplanted to a recipient country.

Can one 'deconstruct' Otto Kahn-Freud's argument – identifying gaps or jumps in logic?

Kahn-Freud's theory is easy to deconstruct. However, unlike the theories of Professors Watson and Legrand, is a conservative theory, which avoids making any bold theory assertions. The theory recommends that legislation makers exercise caution before the decide to transplant a law or rule, in recognition of the fact that multiple variable (known and unknown) may cause transplanted legislation to fail to satisfy its intended purpose.

What are the strengths and limitations of Otto Kahn-Freud 's theory?

The strength of Kahn-Freud's study is that it takes into account the role that end-users plays in the reception or rejection of laws or rules within any given society. His theory is limited because it is a centrist theory, prohibiting one from reaching any definitive conclusion one way or the other.

Kahn-Freund's theory may also, according to Basil Bitas, be limited 'to rules that are used within the commercial law 'that may lay somewhere on the periphery of a system involving the acquiescence of only a few key stakeholders in order to become effective to public or constitutional law which may require broader acceptance from the public at large in order to take root in the soil of the recipient country'.[285]

Oddly, Kahn-Freud's theory is capable of standing on its own or serving as an extension of Legrand's theory, as both theories promote the end-user as a determing factor of effective transplantation.

A weakness of Kahn-Freud's theory is that it does not indicate if the theory is:

(a) applicable to private law;

(b) applicable to public law; or

(c) applicable to public and private law.

Further, Kahn-Freud's theory fails to indicate whether:

1. there is a distinction between public law and private law;

2. there is no distinction between public law and private law; or

3. in either case, the extent the public law and private law debate serves to buttress or to undermine their respective legal transplant theories, if at all.

It is therefore questionable as to whether or not the Legrand theory is a valid tool for determining whether a law or rule has been effectively transplanted, especially in the instance where public is the subject of examination.[286]

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[285] Basil C. Bitas, Comparative Theory, Judges and legal Transplants, Singapore Academy of Law Journal (2014) 26 SAcLJ., p.54.
[286] See Section 1.8.

What does Otto Kahn-Freud's theory contribute to the current study?

Kahn-Freud's theory contributes to this study by way of its recognition that that a transplanted law or rule will always be liable to rejection by a recipient jurisdiction.

2.5 Von Jhering's theory

The fourth legal theorist, on the subject of legal transplants by way of this thesis literature review is Rudolf von Jhering.

The key point discussed by Rudolf von Jhering: is this clearly defined?

Jhering's assertion that to determine successful transplantation, the focus ought to be one of utility, is clearly defined.

What indication has Jhering produced to support this central idea?

Jhering, in support of his theory, has concluded:

> 'the reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden'.

How convincing are the reasons given for Profesor Jhering's point of view?

Jhering's, in light of the existence of the Kahn-Freud theory, is not overly convincing. This is because the Jhering theory does not consider the variable of unknow events and the possible impact that end-users can have on the succes or failure on the effective transplantation of a law or rule.

Could such an indication be interpreted in other ways?

The indication put forward by Jhering can be interpreted to mean that there are no other factors that need to be considered for the purposes of effectively transplanting a law or rule (i.e. the variable of unknow events and the possible impact that end-users can have on the succes or failure on the effective transplantation of a law or rule).

What is Profesor Jhering's theoretical framework?

Jhering's theoretical framework is developmental. By way of his assertion that to determine successful transplantation, the focus ought to be one of utility, this lends itself

well (as a set of ctiteria to consider or to follow) to the development of laws or rules for countries, in particular developing countries.

What is the relationship assumed by Profesor Jhering between theory and practice?

Jhering assumes that the theory and practice associated with his theory reach the same conclusion, that to determine successful transplantation, the focus ought to be one of utility.

Has Profesor Jhering critically evaluated the other literature in the field?

Jhering has critically evaluated the literature in the field, particularly in answer to the literature written by Alan Watson.

Does Jhering include literature opposing his point of view?

Jhering has critically evaluated the literature in the field, in particular literature written in opposition to the literature written by Professors Alan Watson and Pierre Legrand, but holds firm to his assertion that to determine successful transplantation, the focus ought to be one of utility.

Is the research data valid– i.e. based on a reliable method and accurate information?

Jhering's research, in so far as it offers an alternative to the hardened legal theories of Professors Watson and Legrand, is valid. However its validity is undermined by the existence of Legrand's theory (which emphasis the need to take into acount a recipent country's history, culture) and Kahn-Freud's end-user variable.

Can one 'deconstruct' Jhering's argument – identifying gaps or jumps in logic?

It is possible to deconstruct Jhering's argument. The fact that Jhering does not recognise that there are exceptions to his theory represents a gap and a jump in logic, to the exclusion of the Legrand and Kahn-Freud's theories.

What are the strengths and limitations of Jhering's theory?

The strength of Jhering's theory is that it offers a variable for the makers of legislation to consider before they transplant a law or rule from another country. However its strength is limited by virtue of the existence of Legrand's theory (which emphasis the need to take into acount a recipent country's history, culture) and Kahn-Freud's end-user theory.

A weakness of Jhering's theory is that it does not indicate if the theory is:

(a) applicbale to private law;

(b) applicable to public law; or

(c) applicable to public and private law.

Further, Jhering's theory fails to indicate whether:

1. there is a distinction between public law and private law;

2. there is no distinction between public law and private law; or

3. in either case, the extent the public law and private law debate serves to buttress or to undermine their respective legal transplant theories, if at all.

It is therefore questionable as to whether or not the Legrand theory is a valid tool for determining whether a law or rule has been effectively transplanted, especially in the instance where public is the subject of examination.[287]

What does Jhering's theory contribute to the current study?

Jhering's theory contributes to the current study by way of its strong emphasis on the variable of usefulness, thereby offering another option for consideration when deciding whether or not a law or rule ought to be transplanted. Jhering's theory also acts as a means for testing the validity of the hypothesis of this study.

2.6 Zweigert and Kotz's theory

The fifth legal theorist, on the subject of legal transplants by way of this thesis literature review are Professors Konrad Zweigert and Hein Kotz.

The key point discussed by Professors Konrad Zweigert and Hein Kotz: is this clearly defined?

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[287] See paragraph 1.8 of this thesis for an exapnded discussion concerning the distinction between public and private law.

Professors Konrad Zweigert and Hein Kotz's 'better solutions theory' is clearly defined. Like the Jhering theory, it is founded on the functional or functionality. Inherent in functionalist analysis are two primary elements:

1. problem definition; and

2. solution identification.

What indications have Professors Konrad Zweigert and Hein Kotz produced *to support this central idea?*

Professors Konrad Zweigert and Hein Kotz, in support of his theory, have concluded that 'the legal system of every society faces essentially the same problems'[288] and, therefore, the objects for comparison (by way of the comparative method) should be diverse legal solutions to those societal problems.[289]

Could such inications be interpreted in other ways?

The indications put forward by Professors Konrad Zweigert and Hein Kotz can be interpreted to mean that there are no other factors that need to be considered for the purposes of effectively transplanting a law or rule (i.e. Kahn-Freud's variable of unknow events) and the possible impact that end-users/ history and culture can have on the succes or failure on the effective transplantation of a law or rule (i.e. based on Legrands variables of history and culture).

What is Professors Konrad Zweigert and Hein Kotz's theoretical framework?

Professors Konrad Zweigert and Hein Kotz's theoretical framework is developmental. By way of their assertion that 'the legal system of every society faces essentially the same problems'[290] and, therefore, the objects for comparison (by way of the comparative method) should be diverse legal solutions to those societal problems,[291] this lends itself

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[288] Zweigert and Kotz, *Introduction to Comparative Law* (3 ed. 1998) 34.
[289] Ibid.
[290] Zweigert and Kotz, *Introduction to Comparative Law* (3 ed. 1998) 34.
[291] Ibid.

well (as a set of ctiteria to consider or to follow) to the development of laws or rules for countries, in particular developing countries.

What is the relationship assumed by Professors Konrad Zweigert and Hein Kotz between theory and practice?

Professors Konrad Zweigert and Hein Kotz assume that the theory and practice associated with their theory reach the same conclusion, to determine successful transplantation, the focus ought to be one of identifying the problem to be solved and coming up with the best solution for solving the problem.

Have Professors Konrad Zweigert and Hein Kotz critically evaluated the other literature in the field?

Professors Konrad Zweigert and Hein Kotz have critically evaluated the literature in the field, albeit in answer to the theories of Professors Alan Watson and Legrand.

Have Professors Konrad Zweigert and Hein Kotz included *literature opposing their point of view?*

Professors Konrad Zweigert and Hein Kotz have critically evaluated the literature in the field, in particular literature written by Alan Watson, but holds firm to his assertion that 'the legal system of every society faces essentially the same problems and, therefore, the objects for comparison (by way of the comparitive method) should be diverse legal solutiions to those societal problems determine successful transplantation, the focus ought to be one of utility'.

Is the research data valid– i.e. based on a reliable method and accurate information?

Professors Konrad Zweigert and Hein Kotz 's research data is not reliable. The first argument against the functionalist theory is from James Whitman, who is of the view that the reliability of this theory is doubtful because inherent in this theory is the dubious proposition that all societies view life as presenting the same social problems.[292] Richard

[292] James Q. Whitman, The Neo-Romantic Turn, in Comparative Legal Studies: Traditions and Transitions 312 (Pierre Legrand and Roderick Munday eds, 2003).

Hyland, also finding the functionalist theory wanting, finds that the idea that the social issues the law is asked to resolve are so similar as to present a constant across legal systems is highly questionable.[293]

Hill questions the basis on which comparative lawyers are qualified (or at any rate better qualified than lawyers whose studies are limited to their own countries) to make evaluations of different legal systems.[294] He is of the view that functionalists believe that they can make such judgments because the method used is an objective one, but Hill argues that different legal solutions require value judgments, such as about fairness and justice and that functionalism cannot provide a basis for making judgments.[295]

Can one 'deconstruct' Professors Konrad Zweigert and Hein Kotz's argument – identifying gaps or jumps in logic?

It is possible to deconstruct Professors Konrad Zweigert and Hein Kotz's argument. The fact that Professors Konrad Zweigert and Hein Kotz do not recognise that there are exceptions to their theory represents a gap and a jump in logic.

Professors Konrad Zweigert and Kotz's theory also fails to consider the concept of casual inference. This is founded on the proposition that:

> 'Whenever it is proposed to adopt a foreign solution, which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it'.[296]

Whytock contends that the first question can only be answered 'by having an understanding of the actual effects of a legal solution on a specified outcome in the country of origin'. And to answer the second question, he contends that 'one must have some

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[293] Richard Hyland, Comparative Law: A Companion to Philosophy of Law and Legal theory 184, 188 (Dennis Patterson ed, 1996), 189.
[294] Jonathan Hill, Comparative Law, Law Reform and Legal theory, 9 OXFORD JOURNAL OF LEGAL STUDIES 101 (1989), 102.
[295] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1887.
[296] John Henry Merryman, The Loneliness of the Comparative Lawyer 486 (1999).

understanding of the likely effects of a similar legal institution in a country that adopts it'.[297]

As a legal theory, for use as a tool of legal reform, Whytock raises the caution that:

> '…when legal origins scholarship drifts from testing to attempting to establish causal claims, comparative legal scholars should be wary. Moreover, functionalist comparative legal scholarship would benefit from more methodological diversity than legal origins scholarship in its quest to take causality seriously. None of this is to suggest that all comparative legal scholars should ask causal questions or make causal claims about legal institutions; but when they do, they should be explicit about the process by which they make their causal inferences'.[298]

What are the strengths and limitations of Professors Konrad Zweigert and Hein Kotz 's *theory?*

The strength of Professors Konrad Zweigert and Kotz's theory is that it offers a variable for the makers of legislation to consider before they transplant a law or rule from another country. However its strength is limited by virtue of the fact that it does not warn of arguments that may negatively affect the practical application of Professors Konrad Zweigert and Kotz's theory.

The first argument against the functionalist theory is from James Whitman, who is of the view that the reliability of this theory is doubtful because inherent in this theory is the dubious proposition that all societies view life as presenting the same social problems.[299] Richard Hyland, also finding the functionalist theory wanting, finds that the idea that the social issues the law is asked to resolve are so similar as to present a constant across legal systems is highly questionable.[300]

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[297] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1893.
[298] Ibid, 1897.
[299] James Q. Whitman, The Neo-Romantic Turn, in Comparative Legal Studies: Traditions and Transitions 312 (Pierre Legrand and Roderick Munday eds, 2003).
[300] Richard Hyland, Comparative Law: A Companion to Philosophy of Law and Legal theory 184, 188 (Dennis Patterson ed, 1996), 189.

Hill questions the basis on which comparative lawyers are qualified (or at any rate better qualified than lawyers whose studies are limited to their own countries) to make evaluations of different legal systems.[301] He is of the view that functionalists believe that they can make such judgments because the method used is an objective one, but Hill argues that different legal solutions require value judgments, such as about fairness and justice and that functionalism cannot provide a basis for making these kinds of judgments.[302]

There is also the issue of for whom a legal rule is functional. According to Christopher Whytock:

> 'Societies are not monolithic; they are composed of diverse individuals and groups. Thus it is difficult to speak of societal functions per se. Instead we must speak in terms of which individuals and groups define the intended consequences of a legal institution. Functionalism proposes neither an answer nor a general approach'.[303]

Abrahamson cautions against using the functionalist theory because there is a tendency to assume that different societies face similar problems and a tendency to imply the ability to make objective claims about which legal solutions to those problems are superior.[304]

Also absent from consideration by this theory is the casual inference theory. This is founded on the proposition that:

> 'Whenever it is proposed to adopt a foreign solution, which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it'.[305]

Whytock contends that the first question can only be answered 'by having an understanding of the actual effects of a legal solution on a specified outcome in the country

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[301] Jonathan Hill, Comparative Law, Law Reform and Legal theory, 9 OXFORD JOURNAL OF LEGAL STUDIES 101 (1989), 102.
[302] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1887.
[303] Ibid, 1888-1889.
[304] Ibid, 1889.
[305] John Henry Merryman, The Loneliness of the Comparative Lawyer 486 (1999).

of origin'. And to answer the second question, he contends that 'one must have some understanding of the likely effects of a similar legal institution in a country that adopts it'.[306]

As a legal theory, for use as a tool of legal reform, Whytock raises the caution that:

> '…when legal origins scholarship drifts from testing to attempting to establish causal claims, comparative legal scholars should be wary. Moreover, functionalist comparative legal scholarship would benefit from more methodological diversity than legal origins scholarship in its quest to take causality seriously. None of this is to suggest that all comparative legal scholars should ask causal questions or make causal claims about legal institutions; but when they do, they should be explicit about the process by which they make their causal inferences'.[307]

Absent from consideration by the theory of Professors Konrad Zweigert and Hein Kotz, is the variable of 'laws in context'. Whytock suggests that of the functionalist theories that the 'laws context theory' should be taken seriously. This is because, and as Tushnet has noted:

'Every society's law is tied to so many aspects of that society, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more, that no functionalist account can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience of others'.[308]

Another weakness of Professors Konrad Zweigert and Hein Kotz 's theory is that it does not indicate if the theory is:

(a) applicbale to private law;

(b) applicable to public law; or

(c) applicable to public and private law.

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[306] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1893.
[307] Ibid, 1897.
[308] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', (1999) 108 Yale L.J. 1225, 1265.

Further, Jhering's theory fails to indicate whether:

1. there is a distinction between public law and private law;

2. there is no distinction between public law and private law; or

3. in either case, the extent the public law and private law debate serves to buttress or to undermine their respective legal transplant theories, if at all.

It is therefore questionable as to whether or not the Legrand theory is a valid tool for determining whether a law or rule has been effectively transplanted, especially in the instance where public is the subject of examination.[309]

Further, according to Konrad Zweigert & Hein Kotz, 'comparative legal scholars should understand different countries' laws as a means of finding solutions to similar social problems; the functional method.[310] This assertion suggests that there is only one form of functionalism. This, according to Ralf Michaels, is not the case.

According to Michaels, 'one can distinguish at least seven different concepts of functionalism across disciplines:

> (1) finalism, a neo-Aristotelian functionalism based on inherent teleology, (2) adaptionism, an evolutionary functionalism in a Darwinian tradition, (3) classical (Durkheimian) functionalism, explaining institutions through their usefulness for society, (4) instrumentalism, a normative theory of using law for social engineering, (5) refined functionalism, a functionalist method that replaces certain postulates of classical functionalism with empirically testable hypotheses, (6) epistemological functionalism, an epistemology that focuses on functional relations rather than on the ontology of things, and (7) equivalence functionalism, building on these concepts but emphasizing the non-teleological, non-causal aspect of functional relations. Largely oblivious of incompatibilities, functionalist comparative law (8) uses all of these'.[311]

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[309] See paragraph 1.8 of this thesis for an expanded discussion concerning the distinction between public and private law.
[310] See generally: Konrad Zweigert & Hein Kötz, Introduction To Comparative Law 34 (3d ed. 1998)
[311] Ralf Michaels, The Functional Method of Comparative Law, p.344.

2.6.1 Finalism

Underlying this was a teleological image of the world, in which everything strove toward perfection. 'Is' and 'ought' were connected: the correct laws could be deduced from the nature of things. Such thoughts were later rejected both in philosophy and in legal theory, before the crisis of legal positivism spurred a simultaneous return to Natural law and comparative law, and to Aristotelian ideals, in the twentieth century. Once it could be shown that not only problems but also their solutions were similar, a return to a minimal version of Natural law or at least *ius gentium*, based on an Aristotelian notion of function, seemed possible. To this end, the revived rhetorical tradition of topics could be made fruitful. Topics, taking the role of problems, did not spur universal solutions by themselves, but inspired similar analyses that might lead to similar results. Comparative law became phenomenological: Comparatists viewed the solutions in different legal systems as responses to common problems, contingent in their form but none the less required by the nature of the problem.[312]

The most important theoretical treatise in this tradition and, at the same time, one of the most important works for functionalist comparative law is Josef Esser's book on principles and rules in judicial law-making. Esser's functionalism is richer and more sophisticated than the one developed later by Zweigert, but its central elements are strikingly similar: Institutions are contingent while problems are universal, the function can serve as *tertium comparationis*, different legal systems find similar solutions by different means, so universal principles of law can be found and formulated as a system with its own terminology. The reason for the similarity is that solutions are deemed inherent in problems and arguments can be made from the *Natur der Sache* (the thing's nature); a commonality of values is both the basis for and the consequence of this. Another comparatist, more openly in the tradition of Aristotle and Thomas Aquinas, is James Gordley. His general approach is more philosophical than Esser's, but in effect quite similar: Gordley also sees different laws as different responses to the same, universal problems. Neo-Aristotelians postulate that comparative law can lead us to universal, common legal principles. Different laws provide answers to similar problems that are doctrinally (formally) different but substantively similar, and their relative similarity suggests

[312] Ibid, p.346.

inherently correct solutions to these problems—a Natural law, a ius commune (Gordley), a ius gentium (Esser), or 'universal legal principles' (Troller).[313]

Both Esser and Gordley call their approaches functional, and both have been influential in functionalist comparative law. But they use function in a very specific sense: For them it is synonymous with purpose and *causa finalis*. This is quite different from the modern notion of function as developed by Durkheim. Durkheim explicitly distinguished an institution's functions from its cause and from its nature, rejected the Aristotelian fourfold concept of causa by confining 'cause' to *causa efficiens*, and replacing end or goal (*causa finalis*) with function. Since then, the function of a thing (or a law) is normally separated not only from the reasons for its origin and evolution, but also from its essence; functional relations are separate from the things themselves. Esser's and Gordley's functionalisms are different; they must be understood against the background of Aristotelian ontology and metaphysics and answer the criticisms brought forward against these.[314]

2.6.2 Adaptionism

This version of functionalism, which one may call adaptionism, seemed especially apt for comparative law. That field had hitherto consisted largely of comparative legal history, understood as the history and diffusion of ideas and doctrines. The new sociological interest in interrelations between law and society changed this focus. Now ideas about law were drawn neither from texts nor from the spirit of a particular people, but from general ideas about societies and their development. Consequently, generalisation across borders became possible; comparative law could become a science of the way in which societies dealt with similar problems on their paths toward progress. Central to this new approach was the focus on the functions that both law at large and its individual institutions fulfilled for society. An early example comes from Franz von Liszt, a supporter of a functional criminal law in the tradition of Beccaria (and a cousin to the famous composer). Liszt suggested that because punishment was necessary for maintenance of the legal order and because the legal order in turn was necessary for the maintenance and development of the state, criminal law norms had to be judged against their ability to maintain the legal

[313] Ibid. p.347.
[314] Ibid, p346 – 347.

order.[315] This function was useful for comparative law; it served as the *tertium comparationis* for the (functional) comparison of criminal law in different legal orders. Philipp Heck, the most important proponent of a jurisprudence of interests, also argued for functionalist comparative law: Similarities of values among societies created laws different in doctrine but similar in results. Also, Roscoe Pound, while not a strict functionalist himself, shared some of functionalism's convictions. Pound was interested in 'law in action, not law in the books' and in 'how the same things may be brought about, the same problem may be met by one legal institution or doctrine or precept in one body of law and by another, quite different institution or doctrine or precept in another'—both central elements of functionalist comparative law.[316]

Adaptionism survives today in only a very reduced form. In political science it is used in some integration studies as an explanation of convergence, especially of the European Union.[317] But the loss of teleology and awareness of the complexity of the world have made the simple

functionalism of means and ends harder to justify both as an explanatory theory and as a guiding principle. Adaptionism seemed to suggest a false determinism.[318] Evolutionary functionalism in political science has therefore been called ideological and ethnocentric, a criticism replicated in reference to comparative law.[319]

2.6.3 Classical Functionalism

Sociologists interested in a value-free sociological science perceived this as an illegitimate faith in progress and tried to develop a non-teleological functionalism instead. These

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[315] Ibid.
[316] Roscoe Pound, 'What May We Expect from Comparative Law?, (□□□□) □□ ABAJ □□, □□.
[317] David Mitrany, A Working Peace System: An Argument for the Functional Development of International Organisation (□□□□); Ernst B. Haas, Beyond the Nation-State: Functionalism and International Organisation (□□□□); David Long and Lucian M. Ashworth, 'Working for Peace: the Functional Approach, Functionalism and Beyond', in idem (eds), New Perspectives on International Functionalism (□□□□), □–□□; Jürg Martin Gabriel, 'Die Renaissance des Funktionalismus', (□□□□) □□ Aussenwirtschaft □□□–□□.
[318] Robert W. Gordon, 'Critical Legal Histories', (□□□□) □□ Stanford LR □□–□□□; Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', (□□□□) □□ Harvard International LJ, pp 412 and 438.
[319] Léontin-Jean Constantinesco, Traité de droit comparé, vol III: La science des droits comparés (1983), 74.

efforts can be traced back to Émile Durkheim, who introduced two important ideas. First, he separated functions from origins and established functions as relations between, not qualities of, elements. Second, he emphasised that the goals of individuals were contingent and therefore not the valid material of scientific endeavours; sociology as a science had to focus on objective functions.[320]

Both steps had crucial implications. As long as the ends or goals of an institution had been its inherent elements, any explanation had to be teleological, and an analysis would have to focus either on the will of a transcendent creator or on the inherent nature of things. If institutions were defined by the purposes defined by their creators, a systematic analysis had to be impossible, for individual goals were hard to observe as well as arbitrary and contingent. The emphasis on objective functions on the other hand, distinct from both origin and purpose, allowed the search for general laws, the goal of all sciences. Still, Durkheim did think an institution's existence and its function interrelated. On the one hand, causes often determine functions: An institution is established in order to maintain a certain status quo, and it then fulfils that function. On the other hand, functions often determine if not the origin then at least the persistence of institutions: Dysfunctional institutions cannot compete with more efficient institutions, societies with wasteful, dysfunctional institutions cannot survive.[321]

Elements of Durkheim's functionalism reappear in functionalist comparative law: the scientific character and objectivity of research, a perception of society as a whole that transcends the sum of its parts because its elements are interrelated, the idea that societies have needs, the idea that law can be understood in terms of the needs it meets, a focus on observable facts rather than individual ideas (law in action versus law in the books), the discovered similarity of institutions of different societies, and the competitive advantage of more functional institutions within one society's law and of societies with better laws vis-á-vis other societies. None the less, although Durkheim himself was a trained lawyer, his

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[320] Émile Durkheim, Les règles de la méthode sociologique (□th edn, □□□□, originally published in □□□□–□), □□□: 'Nous nous servons du mot de fonction de préférence à celui de fin ou de but, précisément parce que les phénomènes sociaux n'existent généralement pas en vue des résultats utiles qu'ils produisent' (we use the word function rather than that of end or goal precisely because social phenomena do not generally exist in view of the useful results they produce).
[321] Ibid, p. 189.

functionalism had less immediate impact on comparative law than his concept of social facts. Saleilles followed Durkheim (and Weber) in maintaining that comparative law 'cherche à définir le type d'idéal tout relatif qui se dégage de la comparaison des législations, de leur fonctionnement et de leurs résultats' and in emphasizing 'l'unité des résultats dans la diversité des formes juridiques d'application'.[322] But most comparatists in the Durkheimian tradition focused rather on a non-teleological comparative legal history than on functional analysis46 and opposed more functionalist versions of comparative law.[323]

2.6.4 Instrumentalism

One reason why comparatists lacked interest in Durkheimian sociology may have been that they did not share the social scientists' fear of normativity. Instead, comparatists embraced an offspring of adaptionism that was popular in law: instrumentalism. If law fulfils functions and meets societal needs, then the lawyer's job is to develop laws that perform these tasks ('social engineering'), and comparative law can help compare the ability of different solutions to solve similar problems, and spur similar degrees of progress.[324]

These ideas, which can be found already in Jhering's work, became prevalent in legal realism. Realism made functionalism fashionable not only in academic writing but also for curriculum reform proposals. One strand of realism starts from the sociological concept of function, but then translates objective functions into purposes to be set by legislatures. These realists substitute teleological analysis for Durkheim's objective science, and they assume that the effect of laws on society can be both measured and controlled. While American legal realists remained surprisingly uninterested in comparative law, European comparative law was influenced. Zweigert and Kötz put it bluntly: 'Law is 'social engineering' and legal science is a social science. Comparative lawyers recognise this: it is, indeed, the intellectual and methodological starting point of their discipline'.[325]

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[322] Raymond Saleilles, 'Conception et objet de la science du droit comparé', in Congrès international de droit comparé: Procès verbaux (vol I,), , , .
[323] Pierre Lepaulle, 'The Function of Comparative Law: With a Critique of Sociological Jurisprudence', (–) Harvard LR –; also in Zweigert and Puttfarken (n), –.
[324] Brainerd Currie, 'The Materials of Law Study, ( ) Journal of Legal Education –.
[325] Zweigert and Kötz,p. 45

Such ideas became especially attractive to the law and development movement, which hoped to use law in order to aid the economic progress of developing countries—a combination of the Darwinian faith in progress and teleology with the instrumentalist's hope placed in law. Such ideas, out of fashion for some time,[326] have recently been revitalised, specifically for former communist economies, generally in the World Bank's 'Doing Business' project.[327] Yet they face problems.[328] First, researchers frequently place naïve faith in both the mono-functionality and effectiveness of legal institutions. Second, they are often insufficiently aware of the non-legal elements of success or failure of societies, including cultural differences.[329]

Experience in domestic contexts has shown that social engineering through law is far more complex than one thought; the insight still has to make its way into comparative law.[330]

2.6.5 Refined Functionalism

Developments in the social sciences also contributed to their disjunction from comparative law: sociological functionalism became more complex and thereby less useful for functionalist comparative law. The work of Radcliffe-Browne, Malinowski, and Parsons has had little direct response in comparative law, mostly because their interest in a theory of societal systems was not congruent with the search in comparative law for a method. But comparative lawyers have also ignored sociologists interested in functionalism as a method. In particular, Robert Merton's seminal text on latent functions should have shown the problems of translating functionalism into comparative law.[331]

First, Merton introduces the important distinction between manifest functions (functions intended and recognised by participants) and latent (unknown and unintended)

[326] David M. Trubek, 'Towards a Social Theory of Law: An Essay on the Study of Law and Development', (□□□□) □□ Yale LJ □–□□.
[327] See: www.doingbusiness.org
[328] See: Kerry Rittich, 'Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates', (□□□□) □□ University of Toronto LJ □□□–□□.
[329] Jan Torpman and Fredrik Jörgensen, 'Legal Effectiveness', (□□□□) □□ Archiv für Rechts- und Sozialphilosophie □□□–□□; Association Henri Capitant, Les droits de tradition civiliste en question—A propos des Rapports Doing Business de la Banque Mondiale vol (2006).
[330] analysis is Daniel Berkowitz, Katharina Pistor, and Jean-François Richard, 'The Transplant Effect', (2003) 51 AJCL pp163–203.
[331] Merton, 'Sociological Theory', (1945) 50 American Journal of Sociology pp.462- 473.

functions.[332] Separating objective functions from subjective intentions has a pedagogical effect: it points researchers to the importance of latent functions, which yield more important insights precisely because they previously went unrecognised. Comparative lawyers are sometimes in accord when they focus on what the courts do in fact, as opposed to what they say they are doing. Yet when lawyers wish to use comparative law for social engineering, they forget that legislatures cannot know latent functions precisely because these functions are only latent. Social engineering presumes unrealistically simple relations between society and laws.

A second contribution is Merton's challenge to the postulate of functional unity of society—the axiom, shared by Rabel and Zweigert, that societies are so integrated and interdependent that changing one element affects all others. In response, Merton suggests that different societies are integrated to different degrees and empirical tests are necessary to determine this degree.[333]

Merton's third challenge attacks the assumption that every element in society fulfils some vital function, ignoring non-functional or even dysfunctional institutions. Such institutions, so-called survivals, were known in both sociology and functionalist comparative law.[334] But traditional sociologists and anthropologists, and likewise comparative lawyers, consider survivals to be unstable and only temporary. Merton in turn emphasizes that whether institutions are functional or not is a matter of empirical research,[335] a point made forcefully in comparative law from an anti-functionalist perspective by Alan Watson.[336]

Merton's critique was powerful, while his constructive 'paradigm for functional analysis in sociology',[337] was less successful. (This is similar to Felix Cohen's article on legal functionalism,[338] which contains, in its first part, a brilliant critique of conceptualism, while its second part, developing a constructive theory of values, is much weaker. Criticism of

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[332] 'The Unintended Consequences of Purposive Social Action', (1936) 1 American Sociological Review pp. 894–904.
[333] Zweigert and Kötz, p. 36 and Merton, pp. 79- 84.
[334] Durkheim, p.184; Zweigert and Kötz,p. p. 35.
[335] See Merton, pp. 84-86.
[336] Alan Watson, Legal Transplants (1974), pp. 12-15.
[337] Martin Golding, 'Realism and Functionalism in the Legal Thought of Felix S. Cohen', (□□□□) □□ Cornell LR 1032 p.1051.:
[338] Ibid.

sociological functionalism grew. Functionalism is criticized as intrinsically teleological and therefore unable to fulfil Durkheim's own postulate of a value-free social science.[339] Related to this is a criticism of implicit tautology and circularity, mirrored in comparative law:[340] The survival of societies is explained by the existence of institutions, while the existence of these institutions is explained in turn by the needs of society. For critics this means either that functional relations are no different from causal relations (and therefore dispensable as a separate category) or that teleology is reintroduced into sociology.[341] Other critics go against the programme of functionalism. For them, emphasis on the stability of systems makes its proponents both politically conservative and methodologically incapable of explaining social change[342]—again, a criticism raised also against functionalist comparative law.[343] And finally, and perhaps most importantly, sociological functionalism is considered unable to account for culture, in particular to explain practices that serve no function—another critique also of comparative law.[344] In general, Parsons's 'grand theory' was considered too abstract and therefore often unable to predict all empirical findings,[345] again a concern shared in comparative law.[346]

After these critiques, functionalism lost ground; a proclaimed 'neofunctionalism' has not been successful.[347] Within sociology and especially social anthropology, functionalism made way for cultural and hermeneutic methods[348]—a 'cultural turn' reflected in legal

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[339]Carl G. Hempel, 'The Logic of Functionalism',
in Llewellyn Gross (ed), Symposium on Sociological Theory (1959), pp. 271-307.
[340] Mark Abrahamson, Functionalism (1978), p. 37
[341] Ernest Nagel, 'A Formalisation of Functionalism with Special Reference to its Application in the Social Sciences', in idem, Logic without Metaphysics (1956), pp. 247- 283,
[342] Ralf Dahrendorf, 'Struktur und Funktion', (1955) 7 Kölner Zeitschrift für Soziologie und Sozialpsychologie, pp. 491- 519.
[343] Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory', (1989) □ Oxford Journal of Legal Studies pp. 101-106□□□.
[344] Clifford Gertz, 'Ritual and Social Change: A Javanese Example',
(□□□□) □□ American Anthropologist pp. 32-54.
[345] Wright Mills, 'Grand Theory', in idem, The Sociological Imagination (1959); reprinted in Demerath and Peterson, pp. 171- 183.
[346] William Alford, 'On the Limits of 'Grand Theory' in Comparative Law', (1985) 61 Washington LR pp945—956.
[347] Jeffrey C. Alexander, Neofunctionalism and After (1998), pp. 279- 803.
[348] Victoria E. Bonnell and Lynn Avery Hunt, Beyond the Cultural Turn: New Directions in the Study of Society and Culture, pp 1- 23.

studies generally and comparative law specifically.[349] At the same time, sociology as a discipline, not least due to the perceived lack of methodological sophistication, had to yield its once leading position within the social sciences to economics, again, a development replicated in comparative law.[350]

Legal functionalism has faced similar challenges. Already before 1900, criticism abuses of functionalism by the Nazis[351] made the concept unattractive in the post-war period. Instead, the paradigm for statutory interpretation and legal argumentation moved from a functionalist jurisprudence of interests to a jurisprudence of values, thereby substituting the legislator's individual goals or a specific society's values for objective functions and abolishing the universalist aims of functionalism which had made it attractive for comparative law. of the German Civil Code's structure as non-functional remained unheard; later abuses of functionalism by the Nazis made the concept unattractive in the post-war period. Instead, the paradigm for statutory interpretation and legal argumentation moved from a functionalist jurisprudence of interests to a jurisprudence of values, thereby substituting the legislator's individual goals or a specific society's values for objective functions and abolishing the universalist aims of functionalism which had made it attractive for comparative law.

2.6.6 Epistemological Functionalism

All proponents of functionalism discussed so far stand before a dilemma. Either they must explain function as mere causality, or they have to insert some kind of teleology into their worldview, some '*Natur der Sache*'. A way out can be found in Ernst Cassirer's functionalist epistemology. Cassirer posits that, since Kant suggested laws of nature as human constructs, there has been a seismic shift from a focus on substance to a focus on function,

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[350] Peter Behrens, 'Ökonomische Wirkungsanalyse im Kontext funktionaler Rechtsvergleichung' (unpublished paper delivered at the 2005 Conference of the German Society for Comparative Law in Würzburg; summary in [2006]
Juristenzeitung, p 454.

[351] Vivian Grosswald Curran, 'Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law', (2002) 35 Cornell International LJ. P. 101.

from attempts to understand how things 'really' are (their substance, ontology) to understanding them only in their (functional) relation to particular viewpoints (their function, epistemology).[352] No longer could classes of elements be defined simply by common traits, because such an abstraction would ignore the necessary relation between the element and the whole. Rather, individual elements had to be understood in relation to particular aspects, as different results to the same function. A series of elements a α1 β1, a α2 β2, a α3 β3 . . . cannot be understood merely by the common criterion a, but rather by the regularity in which its elements are brought about through the function a x y, in which the variable x defines all α, the variable y defines all β, and all these elements stand in a functional regularity so that it is possible to create new elements in the series. cannot be understood merely by the common criterion a, but rather by the regularity in which its elements are brought about through the function a x y, in which the variable x defines all α, the variable y defines all β, and all these elements stand in a functional regularity so that it is possible to create new elements in the series.

This move has two decisive advantages. First, it is not necessary to recognise some essence of a particular element; it is sufficient to understand the element as variable result of a functional connection with another variable element. Individual numbers do not have an essence, but the totality of all numbers does.[353] Functionalism need not declare the existence of any α or any β but only that if there is a certain α there will be a certain β. Second, it is possible to conceive of groups of elements and to describe them without the loss of specificity that comes with traditional classifications requiring abstraction.[354] The function a x y describes all elements of the This move has two decisive advantages. First, it is not necessary to recognise some essence of a particular element; it is sufficient to understand the element as variable result of a functional connection with another variable element. Individual numbers do not have an essence, but the totality of all numbers does. Functionalism need not declare the existence of any α or any β but only that if there is a certain α there will be a certain β. Second, it is possible to conceive of groups of elements and to describe them without the loss of specificity that comes with traditional

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[352] Laurence J. Lafleur, 'Epistemological Functionalism',
(1941), p. 50.
[353] Ibid.
[354] Laurence J. Lafleur, 'Epistemological Functionalism', (1941), p. 50

classifications requiring abstraction.[355] The function a x y describes all elements of the series completely, whereas a focus on the common element a as classificatory criterion would ignore both the differences between two elements a α1 β1 and a α2 β2 as well as the specific functional relation between a and y that creates the respective elements.

Although Cassirer had no direct influence on functionalist comparative law,[356] several parallels exist. First, functionalist comparative law is also interested not in some essence of legal institutions, but rather in their functional relation to particular problems. Second, functionalist comparative law also aims at avoiding the abstraction inherent in both conceptual comparisons and the macro-comparison of legal families, and instead focuses on a legal institution's relation to the whole. Third, Cassirer's emphasis on the totality of elements as opposed to individual elements is akin to Max Salomon's attempt to define universal jurisprudence beyond individual national institutions. Cassirer's concept of function, which he borrowed from mathematics, can work as a formalisation of functional equivalents in comparative law: If we define a as a particular problem, 'x' as the variable for legal systems α1, 2, 3 . . ., and 'y' as the variable for legal institutions β1, 2, 3 . . ., we can formalise the functional comparison of different legal institutions as a series, where, for example, a α1 β1 is French law's (α1) response (β1) to problem a, a α2 β2 is German law's (α2) response (β2) to the same problem a, and so on. This approach enables the comparatist to focus not only on the similarity between institutions (the common problem a and the institutions' similar ability to respond to it) but also on the differences (between α1 and α2, and between β1 and β2, respectively), and furthermore allows her to explain these differences between institutions as a function (!) of the differences between legal systems. Such formalisation, while raising many problems (e.g. whether the social sciences reveal the same degree of regularity as do mathematics and the natural sciences), is a promising step towards more rational comparative law.[357]

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[355] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.
[356] Georges Langrod, 'Quelques réflexions méthodologiques sur la comparaison en science juridique', (1957) 9 RIDC, pp. 353-364.
[357] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.

2.6.7 Equivalence Functionalism

The insight that different elements can respond to the same problem is crucial. Finalism, adaptionism, and classical functionalism all contain traces of determinism and teleology: if similar problems cause similar solutions, then the solutions must somehow be inherent in the problems, and similar functions must be fulfilled by the same kinds of institutions. Durkheim expressly rejected functional equivalence as finalist and proclaimed a remarkable similarity between institutions of different societies as responses to functional requirements. Goldschmidt's otherwise original study of comparative functionalism in anthropology claimed that 'certain social needs repeatedly call forth similar social institutions, that correlations between institutional forms can be found because, broadly speaking, they are the 'natural' or 'preferred' means by which certain necessary social tasks may best be performed in given circumstances'.[358] Even Rabel marvelled at the finding of 'essentially related institutions and developments'[359] be performed in given circumstances'. Even Rabel marvelled at the finding of 'essentially related institutions and developments'.[360]

Given how different institutions are in detail, such a view is hard to maintain except in very abstract analysis; the similar institutions must be ideal types. Comparative lawyers, with their focus on details and specificities, have long known this. They knew on the one hand that similar institutions can fulfil different functions in different societies or at different times, and they found, on the other hand, that similar functional needs can be fulfilled by different institutions, the idea of the functional equivalent. This idea, central to functionalist comparative law, appears in all kinds of functionalism: Max Salomon's focus on problems as the unifying element of general jurisprudence enabled scholars to see different solutions as functionally equivalent;[361] Josef Esser developed the concept for comparative law;[362] and Konrad Zweigert made it the central point of his approach to

[358] Walter Goldschmidt, Comparative Functionalism: An Essay in Anthropological Theory (1966), 30, p.122.
[359] Ibid.
[360] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.
[361] Ibid, p.357.
[362] Ibid.

comparative law and an important tool in seeing universalities in what may look like differences.[363]

Indeed, the recognition of functional equivalents gave a boost to the possibilities for comparative law. In particular, the comparison between common law and civil law has traditionally tempted functionalists, for two reasons: First, functionalist comparison overcomes the epistemic/doctrinal difference between civil and common law by declaring it functionally irrelevant. Second, the common law with its organic development should be particularly apt for functional understanding. Not surprisingly then, some of the most influential works applying the functional method have focused on institutions from the common law and their functional equivalents in the civil law, for example trusts[364] and consideration.[365] Some even found functionalism helpful for intersystemic comparison between socialist and capitalist legal systems.[366] Yet equivalence functionalism in comparative law has always been explicated by examples rather than developed theoretically.[367] Thus, it is not clear whether functional equivalence suggests some uniformity of values beyond the universality of problems. Likewise, the concept of a function suggests a comparatively naïve relation between the problem and the institution, either between cause and effect (so that the problem causes an institution to exist), or between purpose and use (so that a legal solution serves the purpose of solving a recognised problem). [368]

Here, comparative law could profit from sociological equivalence functionalism as developed especially by Niklas Luhmann (who in turn was influenced not only by Merton but also by Cassirer). Merton questioned the postulate of indispensability, according to which every element in a society is indispensable for the working of the system, and pointed out that even indispensable necessities can be met by different institutions that act

[363] Ibid.
[364] Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis', (1998) 73 New York University LR, pp. 434-79.
[365] Arthur T. von Mehren, 'Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis', (1959) 72 Harvard LR pp. 1009- 1078.
[366] Konrad Zweigert and Hans-Jürgen Puttfarken, 'Possibilities of
Comparing Analogous Institutions of Law in Different Social Systems', (1973) 15 Acta Juridica Academiae Scientiarium Hungaricae pp.107-130.
[367] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.
[368] Ibid.

as functional substitutes or functional equivalents.[369] Cassirer's epistemology provided a formalised version of the argument.

Functional equivalence means that similar problems may lead to different solutions; the solutions are similar only in their relation to the specific function under which they are regarded. Luhmann brings the two together to overcome a main problem of classical functionalism—the problem that functions either are nothing more than causal relations, or contain an element of teleology. Equivalence functionalism by contrast explains an institution as a possible but not necessary response to a problem, as one contingent solution amongst several possibilities. As a consequence, the specificity of a system in the presence of (certain) universal problems lies in its decision for one against all other (functionally equivalent) solutions.[370] Legal developments are thus no longer necessary but only possible, not predetermined but contingent.[371] This method in turn requires an understanding of society (and its subsystems, including law) as a system constituted by the relation of its elements, rather than set up by elements that are independent of each other.[372] It does not avoid the criticism of tautology—institutions are still understood with regard to problems, and problems are understood as such by their relation to institutions. But because Luhmann's functionalism is constructivist, he can use these tautologies as the means by which societies constitute themselves, by which they make sense of institutions.

Luhmann emphasizes that 'the functional method is ultimately a comparative one'[373] and occasionally suggests the comparison of systems as a valuable project of verification, but does not, apart from a passing reference to Josef Esser,[374] use this for comparative law. Functionalist comparative law in turn has rarely reacted to Luhmann's method,[375] despite the similar focus on functional equivalence. This is unfortunate. Of course, Luhmann's systems theory has been criticized severely—as being indifferent to individuals, inherently

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[369] Merton, pp. 86-90. .
[370] Niklas Luhmann, 'Funktion und Kausalität', (1962) 14 Kölner Zeitschrift für Soziologie und Sozialpsychologie pp/ 617 – 644.
[371] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.
[372] 'Niklas Luhmann, 'Funktionale Methode und Systemtheorie: Social Systems by John Bednarz and Dirk Baecker (1984, p. 52.
[373] Klaus A. Ziegert, Law as a Social System (2004), p. 56.
[374] Ibid.
[375] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.

conservative (again), and as ignorant of the permeability of systems. Yet all these criticisms can also be launched against functionalist comparative law as it stands; they are not reasons against enriching current functionalism with Luhmann's constructivism. rarely reacted to Luhmann's method,[376] despite the similar focus on functional equivalence.[377] This is unfortunate. Of course, Luhmann's systems theory has been criticized severely—as being indifferent to individuals, inherently conservative (again), and as ignorant of the permeability of systems. Yet all these criticisms can also be launched against functionalist comparative law as it stands; they are not reasons against enriching current functionalism with Luhmann's constructivism.[378]

2.6.8 Functionalist Comparative Law: Synthesis

It is necessary to affirm here that this thesis is not a comparative law thesis. However it is necessary to deal with the general concept of comparative law because Zweigert and Kotz are (like Watson, Legrand, Kahn-Freud) are comparative theorist. As such arguments about the functionalist comparative law have implications for their respective theories. The question to be raised here is: which of these concepts underlies the functional method of comparative law? According to Ralf Michaels, the answer is all of the above.[379] His rationale is that all Comparative lawyers pick and choose different concepts, regardless of their incompatibility. There is still a strong faith that the similarities between different legal orders revealed by the functional method are neither the result of circular reasoning, nor mere indications of similar needs between societies, but proof of deeper universal values. While this suggests an Aristotelian background, elsewhere functionalists place themselves outside of legal philosophy and within legal sociology and emphasize objective needs over contingent values. In the concept of function itself, comparative lawyers borrow, if inadvertently, the antimetaphysical focus of epistemological functionalism as opposed to

[376] Ibid.

[378] Lynn M. LoPucki and George G. Triantis, 'A Systems Approach to Comparing U.S. and Canadian Reorganisation of Financially Distressed Companies', (1994) Harvard International LJ; pp.267- 270, Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying the Law Ends Up in New Divergences', (1998) 61 Modern LR p.11 and generally

[379] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.

an essential concept of legal institutions; they understand institutions through their relation to problems. But it is not clear whether this concept of function is teleological or not. Sometimes comparatists use functions in an openly teleological fashion, as a way towards progress reminiscent of adaptionism—when only legal systems at similar stages of evolution are deemed comparable,[380] or when the development of the law is deemed important for the discovery of its function, a combination of cause and function that is anathema to Durkheim's postulates. Sometimes comparatists focus on legal institutions as tools for the preservation of stability, something more akin to classical functionalism.[381] But then it is often unclear whether they include latent functions in their focus on what laws do in effect, or whether they confine themselves to manifest functions, as in instrumentalism and social engineering. And finally, the claim that 'there will always remain . . . an area where only sound judgment, common sense, or even intuition can be of any help'[382] has an irrational ring to it that would, it seems, altogether distance functional comparative law from the scientific aspirations of functionalism in all other disciplines.[383]

In particular, the functionalism of sociology and that of law are different. First, sociologists and lawyers use different concepts of function.[384] While sociological functionalism is interested in latent functions (and largely ignores the intention of lawmakers), lawyers focus precisely on manifest or even imagined as opposed to latent functions: The judge must interpret a statute according to the function intended by the legislator even if the statute is dysfunctional; the legislator can consider only manifest functions because by definition he does not know about latent functions.[385] Sociologists could be said to take an external, and lawyers an internal point of view. [386]

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[380] Ibid.
[381] Ibid.
[382] Ibid.
[383] Ibid. p. 561.
[384] Niklas Luhmann, 'Funktionale Methode und juristische Entscheidung', (1969) 94 Archiv für öffentliches Recht; pp. 1-31
[385] Ralf Michaels also argues, at p.361,. that lawmakers may learn about latent functions over time. Sunset clauses for legislation are a response to the problem: lawmakers make laws, then observe their latent functions and dysfunctions, and then react to this learning experience.
[386] William M. Evan, Angelo Grisoli, and Renato Treves, 'Socialogia del divitto e divitto comparato—Considerazione conclusive', (1965) Quaderni di sociologia; pp. 376-389.

Second, the goals of functionalism in sociology and law are different. This is only partly due to the difference between normative and descriptive analytical goals—after all, a large part of the judge's task is descriptive, too. Rather, sociologists use functionalism in order to raise complexity, so their picture of observed societal systems becomes more accurate than a mere listing of its elements. Lawyers, on the other hand, use functionalism to reduce complexity—they hope for functionality to tell them which of several alternative decisions they should take.[387] The effects of judicial decisions are only partly the responsibility of judges;[388] even legislators must take decisions in necessary partial ignorance of effects. Finally, sociologists and legal philosophers often focus on the differentiated functions of relatively broadly defined institutions, while comparative lawyers take the existence and functionality of law for granted and focus on very specific legal issues.

Ralf Michaels argues that the clash between sociological and legal concepts of comparative law is sometimes observable—when Roscoe Pound's sociological comparative law is criticized from the Durkheimian tradition as unsociological, when a lawyer rejects a questionnaire proposal by a sociologist as too unspecific and too oblivious of legal categories,[389] or when Zweigert's concept of functional comparative law is criticized by lawyers as not sufficiently legal and by sociologists as not sufficiently sociological.[390] Whereas sociological functionalism has been criticized as inherently conservative, legal functionalism and social engineering have been rejected as overly progressive and activist. Whereas sociological functionalism is rejected as tautological, legal functionalism is criticized for its open introduction of new values into legal arguments. A big interdisciplinary project at the Hamburg Max Planck Institute involving both sociologists and lawyers largely failed due to these incompatibilities; the interaction between sociology and comparative law has focused more on empirical sociology than on theory.[391]

In consequence, Ralf Michaels asserts that one reason for the methodological mishmash in comparative law is that the founders of the functional method were more pragmatically

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[387] See Ralf Michaels and Nils Jansen, 'Die Auslegung und Fortbildung ausländischen Rechts', (2003) 116 Zeitschrift für Zivilprozeß 3, pp. 8-12. .
[388] Ralf Michaels, The Functional Method Of Comparative Law, pp. 355-356.
[389] Ibid.
[390] Ibid, p. 561-362
[391] Ibid, p. 360- 561

than methodologically interested. In suggesting, almost in passing, that the function of institutions has to stand at the centre of the comparative endeavour, Ernst Rabel did not develop an elaborate method from this insight. His approach was deliberately pragmatic rather than theoretical; he was not interested in expansive methodological debate,[392] but in solving practical problems. Ascribing a 'functional method' to him was rather the work of his student Max Rheinstein, who introduced his thoughts to the United States.[393] Josef Esser came closer to developing an elaborate functional method, but his influence did not extend to the details of the method, and few would have shared his philosophical foundations. Konrad Zweigert,[394] despite the disdain for methodological debates uttered in his textbook, published quite extensively on methodological questions. Yet he was driven primarily by an interest in universalist humanism and in legal unification; the functional method was simply the best tool to reach these goals.

Methodological eclecticism could be justified as pragmatism. But it has invited criticism, and functionalist comparatists react surprisingly defensively. One defensive strategy is to acknowledge the relevance of culture as an add-on for functionalist comparative law. Yet with no clear view of the relationship between culture and function, this must lead to an eclectic, internally inconsistent method. Another strategy, according to Ralf Michaels, is to postulate a 'methodological pluralism' in which functionalism is only one of several methods, and the comparatist picks whichever method seems most appropriate for a given purpose.[395] Neither strategy seems promising unless the strengths and weaknesses of a more clearly functional method are recognised. If the functional method is deficient, it is not clear why a moderated version should be maintained; if it is not deficient, it is unclear why it should be moderated. Yet we cannot evaluate this as long as we lack a coherently formulated functional method, with a consistent concept of function.

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[392] Ibid.
[393] Ibid.
[394] Ibid.
[395] Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?', (2003) 67;53 AJCL p.290.

2.6.9 What does Professors Konrad Zweigert and Hein Kotz's theory *contribute to the current study?*

Professors Konrad Zweigert and Hein Kotz 's theory contributes to the current study by way of its strong emphasis on the variable of 'better solutions', thereby offering another option for consideration when deciding whether or not a law or rule ought to be transplanted. Professors Konrad Zweigert and Hein Kotz 's theory also acts as a means for testing the validity of the hypothesis of this study.

Conclusion

The conclusion reached by way of the literature review of the five legal theories (those of Alan Watson, Pierre Legra, Otto Kahn-Freud, Rudolf von Jering, Konrad Zweigert and Hein Kotz).is that it is possible to transplant a law or rule from one country to another. However it is recognised that there may be occassions when a law or rule cannot be transplanted for its intended purpose- leaving one to determine if the law or rule can be transplanted for another or better ppurpose.

Chapter 3. Law reform, transplantation and the main legal theories

The hypothesis of this thesis is that laws and rules cannot, unconditionally, be transplanted to Bermuda, because effectiveness requires that it be crafted to take into account the perspectives of both donor and recipient. To test this, reliance will be placed on 4 theories which are set out and described in this chapter. These theories are often associated with transplantation of laws and the comparative method, both often used as tools to advance societies. Although this work will not be relying on the comparative method, it is still necessary to understand what is meant by law reform and the comparative method.

3.1 Law Reform

The transplantation of laws or rules is often used as a means to reform laws, but there is no single definition. This difficulty was recognised by Hurlburt[396] in his study of law reform commissions. He noted that differing definitions cause not only semantic difficulty, but also misunderstanding. Lawyers, too, have added to this problem by imposing unnecessary limits on what is meant by law reform, assuming that it only relates to legislative law[397] or is confined to fundamental recasting of the law and not to mere technical changes.[398] On other occasions it has been suggested that 'if there is no pre-existing law on a particular topic then it is arguable that one cannot logically have law reform'.[399]

There has also been a tendency to describe law reform as being the work of law reform commissions, but 'law reform is too important to be the exclusive prerogative of commissions assigned that name'.[400] According to Diamond, 'law reform' means not merely change, but change for the better.[401]

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[396] William H. Hurlburt, Law Reform Commissions in the UK, Australia and Canada (Juriliber, Edmonton, Canada, 1986) 514.
[397] Dias, Jurisprudence (5th ed.), 322-324; David M. Walker, The Oxford Companion to Law (OUP 1980) 729.
[398] John Farrar, Law Reform and the Law Commission (Sweet and Maxwell, London, 1974) 1.
[399] Ibid.
[400] R. Bell, 'Law Reform: Comparative Summing-up' in John A. Clarence-Smith (ed.), *Proceedings of the 9th International Symposium on Comparative Law* (Centre Canadien de Droit Compare 1972) 59; See also

3.1.1 The comparative method

The comparative method can be used by reformers to create or reform laws or rules for the betterment of a society. According to Cohn, it can be subdivided into four subcategories. They are:

- Inventive Comparison where the reformer tries to invent a solution within a vacuum, comparing potential solutions with the current situation;[402]
- Internal Comparison where the reformer looks internally within their legal system where the problem may have already been resolved;[403]
- Historical Comparison where the reformer examines solutions adopted by their legal system in the past; and[404]
- Heureux plagiats where the reformer tries to determine how the problem has been solved in other jurisdictions, and the solution can simply be borrowed for their own legal system.[405]

Bermuda settled on option 4 ('heureux plagiats'), to bring about legislative reforms to solve its gang violence and most of its financial concerns.

However, these methods and the comparative method as a whole should not always be the first or the final tool for bringing about law reform. As Cohn points out:

> 'It is of great importance to remember that the part that comparative jurisprudence can play in the solution of the task set to critical jurisprudence [i.e. law reform] should not be exaggerated. It is probably not right to say that comparative jurisprudence constitutes the last tool to which the critical jurist ought to resort. But if would certainly be wrong to consider it as the first or the most important tool….All that can claimed is that comparative law

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Denning, *Due Process of Law* (1980), 249, where Lord Denning noted 'Law reform…should not be left solely to the Law Commission'.

[401] Diamond, 'The Work of the Law Commission' (1976) 10 Law Teacher 11, 1.

[402] Cohn, supra n.1, 78.

[403] Ibid, 79-80.

[404] Ibid, 80-81.

[405] Translation: 'Happy/ successful plagiarisms': Arminjon, Nolde, Wolff, Traite de Droit Compare (Libraire Generale de Droit et de Jurisprudence, Paris, 1950), 20.

> furnishes a valuable alternative method…. It forms a valuable supplement to, but under no circumstances a substitute for, the other alternatives'.[406]

Indeed, there are other forms or methods by which law reform can be achieved, such as: academic study, to get an understanding of the operation of law; judge made law; the unification and harmonisation of laws; treaties creating a common international standard by which countries are to operate; and international understanding.[407]

3.1.2 The transplantation and reception of laws

The transplantation of laws is achieved when a donor country shares the same problem as a recipient country, and the recipient (seeing that the donor has been more successful in finding solutions) simply borrows or transplants that solution for their own country's purposes; the 'heureux plagiats'. Laws are transplanted on an involuntary basis due to colonisation; or on a voluntary basis, due to respect for the recipient, to further the cause of unification or harmonisation of laws, to solve a problem shared by donor and recipient which the donor has successful addressed,[408] or because a foreign solution is seen as having functioned effectively in practice.[409] However, Kamba cautions against transplanting laws and argues that even if a law may look good on paper, it might be a disaster in practical application, such as the American experience with prohibition. He states that this experience should serve as a strong warning to any other country that was contemplating creating similar legislation.

Although transplanting laws can be beneficial, there are dangers associated with it. This is because 'error of law is probably more common in comparative law than in any other branch or legal study'[410] and because it is difficult to discover 'the exact state of the law of a country at any given moment'.[411] Even if the person transplanting the law is able to gain

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[406] Cohn, supra n.1, 82-83.
[407] Kamba, 'Comparative Law: A theoretical Framework' (1974) 23 ICLQ 485, 489-505.
[408] Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR, 295-298.
[409] Kamba, supra n.21, 497.
[410] Alan Watson, *Legal Transplants* (Scot. Academic Press, Edinburgh 1974), 10-11.
[411] H.C. Gutteridge, *Comparative Law* (2nd ed. 1949; reprinted Wildy and Sons, London 1971) 136.

access to primary or secondary law sources, they may be out of date by the time they seek to rely on them.[412]

Over time the combined use of Law Reform and Comparative Law has become fashionable or, as Tallon puts it, comparative law:

> '…has become something of a bandwagon on which academics and practitioners alike scramble for seats, so much so that the older passengers may sometimes be surprised at the company in which they now travel'.[413]

There are two specific dangers that arise when one adheres to this type of fashion adherence. The first arises when reform is adopted from abroad rather than from native origin or, in the case of misuse of the comparative method, it is used 'merely as an artifice to enable foreign rules to be introduced surreptitiously into a national system of law'.[414] This has happened in some of Bermuda's finance laws and Orders in Council.

The second arises when there is a fashionable demand from the public or those thinking that they require the use of foreign rules, to find out what foreign jurisdictions are doing and using that to solve a problem. This is because there is a risk that a gap will be created 'between very extensive comparative research in connection with a legislative project and a practical result on the proposals made'.[415]

3.1.3 Transplant bias

Transplant bias, or preferring to borrow from some jurisdictions over others, tends to come about because a recipient has particular respect for a specific jurisdiction. To guard against this, Marsh gives the following advice:

> 'I think it important for law reformers who are tempted to adopt some law or institution of another society to ask themselves whether it is the

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[412] Ibid.
[413] L. Neville Brown, 'Comparison, Reform and the Family' (University of Birmingham lecture, 27 April 1967) 7.
[414] Gutteridge, supra n.6, p20.
[415] Norman S. Marsh, 'Comparative Law and Law Reform', Proceedings of the 4th European Conference of Law Facilities (Council of Europe', Strasbourg, 1977), n.3, 82.

> appropriateness of the law or institution to their own society which attracts them or whether it is in fact some broader-based approval of the foreign country which makes them look on the particular law or institution with favour'.[416]

In contrast, Watson views such transplant bias in a positive light and uses the term transplant bias to denote:

> 'a system's receptivity to a particular outside law, which is distinct from an acceptance based on a thorough examination of possible alternatives. Thus, it means for instance a system's readiness to accept Roman law rules *because* they are Roman law rules, or French rules *because* they are French rules'.[417]

Watson reasoned that existence of such bias will depend on:

> '…such matters as linguistic tradition, the general prestige and accessibility of the possible donor, the training and experience of the local lawyers'.[418]

However, as this thesis will show, such a simplistic approach is reckless, as it can result in laws or rules being transplanted without being naturalised for the recipients or recipients use.

3.1.4 Fear of other legal systems

The fear of other legal systems is something that often hinders law reform. It discourages the combined use of the comparative method and of law reform, with negative consequences. As Zweigert, et al. put it:

> 'the result is legal narcissism,[419] insularity, provincialism and isolationism,[420] combined with a fear of foreign influences and a horror *alieni juris*'.[421]

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[416] Marsh, supra n.3, 73-74.
[417] Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Camb. L.J. 313 at 327.
[418] Ibid.
[419] Zweigert and Kotz, *Introduction to Comparative Law, Vol. I* (Translation: Tony Weir, 2nd Ed, Oxford University Press 1987) 15.
[420] Cohn, supra n.1, 93-100 ('Legal Universalism, Legal Isolationism and Legal Regionalism').

Foreign legal systems are, therefore, valuable resources from which to get new ideas, as solutions to problems confronting the recipient within its jurisdiction.

3.2 The five legal theories for testing the thesis and the emergence of 'history' and 'legal culture' core variables

In order to test the laws used in this thesis, four legal theories will used:

- The Watson theory;
- The Legrand theory;
- The Kahn-Freud theory;
- The Zhreing theory; and
- The Zweigert and Kotz theory.

3.2.1 The Watson theory, or the transferist theory

The Watson Theory is a theory that agrees with the transplant theory (i.e. that it is possible to transplant a law or rule from one country to another). Specifically, the Watson theory (the preferred theory of this this thesis), or the transferist theory states that '…law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage'.[422] Gatain defines transferists as those legal academics who support law makers in the copying of foreign rules.[423] They believe that any law or rule can be transplanted from one country to another, without the need to naturalise it – that is to alter the law or rule to accommodate the characteristics of the new country. The foundation on which Watson asserts this theory is that the transplantation of laws has been the biggest source of legal change in the western world.[424] For example, he observes that Roman law had been transplanted into most of the countries of Western Europe for centuries, and still forms the basis of those countries' legal systems today. He asserts that change occurs within a legal

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[421] Hans Dolle, 'Der Beitrang der Rechtsvergleichung zum Deutschen Recht' in M. Rotondi (ed.), n.18, 123 at 151.
[422] MJ 4 (1997) 114.
[423] Maria Gaitan, 'The Challenges of Legal Transplants in a Globalised Context: A case study on working examples', University of Warwick, October 2014, 16-17.
[424] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', (1995) The American Journal of Comparative Law Vol. 43.

system as a result of borrowing, when a new rule is developed analogous to an old rule.[425] This is a historical approach used to interpret how laws are transplanted,[426] but omits the practical reality that with transplanted law comes the history and culture of its place of origin. It also omits any acknowledgement that Roman law was imposed on conquered lands by the Roman Empire.[427]

The Watson theory has its supporters. For example, Ewald argues that:

> 'the transplant bias of western legal systems is grounded in the nature of the legal profession [and that] lawyers (whether they act as legislators, judges, or scholars) constitute an elite law making group within society; into their hands has been entrusted the task of interpreting, preserving and developing the law'.[428]

He also asserts that, on the basis of historical observation, it is possible to make some general comments on how lawyers achieved this end:

> 'As a group, lawyers exhibit certain but three distinctive characteristics: they are creatures of habit; they tend to view legal rules as ends in themselves; and in altering the law they seek either to play down the extent of change, or to borrow a rule from some foreign legal system that has great prestige and authority'.[429]

Distilling from these three characteristics, he concludes that:

> 'Law is treated by the legal elite as existing in its own right; it is being in conformity with laws that make law [the] law. Hence, first, the means of creating law, the sources of law come to be regarded as a given, almost as something sacrosanct […] secondly, law has to be justified in its own terms; hence authority has to be sought and found. That authority (in some form,

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[425] Ibid.
[426] Nicolas H.D. Foster, 'Company Law theory in Comparative Perspective: England and France', (2000) 48 AM. J. COMP. L 537, 610.
[427] History and Origins of Roman Law.
[428] Ewald (n 424).
[429] Ibid, 499.

which may be perverted) must already exist; hence law is typically backward looking. These two features make law inherently conservative'.[430]

Unfortunately, both the Watson theory and Ewald's arguments omit three key variables: the history of, and problems unique to, its place of origin; the culture associated with the place of origin; and the need of the new host to naturalise the law once it has been transplanted which, in effect, creates a new naturalised and transplanted law. These three variables are more apparent in the Legrand theory and the supporting theories of other legal academics.

Although the main legal theories associated with the transplantation of laws can be roughly divided into groupings in favour and opposed to transplantation, the main two groups are able to agree on two things:

- transplanted laws can serve as a major irritation which is capable of activating unwanted and unexpected events when a foreign rule is imposed on a domestic culture; and
- a legal rule in one country, expressed using the same words in another country, may not be the same law in the other country.

Effectiveness- to be determined by the rule of law's existence

The rule of law, as read with the Watson theory, means that in order for a rule or law to be effective that it (the law or rule) must apply to all of the inhabitants of the country in which the law or rule has been transplanted. However, there is nothing within the Watson theory that appears to prohibit the rule of law from applying in such a case. Also, it would be difficult to determine effectiveness in isolation. The Watson theory and the matter off effectiveness would have to be applied to a specifc transplanted rule or law to determine the same.

3.2.2 The Legrand theory or the culturalist theory

The Legrand Theory or the culturalist theory, in contrast to the Watson Theory, is opposed to the notion that a law or rule can be transplated from one country to another, Gatain

[430] Ibid.

defines the 'culturalism' as a more pessimistic stream represented mainly by Legrand who believes legal transplants are impossible.[431] According to Legrand, 'law is not an autonomous entity unencumbered by historical, epistemological or cultural baggage'.[432] He further states that, in relation to the transplanting of laws:

> '…there could only occur a meaningful legal transplant when both the propositional statement as such and its meaning…which jointly constitute the rule […] are transported from one culture to another. Given that the meaning invested into the rule itself is culture specific, it is difficult to conceive, however, how this could ever happen […] a crucial element of the ruleness of the rule […] its meaning […] does not survive the journey from one legal system to another […] thus the imported form of the words is inevitably ascribed a different, local meaning which makes it ipso facto a different rule. As the understanding of a rule changes, the meaning of the rule changes. And as the meaning of the rule changes, the rule itself changes'.[433]

To understand the meaning of Legrand's theory of what a law is not, one must examine his language in the context of the transplantation of laws and from a historical and a cultural perspective.[434]

A consistent definition of law is crucial to this study because the four legal theories used, in various places, deem laws to mean one thing and in other places to mean another thing. For the purpose of this thesis a consensus definition is used, which is that law consists of institutional rules, doctrines and epistemologies.[435] The 'legal system' refers either to the

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[431] Gaitan (n 423) 16.
[432] MJ 4 (1997) 114.
[433] Pierre Legrand, 'The Impossibility of 'Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 116–17.
[434] See also: Richard G. Small, 'Towards a theory of Contextual Transplants', (YEAR) 19 Emory International Law Review, 1431; Pierre Legrand, 'Against a European Civil Code', (1997) 60 Modern Law Review 44; Pierre Legrand, 'How to Compare Now', (1996) 16 Legal Studies 232.
[435] William Twining, *Globalisation and Legal theory* (Butterworth's, London 2000) 1-10; Brian Tamanaha, 'An Analytical Map of Social Science Approaches to the Concept of Law', (1995) 15 Oxford Journal of Legal Studies, 501; Peter De Cruz, *Comparative Law in a Changing World*, (2nd Ed. Cavendish Publishing, London 1999) 488-94.

common law system based primarily on the English legal system, or the civil law system based primarily on the Roman legal system.[436]

According to the World Bank, the word 'culture' is:

> 'often a broad, catch-all term for an array of complex beliefs, symbols, and patterns of behaviour [...and] attempting to define it in a way that permits measurement will inevitably invite objection that the definition is faulty, that it doesn't really capture culture, but only public opinion, religion, language, or whatever other element is used'.[437]

A logical means by which it can be defined is by placing it in context. As the Legrand theory is based on a legal academic context, the most obvious context to place it is in that context, but defining legal culture is also problematic, as it too is too broad. There are three methods that can be used.

The first is to use 'very general categorical variables, such as religion, language, or ethnic background as a proxy for culture'. This method has the benefit of being very relatively clear and straightforward to conceptualise, but is 'vulnerable' to attack for 'being crude and inaccurate'.[438] The second is to use survey data on attitudes and beliefs.[439] This method is more focused than the first, but it too is subject to criticism for being likely to 'miss important nuances of legal culture, making inferences from aggregate opinion data without regard to other (undiscovered) factors'. The third is the ethnographic approach. This is achieved by 'immersing [oneself] in a particular community and attempt to sort out particular signs, symbols, rituals, and practices'. This has the effect of helping to capture even more cultural detail, but it also creates more problems that require resolution. These are, that this type of data gathering:

- is 'time consuming, expensive, and difficult to understand and interpret;

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[436] See: David, R and Brierley, JEC *Major Legal Systems in the World Today, An Introduction to the Comparative Study of Law*, (3rd ed, London, Stevens and Sons 1999) 21; Husa, J (2004) 'Classification of the Legal Families Today' Révue internationale de droit comparé, 12; Esin Örücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) Electronic Journal Of Comparative Law.
[437] World Bank: 'Law and Justice Institutions, Legal Culture and Judicial Reform' @ http://web.worldbank.org.
[438] Ibid, web.worldbank.org
[439] See: 'Bierbrauer 1994, Gibson and Caldeira 1996.

- is unreliable because the ethnographer (i.e. the person collecting the data) tends to produce findings 'that are often hard to verify or reproduce, even by another well trained ethnographer'.
- is inherently problematic as, 'even if a particular ethnographic account could be considered a valid and reliable source of cultural data, cross-country [...] comparisons may be difficult or impossible, precisely because sophisticated ethnographies can be so case specific'.

As each method has its own shortcomings, and the obvious solution is to use a less problematic method, and one is available; it is to ask what effect the law has on culture. Winn argues that 'evidence has been demonstrated [that] legal modernisation is of a marginal importance relative to traditional patterns of business behaviour'.[440] Mattei expands on Winn's argument, indicating that there is evidence 'that the transplant of a foreign legal system tends to be less successful than practices that [have] developed indigenously [suggesting that] existing legal culture is resistant to simple reform'.[441]

Overall, what can be gathered from the interplay between these 4 methods is that beliefs, assumptions, and practices understood as 'cultural' affect the operation of legal systems.[442] It is these beliefs, assumptions, and practices that will help to determine whether a law has been successfully transplanted to Bermuda.

Legrand did not allow himself to become bogged down in trying to settle on a meaning of 'culture' or even 'legal culture', as it can only be determined within a particular context. It is

f*Effectiveness- to be determined by the rule of law's existence*

The rule of law, as read with the Legrand theory, means that in order for a rule or law to be effective that it (the law or rule) must apply to all of the inhabitants of the country in which the law or rule has been transplanted. However, there is nothing within the Legrand theory that appears to prohibit the rule of law from applying in such a case. However the Legrand

[440] Winn 1994.
[441] Mattei 1995.
[442] Ibid, web@worldbank.org

theory's emphasis on the need to take into account the recipient country's history and culture, before transplanting a law or rule, suggests that the theory is trying to make sure the rule of law will apply to every person in the recipient country. Still, it would be difficult to determine effectiveness in isolation. The Legrand theory and the matter off effectiveness would have to be applied to a specifc transplanted rule or law- in order to determine effectiveness..

3.2.3 The Kahn-Freud theory

The Kahn-Freud Theory supports the notion that a law or rule can be transplanted from from one country to another. However it does recognise that there will be times when, for various reasons, it may not be possible. The Kahn-Freud or 'centrist' theory concludes that a transplanted law or rule will always be liable to rejection by the recipient jurisdiction. He equates the act of transplanting a law or rule to the act of transplanting an organ from one human body to another. In particular he stated:

> 'legal transplants like surgical transplants have the risk of being rejected and that it is dangerous to transplant a law (or rule) that is culturally and vitally attached to a particular society because all jurisdictions have a unique and different social construction'.[443]

He relies on the determinations of the legal scholar Montesquieu. In Montesquieu's opinion it was only in the most exceptional cases that the institutions of one country could serve those of another at all. In words 'which for more than two centuries have sounded a warning to all comparative lawyers' Montesquieu said :

> ' The political and civil laws of each nation. . . must be clean so the people for whom they are made, this is a great chance if those of one nation may agree to another'.[444]

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[443] Otto Kahn-Freud, On the Uses and Misuses of Comparative Law, Modern Law Review, Vol. 37, January 1974, No. 1, pp. 5-6.
[444] Ibid.

According to Kahn-Freud, Montesquieu's view of legislative transplantation was much closer to the organic than to the mechanical terminus of our continuum. This observation applied not only to the private law governing the relations between citizens, but also to public law covering constitutional, administrative and judicial arrangements.[445]

Kahn-Freud explores whether the forces linked the law so closely to its environment that it could hardly ever change its habitat. He concludes that Montesquieu's environmental criteria which determine the spirit of the law and permeate the whole work are to some extent geographical, determined by climate and the location of the country. Others are sociological and economic, such as the wealth of the people, their population density, and their trade. Kahn-Freud also identifies religion as a factor, and what Montesquieu refers to as 'leurs inclinations, ... leur moeurs, ... leurs manitres'.[446]

T.T. Arvind, a supporter of Kahn-Freud, uses the analogy of wine grapes by concluding that:

> 'even though a variety of wine grapes (seeds) are able to travel abroad and grow outside its native ground, the wine (produced) will always taste different and this scenario applies to transplanted law (and rules) as well'.[447]

The Kahn-Freud theory, however, only focuses on end-use reception of transplanted laws as the location for finding matters that may affect transplantation. This is a logical inference to make as, logically, one would not generally attempt to transplant an organ from one human body to another if it did not work effectively in the donor.[448]

As a theory, the Kahn-Freud theory does not offer a definitive benchmark of whether a law has effectively been transplanted. At best, it only allows one to infer the existence of a benchmark. These are:[449]

> (a) whether there was an active search, by the transplantor, for signs of possible rejection of the proposed transplanted law due to matters inherent to the place of origin of the transplanted rule or law;

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[445] Ibid.
[446] Ibid.
[447] Ibid.
[448] Ibid.
[449] Ethics of Organ Transplantation, Centre for Bioethics, February 2004, pp. 8 -25.

(b) whether there was an active search, by the transplantor, for signs of possible rejection of the proposed transplanted law due to matters inherent to the law's place of reception;

(c) in the event that that there was a foreseen risk of rejection, whether there was an attempt to weigh the degree of possible rejection versus the mischief the transplanted law was intended to cure;

(d) whether there was a positive decision to ignore the possible existence of high probabilities of rejection of the transplanted rule or law due to an even higher demand by the people of the place of reception to find a way to cure the mischief at issue; and

(e) whether there was a positive decision to accept the existence of high probabilities of rejection of the transplanted rule or law due to an even higher demand by the people of the place of reception to find a way to cure the mischief at issue.

The answers to these questions seek to determine whether a law has been transplanted effectively.

f*Effectiveness- to be determined by the rule of law's existence*

The rule of law, as read with the Kahn-Freud theory, means that in order for a rule or law to be effective that it (the law or rule) must apply to all of the inhabitants of the country in which the law or rule has been transplanted. There is, however, nothing within the Kahn-Freud theory that appears to prohibit the rule of law from taking root in the recipient country. The Kahn-Freud theory's emphasis on recognising that there may be instances where (for various and including unkown reasons) a law or rule is not capable of being transplanted, is perhaps a means of ensuring the transplanted rule of law will apply to all of the recipient countries inhabitants.

3.2.4 The Jhering theory

The Jhering Theory is one where instead of focusing on whether or not a law or rule can be transplanted (like the Watson and Legrand Theories) from one country to another, to focus instead on whether or not the law or rule can be transplanted for some useful purpose. The Jhering theory states that to determine successful transplantation, the focus ought to be one of utility. According to him:

'the reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has

> one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden'.[450]

Jhering theory seeks to determine if the transplanted law can work for the intended purpose. However, this begs a further question: when one determines the intended purpose, is one to include or to exclude the end-users, and if so, which end-user.

Effectiveness- to be determined by the rule of law's existence

The rule of law, as read with the Jhering theory, means that in order for a rule or law to be effective that it (the law or rule) must apply to all of the inhabitants of the country in which the law or rule has been transplanted. There is, however, nothing within the Jhering theory that appears to prohibit the rule of law from taking root in the recipient country. The Jhering theory's emphasis on trying to determine if the transplanted law can work for the intended purpose, is perhaps a means of trying to ensure the transplanted rule or law will apply to all of the recipient countries inhabitants.

3.2.5 The Zweigert and Kotz theory

The Zweigert and Kotz theory, or 'better solutions theory' is, like the Jhering theory, founded on functionality. This is to say that 'the legal system of every society faces essentially the same problems'[451] and, therefore, the objects for comparison (by way of the comparative method) should be diverse legal solutions to those societal problems.[452] Inherent in functionalist analysis are two primary elements: problem definition; and solution identification. According to Zweigert and Kotz, this means that only rules which perform the same function and address the same real problems can profitably be compared, causing functionality to be:

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[450] Rudolf von Jering, 'Geist Des Romischen Rechts Auf Den Verschiendenen Stufen Seiner Entwicklung pt. I', (9th ed. B. Schwabe 1955) 8, cited in Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (Tony Weir trans, 3rd ed 1998).
[451] Zweigert and Kotz, *Introduction to Comparative Law* (3 ed. 1998) 34.
[452] Ibid.

> '…the basic methodological principle of all comparative law….From this basic principle stem all other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparison and so on'.[453]

From this principle is derived applied comparative law,[454] allowing functionalism to provide advice on legal policy by suggesting how a specific problem can be solved under given social and economic circumstances.[455] In using comparative law, Zweigert and Kotz see comparative law as a means by which to discover models for preventing or resolving social conflicts, and:

> 'providing a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled'.[456]

The first argument against the functionalist theory is from James Whitman, who is of the view that the reliability of this theory is doubtful because inherent in this theory is the dubious proposition that all societies view life as presenting the same social problems.[457] Richard Hyland, also finding the functionalist theory wanting, finds that the idea that the social issues the law is asked to resolve are so similar as to present a constant across legal systems is highly questionable.[458]

Hill questions the basis on which comparative lawyers are qualified (or at any rate better qualified than lawyers whose studies are limited to their own countries) to make evaluations of different legal systems.[459] He is of the view that functionalists believe that they can make such judgments because the method used is an objective one, but Hill argues

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[453] Ibid.
[454] Ibid.
[455] Ibid.
[456] Ibid, 15. Schlesinger, von Mehren and Merryman, all espouse the same 'better solutions' impulse theory.
[457] James Q. Whitman, The Neo-Romantic Turn, in Comparative Legal Studies: Traditions and Transitions 312 (Pierre Legrand and Roderick Munday eds, 2003).
[458] Richard Hyland, Comparative Law: A Companion to Philosophy of Law and Legal theory 184, 188 (Dennis Patterson ed, 1996), 189.
[459] Jonathan Hill, Comparative Law, Law Reform and Legal theory, 9 OXFORD JOURNAL OF LEGAL STUDIES 101 (1989), 102.

that different legal solutions require value judgments, such as about fairness and justice and that functionalism cannot provide a basis for making these kinds of judgments.[460]

There is also the issue of for whom a legal rule is functional. According to Christopher Whytock:

> 'Societies are not monolithic; they are composed of diverse individuals and groups. Thus it is difficult to speak of societal functions per se. Instead we must speak in terms of which individuals and groups define the intended consequences of a legal institution. Functionalism proposes neither an answer nor a general approach'.[461]

Abrahamson cautions against using the functionalist theory because there is a tendency to assume that different societies face similar problems and a tendency to imply the ability to make objective claims about which legal solutions to those problems are superior.[462]

3.2.5.1 Casual inference

Also linked to the Zweigert and Kotz functionalist theory, is the casual inference theory. This is founded on the proposition that:

> 'Whenever it is proposed to adopt a foreign solution, which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it'.[463]

Whytock contends that the first question can only be answered 'by having an understanding of the actual effects of a legal solution on a specified outcome in the country of origin'. And to answer the second question, he contends that 'one must have some understanding of the likely effects of a similar legal institution in a country that adopts it'.[464]

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[460] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1887.
[461] Ibid, 1888-1889.
[462] Ibid, 1889.
[463] John Henry Merryman, The Loneliness of the Comparative Lawyer 486 (1999).
[464] Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law (2010), 1893.

As a legal theory, for use as a tool of legal reform, Whytock raises the caution that:

> '…when legal origins scholarship drifts from testing to attempting to establish causal claims, comparative legal scholars should be wary. Moreover, functionalist comparative legal scholarship would benefit from more methodological diversity than legal origins scholarship in its quest to take causality seriously. None of this is to suggest that all comparative legal scholars should ask causal questions or make causal claims about legal institutions; but when they do, they should be explicit about the process by which they make their causal inferences'.[465]

Finally, Whytock suggests that of the functionalist theories that the 'laws context theory' should be taken seriously. This is because, and as Tushnet has noted:

> 'Every society's law is tied to so many aspects of that society, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more, that no functionalist account can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience of others'.[466]

Effectiveness- to be determined by the rule of law's existence

The rule of law, as read with the Zweigert and Kotz theory, means that in order for a rule or law to be effective that it (the law or rule) must apply to all of the inhabitants of the country in which the law or rule has been transplanted. There is, however, nothing within the Zweigert and Kotz theory that appears to prohibit the rule of law from taking root in the recipient country. The Zweigert and Kotz theory's emphasis on trying to identify the problem that needs fixing and then finding a solution to fix that problem (to be obtaine from a contry that is facing the same problem, is perhaps a means of trying to ensure the transplanted rule or law will apply to all of the recipient countries inhabitants. Still, this cannot be determined in isolation. This theory would have to be applied to a specific case study, in order to determine effectiveness.

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[465] Ibid, 1897.
[466] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', (1999) 108 Yale L.J. 1225, 1265.

Chapter 4. Transplantation of criminal rules to Bermuda and their effectiveness

This chapter examines the validity of the four legal theories at issue, by applying them to criminal law in Bermuda:

(a) Section 315F of the Criminal Code Act 1907 ('s 315F'); and
(b) Section 29A of the Firearms Act 1973 ('s 29A').

4.1 Section 315F: 'Stop and Search'

Section 315F is the transplanted version of the UK's s 60 of the Terrorism Act 2000. Its aim is the suppression of violent crime. The section, along with a number of other pre-made legislative provisions,[467] was transplanted to Bermuda in 2008 to give the Bermuda Police Service a tool to halt unlawful gang activity involving the use of guns and the resultant but previously unheard of broad daylight murders of rival gang members. In the 40 years to 2008, there were only 5 fatal shootings in Bermuda[468] but between 2008 and 2011, the gun murder rate rose to around one or two every month.[469] This sudden spike was, according to one Bermudian MP, Bermuda's version of terrorism, as the ongoing gun murders served to place the inhabitants of Bermuda in a state of terror.[470] It is therefore understandable that, with this history and culture of very low levels of gun crime, Bermudian law makers would want to find the tools to stem this spike in gun violence.[471]

[467] See Bermuda's sections 70JA and 70JB of the Criminal Code Act 1907 'Unlawful Gang Activity' Criminal Amendments. These amendments are a transplanted version of Canada's Criminal Code s 467, a rule used by to deal with criminal gangs.
[468] See: Hansard: UK House of Commons Bermuda Debate, 05 December 1977, Vol. 970, cc 1014-241014.
[469] See: Q4 2009 Crime Statistics, Press Release 1; BPS Crime Statistics Report 2010 Q4 Year End; BPS 2010 Year End Crime Statistics; and BPS Crime Statistics 2011 Q4 and Year End.
[470] Hon. Ashfield E. De Vent, debate on the Firearms Amendment Act 2010; Bermuda House of Assembly Official Hansard Report (2009-2010 Session) 374-375.
[471] Minister of National Security's speech to the House of Assembly, 29th October 2012.

4.1.1 Section 315F and the Watson theory

Section 315F was, indeed, transplanted from the UK to Bermuda. However, the Watson theory ignores the need to make a law work once it has been transplanted.

4.1.2 Section 315F and the Legrand theory

Bermuda, contrary to the Legrand theory, did not naturalise s 315F. This is because the same problems that presented themselves in the UK also presented themselves in Bermuda, in that the rule was applied or at least affected visible ethnic groups.[472] This resulted in a number of leading cases which came before the European Court of Human Rights, in particular, *Gillan and Quinton v UK* in which it was held that that the section was incompatible with the UK's obligations under Article 8 of the European Convention on Human Rights. The Court went on to list factors necessary to ensure compliance.

In the case of Bermuda, 'stop and search' has had very similar negative outcomes to those that resulted in England and Wales. Public outcry from members of the predominate black community, particularly young black men, indicates that a negative consequence of s 315F's enactment is that the black male community feels targeted by the police and are being disenfranchised from Bermuda society as a whole, as the enactment has resulted in a whole racial segment of Bermudian society becoming criminalised. This is not surprising as, according to statistics released by the Bermuda Commissioner of Police on the 21 February 2012, in the year ending 31st December 2011, the Bermudian Police conducted 17,429 searches, an increase of 82% compared to 2010.

The ultimate end-users, in particular the young black male population of Bermuda, found themselves targets of the Bermudian Police in the application of s 315F. During an interview with a senior police officer of the Bermuda Police Service, he acknowledged that the specific intent of s 315F, the suppression of violence, had not been achieved. He concluded that the majority of searches under s 315F resulted in arrests for non-violent offences such as the possession of small amounts of marijuana, unpaid fines, and outstanding warrants of arrest, with the majority the people stopped and searched being

[472] Crime Rates: E and HRC Report, 54 – 58.

young black males. No firearms were seized as a result of s 315Fs transplantation to Bermuda from the UK.

Of course the reason the majority of people stopped were young black males is because the majority of the people committing the gun crimes were young black males. However, it is evident that, with Bermuda having an approximately 60% black population, the application of an un-naturalised s 315F would result in racial friction between the Bermudan Police Service and Bermuda's young black male population, adding further to the historical friction between them,[473] which was first highlighted in The Report of the Royal Commission into the 1977 Disturbances (The Pitt Report).

According to the Legrand theory, s 315F has not worked and thus has not been effectively transplanted into Bermuda's statute book.

4.1.3 Section 315F and the Kahn-Freud theory

The Kahn-Freud theory focuses on end-use reception of transplanted laws and rules as the location for finding matters that may affect effective transplantation by applying benchmarking (see Section 2.3).

Unfortunately during the period 2008 to 2012 (the time period the author of this study used randomly select Bermuda laws and rules for examination), no legal mechanisms were available which could determine what factors the Bermudian government considered in determining whether or not they should transplant section 315F into Bermuda's statute book.[474]

4.1.4 Section 315F and the combined Zhreing and Zweigert and Kotz theories, The 'usefulness' variable

The combined Zhreing and Zweigert and Kotz theories, relying on the utility variable and not as simplistic as the Watson theory, serve as an alternative to the Legrand theory

[473] Report of the Commission of Inquiry into the Civil Disorders of 1968 ('the Wooding Report'), paragraph 35.
[474] The Public Access to Information Act 2010 did not come into operation until 2014. Had this Act been in operation during the subject period of examination, it may well have assisted in obtaining the necessary information.

because the Legrand and the combined Zhreing and Zweigert and Kotz theories, have, at their core, a need to determine whether the law has worked once it has been transplanted.

Although the intended purpose of s 315F was to allow the Bermudian Police Service to seize firearms, and none were seized, it did disrupt intended gun use by forcing gang members to constantly seek other means to move unlawful firearms around Bermuda by, for example, giving the weapons to younger children or to women who were less likely to be stopped.[475] This helped to reduce the high levels of gun crime. So s 315F worked by 'disrupting' the use of unlawful firearms in Bermuda, the combined Zhreing and Zweigert and Kotz theories 'usefulness' variable is satisfied and thus s 315F has been successfully transplanted to Bermuda. This also casts doubt on the validity of the Legrand theory as being preferred in determining if a law has been effectively transplanted.

4.1.4.1 Interim conclusion- s. 315F

The hypothesis of this thesis, in relation to s. 315F, has been proven. This has been achieved by determining whether this rule was capable of being transplanted from the UK to Bermuda unconditionally. The Legrand and the the combined Zhreing and Zweigert and Kotz theories, two of the theories used to determine whether this rule can be transplanted unconditionally, serve to indicate that this rule was incapable of being transplanted to Bermuda uncondtionally. Again, the effectiveness of transplanted legislation requires crafting the same and taking into account the perspectives of the government or governments (i.e. in the present case the UK and Bermuda Governments) that caused the legislation to be transplanted, and the people who affected by it.

4.2 Section 29A warrant for detention without charge

Section 29A of Bermuda's Firearms Act 1973, inserted by the Firearms Amendment Act 2010, is another rule that was transplanted from the UK. It is Bermuda's version of the UK's s 41 and schedule 8 of the Terrorism Act 2000. Section 29A (like s 315F), was enacted to arrest the spike in gun crime in Bermuda.[476] In the UK, s 41 has proven to be very

[475] Interview with Superintendent (Police Intelligence) Darrin Simons of the Bermuda Police Service, 21st February, 2014.
[476] Firearms Amendment Act 2010, preamble.

controversial, primarily because of the debate concerning the period of detention and because its intended purpose, the pre-charge detention and subsequent charge of terrorist suspects (excluding Northern Ireland), has historically proven to have been ineffective.[477]

4.2.1 Section 29A and the Watson theory

The Watson theory concludes that any rule or law can be transplanted from one jurisdiction to another, and that no other variables need be considered in determining if a law has been effectively transplanted, and s 29A was indeed transplanted.

4.2.2 Section 29A and the Legrand theory

The Legrand theory requires naturalisation of the transplanted law, and Bermuda did naturalise s 29A. Bermuda had the same concerns as the UK concerning the 28 day period of pre-charge detention.[478] In order to mitigate this concern, the Bermudian legislature ensured that s 29A was subject to a 'sunset clause'.[479]

In Bermuda, 'stop and search' has had very similar negative outcomes to those that resulted in England and Wales and culminated in *Gillan and Quinton v UK*.

4.2.3 Section 29A and the Kahn-Freud theory

It was not possible to assess whether this law was effectively transplanted under the Kahn-Freud theory, as the necessary information was not available at the time of writing (see Section 4.1.3).

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[477] David Anderson QC, 'The Terrorism Acts In 2012**,** Report Of The Independent Reviewer On The Operation Of The Terrorism Act 2000 And Part 1 Of The Terrorism Act 2006'. Anderson reports that 246 arrests under s 41 in 2012 were classed as 'terrorism-related', but only 49 of these were under the special powers in Terrorism Act 2000 s 41, and only 43 resulted in charges being brought for terrorism-related offences.
[478] Bermuda Legislature Hansard, Vol.
[479] Firearms Amendment Act 2010 ss 17(2) and (3). The UK also enacted a sunset clause with regard to s 44 of the Terrorism Act 2000, in recognition of the draconian nature of this rule. See s of the Terrorism Act 2000 and corresponding Hansard debates from 2000 to 2010.

4.2.4 Section 29A and the combined Zhreing and Zweigert and Kotz theories, The 'usefulness' variable

The intended purpose of s 29A was to give law enforcement time to gather evidence that would lead to the charge of an accused person, and that purpose has, according to a Senior Prosecutor and a Senior Bermuda Police Officer, been achieved. Both the Deputy Director of Public Prosecutions[480] and the Bermuda Police Superintendent[481] agree that s 29A is draconian, but that draconian measures are necessary to counter gun crime. The Deputy Director also pointed out that, because of the draconian nature of s 29A, applications made to the Supreme Court for the provision's use are only made when its deemed necessary, and with the oversight of a Supreme Court Judge,[482] otherwise senior prosecutors rely on other less draconian provisions within Bermuda's statute book. Judicial oversight acts to ensure that the state conforms with key democratic values such as freedom and fairness, even in trying times.

Section 29A has been useful in that it has helped to reduce gun crime. According to the Deputy Director of Public Prosecutions, there were at least two instances where gun related violence was either averted, or the offenders were arrested immediately after the event. In each case the offenders were prosecuted and sentenced to lengthy prison sentences. As s 29A has been useful in bringing about the charge and successful prosecution of these people, the combined Zhreing and Zweigert and Kotz theories 'usefulness' requirement is satisfied.

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[480] Interview with the Deputy Director of Prosecutions, Ms. Cindy Clarke, 3rd Floor Board Room of the Attorney General's Chambers Bermuda, 15th January, 2014. During this interview, the Deputy DPP indicated that there have been two prosecutions and resulting arrest: R, v, Grant and R-v, Blakeney.
[481] Interview with Superintendent Mr. Darrin Simons of the Bermuda Police Service on 21st February, 2014.
[482] Interview with Deputy Director of Public Prosecutions, Ms. Cindy Clarke.

4.2.4.1 Interim conclusion- s. 29A

The hypothesis of this thesis, in relation to s. 29A here, too, has been proven. This has been achieved by determining whether this rule was capable of being transplanted from the UK to Bermuda unconditionally. The Legrand and the the combined Zhreing and Zweigert and Kotz theories, two of the theories used to determine whether this rule can be transplanted unconditionally, serve to indicate that this rule was incapable of being transplanted to Bermuda uncondtionally. Again, the effectiveness of transplanted legislation requires crafting the same and taking into account the perspectives of the government or governments (i.e. in the present case the UK and Bermuda Governments) that caused the legislation to be transplanted, and the people who affected by it.

4.3 Section 70JA and 70JB 'Unlawful Gangs'

Sections 70JA and 70JB were transplanted from Canada, where in its previous guise it was known as s. 467 of the Canadian Criminal Code 1985, to Bermuda by the Government of Bermuda in 2012. Of note, the transplantation of s. 467 to Bermuda from Canada serves to demonstrate that Bermuda transplants its rules from countries other than from just the UK. Like the other criminal rules examined under this chapter the enactment of ss. 70JA and 70JB, by the Bermuda Government, was done as means of trying to bring a halt to the unlawful gang murders that were plaguing Bermuda.

4.3.1 Unlawful gang laws in Canada

S. 467 of the Canadian Criminal Code 1985 was crafted by the Canadian Government originally as a means of following its international obligations under the Article 10(2) of the Convention Against Transnational Organised Crime. It was subsequently used by the Provincial Police of the Canadian Province of Quebec as a means of dealing a deemed menace of biker gangs in the province. In Canada as a whole, s. 467 was immediately recognised as being far reaching and broad in application. In a speech to the Standing Committee on Human Rights and Justice, in 2007, Mr. Randall Richmond, the Deputy Chief Prosecutor of Quebec's Department of Justice, said:

'The results obtained demonstrate that it is possible to prove gangsterism, but one should not conclude that it is easy to do so. On the contrary, it can be arduous. In almost all of the cases where we have charged gangsterism, this came after lengthy investigations of 12 to 14 months, during which wiretapping and physical surveillance were carried out and prosecutors were involved as legal advisors during the investigations'.

From this it became clear that it was going to be difficult to determine what is gangsterism or what is a criminal organisation. Subsequent to s. 467 coming into operation a number of

Canadian criminal cases were tried, using s. 467 for the purpose of prosecuting criminal gangs. The most crucial constitutional law protection variable, quickly identified as being under threat, and in quick need for determination, was that of 'freedom of association'. In order to determine if the legal concept of freedom of association was being destroyed, by the use of s. 467, the definition of 'criminal organisation' had to be determined but in the context of preserving the constitutional right of 'freedom of association'. By way of two legal authorities, Canadian Courts determined that the use and definition of 'criminal organisation was not unconstitutional and thus legally sound.[483] However the true test for determining whether or not the definition of 'criminal organisation' was unconstitutional came by way of the Canadian criminal case of Re *Lindsay and Bonner v The Queen*[484] where the court affirmed that the definition of 'criminal organisation' was not unconstitutional but went on conclude that in order to determine whether or not an organisation was a criminal organtisation, one had to determine the same on a case by case basis.[485] In doing so, the court was making the decision that the application of s. 467 the would be ever evolving and that its constitutional validity would be only determined at the time of trial.

4.3.2 Sections 70JA and 70JB and the Watson theory

According to the Watson theory any rule or law can be transplanted from one jurisdiction to another, inferring that it is a simple process and that nothing is needed in order to ensure that the transplanted rule or law has been transplanted effectively. It is indeed correct that ss. 70JA and 70JB were transplanted from Canada to Bermuda. Watson's theory, however, simplistically overlooks the need to ensure that once the sections have been transplanted to every effort is made to ensure that they work.

4.3.3 Sections 70JA and 70JB and the Legrand theory

The Legrand theory, in recognition of the fact that the transplantation of a law or rule is not a simple process, highlights the fact that a transplanted rule or law can only be effectively transplanted in cases where there is a recognition of the parent country and recipient

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[483] *R v Beauchamp* (11 February 2002), Montreal 500-01-003088-017, Boilard J. (C.S.Q.); [2002] R.J.Q. 3086, Beliveau J. (C.S.Q.); *R v Doucet* (2003), 18 C.R. (6th) 103 (C.S.Q).
[484] [2004] 182 C.C.C. (3rd) 301 (Ont SC)(Feb 2004).
[485] *R v Lindsay* (2004) 182 C.C.C. (3d) 301; *R v Myles* (2007) 48 C.R. (6th) 108 (Ont S.C.); *United States v Riszuto* (2005) 209 C.C.C. 3(d) 325.

country's history and culture and an understanding of each other's legal systems. Doing so adds to the 'naturalising process' for transplanting the rule, thereby making sure that the same fits effectively within the recipient jurisdiction's legal system. As with the transplantation of any rule, doing so results in the creation of a new rule. Bermuda, in adherence to the Legrand theory, did naturalise ss. 70JA and 70JB. This was done by:

> (a) changing the definition of 'criminal organisation' to 'unlawful gang' as Bermuda was concerned about gangs and not organised crime;
>
> (b) adding a 'sunset clause' in recognition of the fact that prior to the advent of the unlawful gang murders Bermuda, in the case of gun murders, had been historically a peaceful place prior to 2008. Doing so was also in recognition of the fact that the Government hoped the unlawful gang murders would come to an end;
>
> (c) policy input was obtained from Bermuda's Judiciary, Bermuda Prosecutors, and the Bermuda Police Service.[486]

Accordingly, the three criteria were met in that the same were implemented before ss. 70JA and 70JB were enacted. In doing so, the Bermuda unlawful gang provisions affirm the Legrand Theory (i.e. that once transplanted, legislation cannot operate effectively unless it is naturalised, taking into account the history, culture, etc, of is place of origin versus the history, culture, etc of the end user).

4.3.4 Sections 70JA and 70JB and the Kahn-Freud theory

Here, too, the Kahn-Freud theory focuses on end-use reception of transplanted laws and rules as the source for finding out whether or not there has been effective transplantation of ss. 70JA and 70JB.

During the period 2008 to 2012 (the time period the author of this study used randomly select Bermuda laws and rules for examination) ss. 70JA and 70JB, although enacted by the

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[486] Copy of Original Speech of the Hon. Wayne Perinchief, MP, and Minister of National Security: read to the Bermuda House of Assembly prior to the time Bermuda's Criminal Code Amendment Act 2012, Bermuda's anti-gang law was being debated in the Bermuda House of Assembly[NB. Permission to use copy of speech in this thesis was granted by letter from the Secretary of National Security, Major Marc T. Telemaque, dated 29th October 2012.

Bermuda Government, have not been relied upon by Bermuda prosecutor for the purposes of prosecuting unlawful gang related offences. During an interview with the Deputy Director of Public Prosecutions Ms. Cindy Clarke, she indicated that because of the several and difficult ingredients that would have to be proven by way of ss. 70JA and 70JB, her prosecutors prefer to rely on the old and simpler reliable provisions (within the Bermuda Criminal Code 1907) such those dealing with aiding and abetting or joint enterprise.

4.3.5 Sections 70JA and 70JB and the combined Zhreing and Zweigert & Kotz theories, The 'usefulness' variable

The purpose behind the enactment of ss. 70JA and 70JA was to give the Bermuda Police Service and Bermuda Prosecutors an additional tool for the arrest and prosecution of unlawful gang offences. Moreover, the enactment of ss. 70JA and 70JB was also used to demonstrate to the Bermuda public that the Bermuda Government was at least trying to do something to put an end to the unlawful gang crimes. However, according to the Deputy Director of Public Prosecutions, ss. 70JA and 70JB have not been used by Bermuda prosecutors- preferring to rely on easier to establish offences, found within the Bermuda statute book, such as aiding and abetting and the offence of conspiracy. Still, since ss. 70JA and 70JB have been useful in demonstrating to the people of Bermuda that their enactment is proof that the Bermuda Government is doing something to try and put a halt to the unlawful gang offences, the combined Zhreing and Zweigert and Kotz theories 'usefulness' requirement is satisfied.

4.3.5.1 Interim conclusion- s. 70JA and 70JB

The hypothesis of this thesis, in relation to ss. 70JA and 70JB have been proven. This has been achieved by determining whether this rule was capable of being transplanted from the UK to Bermuda unconditionally. The Legrand and the combined Zhreing and Zweigert and Kotz theories, two of the theories used to determine whether this rule can be transplanted unconditionally, serve to indicate that this rule was incapable of being transplanted to Bermuda unconditionally. Again, the effectiveness of transplanted legislation requires crafting the same and considering the perspectives of the government or governments (i.e. in the present case Canada and the Bermuda Governments) that caused the legislation to be transplanted, and the people who affected by it.

Effectiveness and the rule of law

Effectiveness could not be determined under any of the legal theories in this section. This is because sections 70JA and 70JB have yet to be used the Director of Public Prosecutions in Bermuda.[487]

CHAPTER FOUR CASE STUDY SYNOPSIS

1. Factually, ss. 29A, 70JA, 70JB and 315F were, as determined by way of the case studies, transplanted to Bermuda by Bermuda (as indicated by way of the interviews with the Deputy Director of Public Prosecutions and the Bermuda Police Service Superintendant for Intelligence and as indicated by way of its existence within Bermuda's staute book) .

2. Theoretically, ss. 29A, 70JA, 70JB and 315F were, as determined by way of the case studies, either:

a. transplanted (in accord with the Watson and Kahn-Freund theories);

b. not transplanted (in accord with the Legrand theory);

c. capable of being transplanted if ss. 29A, 70JA, 70JB and 315F could be used for the intended purpose (as determined by Bermuda or the people of Bermuda as end users) or for an alternative purpose (in accord with the Jhreing, Kahn-Freund. Zweigert & Kotz theories).

3. Effectiveness, in the case of ss. 29A, 70JA, 70JB and 315F and ultimately determined by the existence of the rule of law. has been determined not to have been met because these rules were applied in an arbitrary manner by the Bermuda Government as end user (albeit it was never the intent of the Bermuda Government to apply or deploy these two rules to all of the inhabitants of Bermuda).

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[487] Interview with the Deputy Director of Prosecutions, Ms. Cindy Clarke, 3rd Floor Board Room of the Attorney General's Chambers Bermuda, 15th January, 2014.

Chapter 5. Transplantation of financial rules to Bermuda and their effectiveness

This chapter seeks to discuss and to test the validity of the four legal theories at issue, by applying them to the regime between Bermuda and members of the Organisation for Economic Co-operation and Development (OECD) and other countries, and the 1986 Tax Convention between Bermuda and the US.

5.1 Background

From the late 1960s Bermuda began to develop two pillars to its economy; tourism and international business. Until the mid-1980s, the tourism industry remained Bermuda's main source of income, and then international business began to overtake the tourism industry as Bermuda's dominant source of income. Bermuda is now 'the second biggest re-insurance market in the world, with $15 million in activity running through Bermuda [and] the second biggest insurer in the world'. He stated that the 'tax issue has always been an issue' and that there were 'threats of blacklisting' arising from the global 'Insolvency II' project and the TEIAs.[488] Like other offshore jurisdictions, Bermuda has become known as a tax haven.[489]

5.2 TEIAs: the OECD, France, and the threat of blacklisting

Since 2008 the OECD has been encouraged purported tax havens such as Bermuda to enter into TEIA with other countries, primarily those that are members of the OECD. The Agreements came into being with the mixed goals of going after people seeking to hide money generally, and those seeking to fund terrorism.[490] The argument for doing so, according to the OECD, is that the more of these agreements a purported tax haven enters

[488] Interview with Mr. David Lines, a Partner and the Corporate Head of the Reinsurance Department in the Bermuda law firm Appleby, on 2nd November, 2011; Interview with Mr. Shaun Morris, the Managing Partner and a member of the Bermuda based law firm Appleby's Corporate Commercial Department.

[489] United States Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs (107th Congress, First Session) Transcript entitled 'What is the U.S. Position on Offshore Tax Havens?' [Senate Hearing 107-152].

[490] Interview with Mr. Kenneth Robinson, an established and well respected Bermuda Corporate Law Attorney and current corporate law advisor to the Bermudian Government, interviewed in his private capacity and not on behalf of the Bermudian Government, on 24th February, 2014.

into, the more transparent the purported tax haven is in relation to its offshore business sector.

In the case of Bermuda, the recption of these Agreements is ongoing, although the goals have been substantially achieved.[491] This is the case even though the force of Agreements that have been found to be 'one sided',[492] akin to 'a poisoned bond' and leaving Bermuda 'no choice' but to sign them.[493] Of the OECD member countries, France has been the most aggressive in its efforts to force Bermuda to sign a TEIA,[494] threatening to brand Bermuda as a tax haven.

5.2.1 Tax havens

According to the OECD, a tax haven can determined by a number of factors, such as:

1. no or nominal tax on the relevant income;
2. lack of effective exchange of information;
3. lack of transparency; or
4. no substantial activities.

However the OECD has determined that no or nominal tax alone is not sufficient to classify a country as a tax haven.[495] This means that there is no definitive definition. The US has argued that a country with a low tax rate or one below 20% is a 'potential' tax haven,[496] and one US Senator stated that:

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[491] Interview with Mr. Kenneth Robinson, an established and well respected Bermuda Corporate Law Attorney and current corporate law advisor to the Bermudian Government, interviewed in his private capacity and not on behalf of the Bermudian Government, on 24th February, 2014.
[492] Ibid, Mr. Robinson, during the interview, posed the rhetorical question of '*would the OECD be doing this to Bermuda if we had oil or other natural resources*'…going on to say that if Bermuda did…'*they may have taken a different position*' and that '*a lot turns on what goods or products Bermuda supplies*'.
[493] Ibid.
[494] Ibid. Interview with Mr. Shaun Morris.
[495] OECD leaflet entitled 'Countering Offshore Tax Evasion: Some Questions and Answers on the Project, 28 September 2009.
[496] Jane G. Gravelle: Congressional Research Service Report for Congress entitled: 'Tax Havens: International Tax Avoidance and Evasion, January 23, 2013, 6.

> 'tax havens are countries that allow corporations, trusts and other businesses to be established within their territory on the condition that any business they conduct is only with people who are offshore, meaning with people who are not citizens or domestic businesses operating inside the country. He indicated further that offshore tax havens charge hefty fees for establishing and maintaining an offshore business. The offshore businesses are often shell operations, established by attorneys, trust companies or banks within the offshore jurisdiction, and operate under corporate secrecy laws that make it difficult to learn the true owner of a business. The offshore businesses also usually open accounts at banks licensed by the offshore jurisdiction and conduct financial transactions under bank secrecy laws that make it difficult to trace transactions or identify bank account owners'.

He concludes that:

> 'the money deposited in these banks is usually held in correspondent bank accounts that the banks have opened at larger banks in the United States or other countries. Many of the offshore corporations and trusts serve as mere place holders for individuals who want to hide their identity and their activities'.[497]

The US Senate has over the years singled out a number countries as tax havens. However there is an apparent bias, within the US, in favour of purported onshore tax havens (or at least a desire to ignore the existence of onshore tax havens), even though onshore and offshore tax havens can be used for the same purposes. It is very common for offshore tax havens to be linked to the activities initiated by onshore tax havens.[498]

The Canadian government has its own definition of a tax haven:

1. no tax, or very low rates of taxation;
2. strict bank secrecy provisions;
3. a lack of transparency in the operation of its tax system; and

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[497] Transcript of US Senate Hearing 107-152 entitled: 'What is the U.S. Position on Offshore Tax Havens?'; One Hundred Seventh Congress, First Session, July 18, 2001, Senator Carl Levin of Michigan, 6.
[498] Ibid.

4. a lack of effective exchange of information with other countries.[499]

5.2.2 The effect of labelling a jurisdiction as a tax haven

Labelling a country a tax haven has international and legal ramifications as it allows other jurisdictions to levy sanctions, individually or collectively, against the tax haven jurisdiction, especially if the levying of sanctions is contingent on the definition of tax haven being applied.[500]

There are currently several negative outcomes of allowing tax havens to exist. The obvious one is that large sums of money belonging to nationals of other countries are not accessible to their tax authorities, and are sent to offshore tax havens by often complicated or intricate systems known as 'corporate inversion'[501] where a company first incorporated in a high tax jurisdiction subsequently re-incorporates overseas in a low, or no, tax jurisdiction, thereby reducing its tax burden. The corporate governance obligations of these low tax jurisdictions, also tend to be far less or less rigid and convoluted than in a jurisdiction with high taxes, and they use subsidiary banks of large global banks located in low tax jurisdictions, to help these companies or high net worth clients retain huge sums of money.

Many of the large global banks have subsidiaries with private wealth management activities in Hong Kong and the Cayman Islands, and it is estimated that about a third of global offshore wealth is in Switzerland; 20% in Jersey, Guernsey, and Ireland; 20% in the Caribbean and the US; 15% in Luxembourg; and 10% in Singapore and Hong Kong.[502]

One way to deal with the negative outcomes of tax havens is to bring about global tax harmonisation. Doing so would have challenges, in that a jurisdiction or an economic bloc,

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[499] Canada Revenue Agency pamphlet RC4507 entitled: 'Using Tax Havens to Avoid Paying Taxes: Worth the Risk?'; 2.
[500] Jane G. Gravelle: Congressional Research Service Report for Congress entitled: 'Tax Havens: International Tax Avoidance and Evasion', January 23, 2013, 6.
[501] See Generally: Hale E. Sheppard, Fight or Flight of U.S.-Based Multinational Businesses: Analysing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend, 23 NW. J. INT'L L. AND BUS. 551, 554 (2003).
[502] Gabriel Zucman, The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net Creditors?, 1335

such as NAFTA or the EU, may lose the ability to effectively compete in the global markets. This possibility has not gone un-noted by the US or the OECD.

5.2.3 TEIAs and the Watson theory

The Watson theory concludes that any rule or law can be transplanted from one jurisdiction to another, and this includes TEIAs.

5.2.4 TEIAs and the Legrand theory

Bermuda, according to the Legrand theory, did attempt to naturalise the TEIAs by enacting the International Cooperation (TEIA) Act 2005 ('TEIA Act'), to give effect to the TEIA regime.

Unfortunately the Act was problematic for two reasons. Firstly, it clashes with Bermuda's laws on judicial review and the right of an aggrieved person to appeal the decision of a government minister. Bermuda, like many jurisdictions that follow the common law tradition codifies the legal construct of judicial review which allows an aggrieved person or person likely to be affected by a pending decision of the Government to challenge the act or pending action. This includes a Minister of Finance's intrusive but lawful request for information on behalf of an OECD Country or a country that is a member of the TEIA regime. The 'Bunge Ltd' case was, for example, one of the first to challenge a Minister of Finance's request for information, in this case for the purposes of giving effect to a Tax Exchange Information Agreement entered into between Bermuda and Argentina.[503] Judicial Review, as a legal concept, appears to be foreign to some civil law jurisdictions.[504]

Secondly, the provisions of the TEIA Act strike at the heart of the rules of natural justice, namely a person's or company's right to know of the allegations that have been made against them, a right that is enshrined in Bermuda's Constitution.[505] A possible outcome of handing information over to a TEIA country is the loss of property in the form of fines or

[503] Bunge Limited v The Minister of Finance [2012] SC (Bda) 19 Civ (13 March 2013); The Minister of Finance v Bunge Ltd. [2013] CA (BDA) 4 CIV.
[504] Minister of Finance Hon. Bob E.T. Richards statement to the Bermuda House of Assembly after receiving news that France was going to remove Bermuda from its list of black-listed countries: See Bermuda House of Assembly Hansard, parliamentary Session 2013 to 2014 ed.
[505] Bermuda Constitution Order 1968, ss. 6 and 7.

sanctions, or criminal prosecution for offending the TEIA country's laws. The concept of natural justice and the resulting 'right to know' caused France to see this as a reluctance on Bermuda's part to assist it, in contravention of Bermuda's TEIA with France, causing them to temporarily place Bermuda on its list of blacklisted countries..[506]

For these reasons, and because there is nothing barring an OECD country (such as France) from unilaterally placing Bermuda on its own blacklist, it cannot be said that the TEIAs have been naturalised. The mere fact that Bermuda can be blacklisted even though it:

a. has entered into multiple TEIAs with the majority of the OECD membership (creating windows through which to look into Bermuda's international business sector);
b. has entered into a specific TEIA generally with non-OECD countries; and
c. it wishes to ensure that people aggrieved by the receipt of a directive to hand over information, albeit in accordance with a TEIA, have the right to recourse to Bermuda's own legal system (one based on the long established English Common Law which has enshrined in it the rules of natural justice… 'a fair trial'),

imposes a disproportionate burden on the people of Bermuda, bearing in mind that Bermuda does not have any sources of income other than its tourism, finance and re-insurance sectors, and this clearly smacks of agreements entered into under duress. Such an act also smacks of bullying of smaller states by bigger states. This is especially so in light of the fact that a number of the OECD countries such as the US, the UK (in particular the City of London), Denmark, Iceland, Israel and Portugal's all exhibit traits of or fall within the various definitions of tax havens. The US also exhibits a number of tax haven traits, namely:

a. a lack of reporting requirements;
b. a failure to tax interest;
c. exempted passive income that is paid to foreign entities;
d. limited liability incorporation which allows a flexible corporate vehicle not to be subject to taxation; and

[506] Interview with Mr. Kenneth Robinson on 24th February, 2014.

e. in the case of incorporating within certain US states or territories, such as in Delaware, Nevada, Wyoming, and Puerto Rico, low levels of taxation to act as lures for incorporation.[507]

There has been no obvious effort by the OECD or the United Nations to address this form of international bullying and inequality, made worst because a number of the tax havens' sole or primary source of income is (like Bermuda) international business. This is in stark contrast to OECD Countries, such as the US and France, which have vast amounts of natural resources on which to generate sources of income for their respective countries. This form of international bullying and forced international inequality begs the following question: Can one see the OECD countries, as a whole, referring to the US as a tax haven and thus liable to blacklisting by the OECD as a whole, or even by France and the other OECD countries independently? The current state of geopolitics serves to indicate that such an act is very unlikely to happen.[508]

Accordingly, the TEIAs have failed to be naturalised in Bermuda due to the inequality of bargaining power between the OECD and Bermuda and, therefore, have failed to meet the threshold standard necessary to satisfy the Legrand theory.

5.2.5 TEIAs and the Kahn-Freud theory

It was not possible to assess whether TEIAs have been effectively been transplanted under the Kahn-Freud theory, as the necessary information was not available at the time of writing (see Section 4.1.3).

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[507] See: Charles Gnaedinger, 'Luxembourg P.M calls out the U.S. States as Tax Havens' Tax Notes International, April 6, 2009; 'Haven Hypocracy,' The Economist, March 26, 2008; Michael McIntyre, 'A Program for International Tax Reform,' Tax Notes, February 23, 2009, 1021 to 1026; Tax Justice Network, 'Tax Us if You Can', September, 2005; Harry Grubert, 'Intangible Income, Intercompany Transactions, Income Shifting and the Choice of Locations', National Tax Journal, vol. 56, March 2003, Part II, 221 to 242.

[508] See: Hepple, Leslie W. (1986) 'The Revival of Geopolitics', Political Geography Quarterly; Ikenberry, G. (1998) 'Constitutional Politics and International Relations', European Journal of International Relations, 147-177.

5.2.6 The Legrand theory and the combined Zhreing and Zweigert and Kotz theories

Efforts have been made by Bermuda to bring about greater transparency by entering into a large number of TEIAs with member states of the OECD. Although greater transparency has been achieved, the fact that doing so failed to stop a member of the OECD (France) from placing it on a blacklist of tax havens indicates that the regime cannot be said to have been useful for Bermuda. This in turn means that Bermuda's TEIAs have failed to satisfy the 'usefulness' variable which is at the core of the combined Zhreing and Zweigert and Kotz theories. At best, TEIAs have been useful for members of the OECD only, allowing them to probe into Bermuda's finance and re-insurance sectors.

5.3 Bermuda and 1986 US Tax Treaty 1986

On behalf of Bermuda, in 1986, the UK signed a tax treaty ('the Treaty') with the US. This had the effect of making the Treaty a part of Bermuda's separate legal order or separate legal system in the form of the USA, Bermuda Tax Convention Act 1986 (which transformed the Treaty into an enactment of Bermuda's statute laws or rules. The Treaty and the 1986 Act also, collectively, acted as the means by which the Treaty was tranplanted into Bermuda's statue book.

The Treaty concerned the taxation of insurance enterprises and mutual insurance tax matters,[509] wherein the US would grant Bermuda a waiver of insurance excise tax, the effect of which was to do away with double taxation on income generated by insurance companies doing business with Bermuda.[510] Fortunately for Bermuda but not for the US, this resulted in zero tax for insurance companies doing business with Bermuda. In other words the affected insurance businesses paid no taxes within the US (due to a 'tax loophole') or in Bermuda, as Bermuda does not charge income tax on income earned.[511]

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[509] Treasury Department Technical Explanation of the Treaty, 'Tax Notes Today', Sept. 29, 1986: LEXIS. 86 TNT 195 -12.
[510] Testimony of Mindy Pollack before the US Senate Foreign Relations Committee, TAX NOTES TODAY. Sept. 29th, 1986: LEXIS, 86 TNT 195-11.
[511] 'Metzenbaum (*Senator) Amendment Kills Provisions in Barbados and Bermuda Tax Treaties to Waive Some Excise Taxes on Insurance Premiums': TAX NOTES TODAY, Oct. 14th, 1988: LEXIS, 88 TNT 209-42.

The primary intent of the Treaty was that the US's wished to bring about a sense of fairness between Bermuda and Barbados within the international insurance industry.[512] They were also of the view that granting such assistance to Bermuda would further diplomatic relations between Bermuda and the US[513] during the Cold War, especially in relation to the existence of the two naval bases in Bermuda.[514]

At the conclusion of the Cold War, and the resulting closure the bases, the tax loophole was closed.[515] One would have assumed that the closing of the tax loophole would have silenced those who had been branding Bermuda as a tax haven. This was not to be the case as, with the advent of the twenty-first century, the repeated branding of Bermuda as a tax haven (especially by the OECD) dramatically intensified.

5.3.1 The Treaty and the Watson theory

The Watson theory concludes that any rule or law can be transplanted from one jurisdiction to another, with the inference being made that no other variable or variables need be considered when trying to determine if a law has been effectively transplanted. The 1986 Bermuda and USA Tax Treaty was, indeed, transplanted from the US and originated from a diplomatic good will gesture on the part of the US toward Bermuda. By affirming that it was transplanted from the US to Bermuda, this serves as another example of where one can conclude that the Watson theory is a valid theory. On the contrary the Watson theory is proven, once again, to be false in relation to 1986 Bermuda and USA Tax Treaty by virtue of:

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[512] Testimony of Alan L. Fischl before the U.S. Joint Tax Committee, TAX NOTES TODAY, Sept, 1986: LEXIS, 86 TNT 195-7.
[513] Testimony of Mr. J. Roger Mentz, September 25th, 1986, Senate Foreign Relations Committee: Tax Notes Today, Sept, 29th, 1986: LEXIS. 86 TNT 195-10.
[514] Frank J. Parker, 'Closing Bermuda's U.S. Naval Bases', 22 REAL EST. ISSUES (August 1997).
[515] 'Metzenbaum (*Senator) Amendment Kills Provisions in Barbados and Bermuda Tax Treaties to Waive Some Excise Taxes on Insurance Premiums':Premiums': TAX NOTES TODAY, Oct. 14th, 1988: LEXIS, 88 TNT 209-42.
[515] Testimony of Alan L. Fischl before the U.S. Joint Tax Committee, TAX NOTES TODAY, Sept, 1986: LEXIS, 86 TNT 195-7.

(a) the fact that the 1986 Treaty had to be naturalised by Bermuda which was achieved by way of the USA, Bermuda Tax Convention Act 1986 (enacted to give effect to the 1986 Treaty); and
(b) the existence of the combined Zhreing and Zweigert and Kotz theories. This is because the Watson theory does not have, at its core, a demanding desire to ensure a law works once it has been transplanted.

5.3.2 The Treaty and the Legrand theory

The Legrand theory concludes that a rule or law can only be 'effectively' transplanted when there is a recognition of the parent and recipient jurisdiction's history and culture, and an understanding of its legal systems. Bermuda did naturalise the 1986 Treaty by enacting the USA, Bermuda Tax Convention Act 1986, thereby taking into account Bermuda's desire to compete effectively for insurance business with Barbados.

However the original 'shelf life' of the 1986 Treaty, (1986 to 1998, or the date of inception until the US overriding Cold War contingent concerns ended with it the need to have two naval bases in Bermuda), suggests that the Legrand theory may have a flaw which suggests that the Legrand theory only applies to laws or rules that are not subject contingent events.

5.3.3 The Treaty and the Kahn-Freud theory

It was not possible to assess whether this treaty was effectively been transplanted under the Kahn-Freud theory, as the necessary information was not available at the time of writing (see Section 4.1.3).

5.3.4 The Bermuda and US Tax Treaty of 1986: The Dichotomy of the combined Zhreing and Zweigert and Kotz theories

The intended purpose of the 1986 Treaty was to give Bermuda an ability to compete with Barbados for American insurance business. This purpose was achieved, thereby providing some 'usefulness' for the US and for Bermuda. This concept of 'contingent usefulness' is not a measure of certainty by which one can determine if this theory has been satisfied. At best, the 1986 Treaty can only be said to satisfy the combined Zhreing and Zweigert and Kotz theory's 'usefulness' variable.

5.3.4.1 Interim conclusion- The Bermuda and US Tax Treaty of 1986

The hypothesis of this thesis, in relation to the Beermuda and US Tax Treaty of 1986 has been proven. This has been achieved by determining whether this rule was capable of being transplanted from the OECD to Bermuda unconditionally. The Legrand and the the combined Zhreing and Zweigert and Kotz theories, being two of the theories used in this

thesis to determine whether this rule and law could be transplanted unconditionally, serve to indicate that this rule was incapable of being transplanted to Bermuda uncondtionally. Again, the effectiveness of transplanted legislation requires crafting the same and taking into account the perspectives of the government or governments (i.e. in the present case Canada and the Bermuda Governments) that caused the legislation to be transplanted, and the people who affected by it. Bermuda was able to achieve some usefulness from the 1986 Treaty, satisfying the 'usefulness' variable which is at the core of the combined Zhreing and Zweigert and Kotz theories. Like the Legrand theory, there appears to be a lacuna in the combined Zhreing and Zweigert and Kotz theories. The 1986 Treaty only remained useful until the end of the Cold War.

CHAPTER FIVE CASE STUDY SYNOPSIS

1. Factually, the 1986 US Tax Treaty was, as determined by way of the case studies, transplanted to Bermuda by the US, UK and Bermuda (as indicated by way of its existence within Bermuda's staute book).

2. Theoretically, the 1986 US Tax Treaty was, as determined by way of the case studies, to be either :

a. transplanted (in accord with the Watson and Kahn-Freund theories);

b. not transplanted (in accord with the Legrand theory);

c. capable of being transplanted if 1986 US Tax Treaty could be used for the intended purpose (as determined by Bermuda or the people of Bermuda as end users) or for alternative purpose (in accord with Jhreing, Kahn-Freund. Zweigert & Kotz theories).

3. Effectiveness, in the case of the 1986 US Tax Treaty was and ultimately determined by the existence of the rule of law. has been determined to have been met because this rule was applied to all of the people of Bermuda and not in an arbitrary manner by the Bermuda Government as primary end user; AND

4. Factually, the TEIA's were, as determined by way of the case studies, transplanted to Bermuda by the US, UK and Bermuda (as indicated by way of its existence within Bermuda's staute book).

5. Theoretically, the TEIA's were, as determined by way of the case studies, to be either :

a. transplanted (in accord with the Watson and Kahn-Freund theories);

b. not transplanted (in accord with the Legrand theory);

c. capable of being transplanted if the TEIA's could be used for the intended purpose (as determined by Bermuda or the people of Bermuda as end users) or for alternative purpose (in accord with Jhreing, Kahn-Freund. Zweigert & Kotz theories).

6. Effectiveness, in the case of the TEIA's were and ultimately determined by the existence of the rule of law. has been determined to have been met because this rule was applied to all of the people of Bermuda and not in an arbitrary manner by the Bermuda Government as primary end user.

Chapter 6. Transplantation of Orders in Council to Bermuda and their Effectiveness

This chapter seeks to discuss and to test the validity of the four legal theories at issue, by applying them to the Ottawa Treaty, the Landmines Act 1998, and the Landmines Act 1998 (Overseas Territories) Order 2001 (the rules) and to determine if these rules collectivel satisfy the rule of law- that they are not arbitrary..

6.1 Orders in Council

Orders in Council are used by the UK, from time to time, to make rules for Bermuda and the other Overseas Territories, most notably for the purpose of extending or transplanting the UK's United Nations treaty obligations to Bermuda (see Chapter 1).[516]

The rationale for Orders in Council is when there is a common purpose, and the Bermudian and UK governments agree that there is a common need to extend a specific legal obligation via an Order in Council. However the constitutional law relationship can cause friction, as there are times when the interests of the UK are not the same as those of Bermuda. The conflict of interest may be apparent prior to the extension of an Order in Council, or only afterwards. To avoid such conflicts, the UK Government tends to consult the Bermudian Government prior to the extension of an Order in Council, but there is nothing in law that mandates consultation or consent. Indeed the likelihood of conflicting purposes and this lack of a need for an agreed mandate was noted in the Privy Council authority of *Madzimbamuto v Lardner-Burke and George*,[517] where Lord Hoffmann held:

> 'Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the UK. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review or prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her UK Ministers, to prefer the interest of the UK'.

[516] See: Ian Hendry and Susan Dickson, British Overseas Territories Law, Hart Publishing Ltd. 2011, 22.
[517] Ibid, para. 49

6.2 Orders in Council and the Ottawa Treaty

The Ottawa Treaty bans the use of antipersonnel landmines.[518] It was chosen as an example in this thesis for three reasons. First, it is a seemingly non-contentious example of where there is a recognised common need to uphold humanitarian law by agreeing to banning the use of landmines. Second, it is an example of where no realistic or practical consideration was made of the un-naturalised provisions of the parent Treaty (specifically paragraph 1 (e)), and third, because it is an example where of Bermuda and the UK did not foresee some unintended consequences.

6.2.1 The negative implications of extending the Ottawa Treaty to Bermuda

The negative implications of the extension of the Ottawa Treaty[519] to Bermuda using the legislative tool of an Order in Council arise from the fact that the US, a major military superpower, and a key trading partner of Bermuda, has not signed the Ottawa Treaty and continues to use and stockpile large numbers of landmines around the world, principally in demilitarised zone located between North and South Korea, although it has said it will be bound by the Treaty's terms.

Although there is a global acknowledgement that landmines represent a lingering threat to civilian populations, there is a desire amongst some countries to retain them as defensive weapons. Indeed, the conflicting interest between humanitarian benefit and defensive military benefit has been a subject of concern for several US Presidents. The Ottawa Treaty has been ratified by 133 countries, including Bermuda. However Article 1(e) of the Ottawa Treaty is a provision that has caused military planners in the US continued concern, and should do likewise for both the UK and the Bermudian Governments. This is because the wording of Article 1(e) is ambiguous and open to interpretation, and may very well lead to unintended difficulty if a US flagged ship or aircraft carrying land mines entered Barbadian territory. Bermuda would be obligated under Article 1(e) to seize and destroy the landmines under the terms of the Ottawa Treaty and of the Order in Council.

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[518] Convention On The Prohibition Of The Use, Stockpiling, Production And Transfer Of Anti-Personnel Mines And On Their Destruction, United Nations, *Treaty Series,* vol. 2056, 211; C.N.163.2003.TREATIES-2 of 3 March 2003

[519] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999) [the Ottawa Treaty].

Although these difficulties and obligations are entirely hypothetical, there is currently nothing that would prohibit Bermuda from seizing and destroying the landmines owned by the US, as doing so would be in keeping with the purpose of the Ottawa Treaty and the Order in Council.[520] This is especially so as the UK did nothing to naturalise the Ottawa Treaty or the Order in Council for the purposes of effective operation in Bermuda. Giving effect to the Treaty may be effective for the UK's humanitarian purpose of upholding humanitarian treaty obligation but doing so creates a very real possibility that any enforcement actions by Bermuda (as agent of the UK) could cause Bermuda to be liable sanctions by the US government.

6.3 Orders in Council and the Watson theory

The Watson theory concludes that any rule or law can be transplanted from one jurisdiction to another, implying that no other variables need be considered when trying to determine if a law has been effectively transplanted. The Treaty was imposed by the UK on Bermuda.

6.4 Orders in Council and the Legrand theory

The Legrand theory concludes that a rule or law can only be 'effectively' transplanted from one jurisdiction to another when there is a recognition and understanding of the parent and recipient jurisdictions':

(a) history;
(b) culture; and
(c) legal systems.

In other words, this recognition and understanding is achieved by 'naturalising' the transplanted law to ensure that it can 'effectively' work within the recipient jurisdiction's legal system or statute book.[521] Doing this, the naturalisation, also serves to create a new

[520] Landmines Act 1998 (Overseas Territories) Order 2001.
[521] Pierre Legrand, 'The Impossibility of 'Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 p116–17.

law for the recipient as it is no longer looks or functions as it did (or could have done) when it was in the parent jurisdiction.

The UK, in contravention of the Legrand theory, did nothing to naturalise the Order in Council. This is because the Order in Council did nothing to address the apparent likelihood that Bermuda, acting as agent for the UK, would be obligated under the Order in Council and the Treaty, to seize and destroy illegal contraband property of the US, risking an international standoff between Bermuda (as agent of the UK) and the US if the latter were unwise enough to use Bermuda as a transhipment location. Most worrying about this failure to naturalise the Order is that the US is Bermuda's nearest geographical and largest international trading partner, and any possible standoff would most likely affect Bermuda's trading relationship with the US and matters of military assistance via the NATO protection umbrella.

The UK Government's apparently altruistic reason for agreeing to and extending the Ottawa Treaty to Bermuda, to uphold a human rights treaty, by way of the Order in Council, serves as an act that conflicts with the interest of Bermuda. This conflict of interest, according to and by applying the rationale of Lord Hoffman,[522] takes place within the constitutional hierarchy that exists between the UK (as the parent country having responsibility for Bermuda's international affairs) and Bermuda (an overseas territory of the UK).

In summary although the UK Government and the Bermudian Government failed to naturalise the Order in Council, in accordance with the Legrand theory, their failure do not make the Legrand theory invalid, for had the UK Government and the Bermudian Government adhered to this theory, by taking into account Bermuda's neighbour the US's continued use of land mines, the Order in Council could have been effectively naturalised for use in Bermuda.

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[521] Richard G. Small, 'Towards a theory of Contextual Transplants', Emory International Law Review, Vol. 19, 1431; Pierre Legrand, 'Against a European Civil Code', 60 Modern Law Review 44 (1997); Pierre Legrand, 'How to Compare Now', 16 Legal Studies 232 (1996).
[522] Madzimbamuto v Larder-Burke and George [1969] 1 AC 645 (PC), 722.

6.5 Orders in Council and the Kahn-Freud theory

It was not possible to assess whether this treaty was effectively been transplanted under the Kahn-Freud theory, as the necessary information was not available at the time of writing (see Section 4.1.3).

6.6 Orders in Council and the combined Zhreing and Zweigert and Kotz theories

The combined Zhreing and Zweigert and Kotz theories rely on the utility variable, and serve as alternatives or substitutes for the Legrand theory because they have, at their core, a demand for a way to make a law work once it has been transplanted.

The purpose for extending the Order in Council to Bermuda by the UK was to uphold a human rights treaty by banning the use of landmines. This is in keeping with the 'usefulness' variable inherent within the combined Zhreing and Zweigert and Kotz theories. Bermuda's military does not have as part of its offensive or defensive military equipment arsenal a single landmine,[523] and so by this measure the transplant was successful.

To ensure that Bermuda has the last and final say as to which treaties are extended to it, it will necessitate Bermuda becoming its own sovereign state, something that has been rejected in plebiscite. Until that time comes, the only equitable solution would be for the UK to exercise great restraint or greater consideration in the use of its inherent and ultimate colonial ability to impose treaties on Bermuda by way of Orders in Council.

6.7 Interim conclusion- Orders in Council/ Landmines Treaty

The hypothesis of this thesis, in relation to the Beermuda and US Tax Treaty of 1986 has been proven. This has been achieved by determining whether this rule was capable of being transplanted from the OECD to Bermuda unconditionally. The Legrand and the the combined Zhreing and Zweigert and Kotz theories, being two of the theories used in this thesis to determine whether this rule and law could be transplanted unconditionally, serve to indicate that this rule was incapable of being transplanted to Bermuda uncondtionally.

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[523] http://www.bermudaregiment.bm/equipment/weapons.

This is because the UK, in contravention of the Legrand theory, did nothing to naturalise the Order in Council. Further, the Order in Council did not contain within it anything to address the apparent likelihood that Bermuda, as agent for the UK, would be obligated under the Order in Council and the Treaty, to seize and destroy illegal contraband property of the US, thereby risking an international standoff between Bermuda (as agent of the UK) and the US if the latter was unwise enough to use Bermuda as a transhipment location. Moreover, most concerning about this failure to naturalise the Order is the fact that the US is Bermuda's nearest geographical and largest international trading partner, and any possible standoff would most likely affect Bermuda's trade relationship with the US and or matters of military assistance via the NATO protection umbrella.

CHAPTER SIX CASE STUDY SYNOPSIS

1. Factually, the Ottawa Landmines Treaty was, as determined by way of the case studies, transplanted to Bermuda by the UK (as indicated by way of its existence within Bermuda's staute book)[524].

2. Theoretically, the Ottawa Landmines Treaty was, as determined by way of the case studies, to be either :

a. transplanted (in accord with the Watson and Kahn-Freund theories);

b. not transplanted (in accord with the Legrand theory);

c. capable of being transplanted if the Ottawa Landmines Treaty could be used for the intended purpose (as determined by Bermuda or the people of Bermuda as end users) or for alternative purpose (in accord with Jhreing, Kahn-Freund. Zweigert & Kotz theories).

3. Effectiveness, in the case of the Ottawa Landmines Treaty was and ultimately determined by the existence of the rule of law. has been determined to have been met because this rule was applied to all of the people of Bermuda and not in an arbitrary manner by the Bermuda Government as primary end user.

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[524] www.bermudalawsonline.bm

Chapter 7. Recommendations for the future: Bermuda onward and upward

This chapter recommends solutions to specific cultural and historical social, economic and legal problems of Bermuda, as explored in the previous chapters of this thesis. The specific social, economic and legal problems highlighted in this thesis are:

1. Bermuda's gang problem[525] affecting predominantly Bermuda's young black males (see Chapter 3);

2. Bermuda's unwanted status as a tax haven and the resulting imposition of TEIAs (and enabling legislation) imposed upon it by the likes of the OECD S(see Chapter 4); and

3. the imposition of Orders in Council on Bermuda by the UK (see Chapter 5).

More often than not it is very easy to identify problems but difficult to identify absolute solutions, which represents the dichotomy in the preparation of this chapter. Each recommended solution should not be seen as a stand-alone solution, but rather as a a continuum.

7.1 Bermuda's Gang Problem

The finding or the offering of solutions to Bermuda's unlawful gang problem was done with the following haunting statements from Bermuda's history in mind:

> 'Those who cannot remember the past are condemned to repeat it;'[526]
>
> 'If Bermuda is to remain prosperous, it must be peaceful. If it is to be peaceful, Bermudians cannot afford to forget or to ignore the issues which

[525] The definition of 'unlawful gang' is set out in ss 70JA and 70JB Bermuda's Criminal Code Act 1907, and are transplanted from Canada's Criminal Code s 467.
[526] Attributed to Jorge Agustín Nicolás Ruiz de Santayana y Borrás, aka George Santayana.

> have hitherto divided them. They need to face these and, in particular, to take stock of race relations'.[527]

These statements can be summed up best by concluding that the answer has been staring the people of Bermuda and its successive governments in the face from the very first date that the gang problem began, in the form of Bermuda's unsettled history and those encapsulated by the various Reports that have resulted from Bermuda's oftentimes volatile history. Had successive Bermudian or UK governments been brave enough to follow and implement the recommendations put forward by these Reports the gang problem may not have become a problem at all.

The lure of gangs for young black Bermudian males can be summarised as follows (see Chapter 3):

(a) a desire to attain fame; and

(b) a sense of identity or belonging, by having an affiliation with those already in the Bermudian gangs.[528]

The cause of these lures has been the successive failure of the Governments of Bermuda and the UK to follow up and act on the use of Rule of Law Indicators,[529] indicators

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[527] From the declassified letter of Sir Peter Ramsbotham, former Governor of Bermuda and the Governor who oversaw the acts of capital punishment in Bermuda (i.e. the hanging of Erskine Burrows and Larry Tacklyn for five murders including the assassinations of the former Governor of Bermuda Sir Richard Sharples and his Aide de Camp Captain Hugh Sayers), dated 15th February 1978, sent by him to the UK Foreign and Commonwealth Office in the aftermath of the 1977 Riots, the Islands worst bout of civil unrest in its history.

[528] Interviews with Deputy Director of Public Prosecutions, Ms. Cindy Clarke, and Bermuda Police Service Superintendent, Mr. Darrin Simons.

[529] According to the United Nations, 'Rule of Law Indicators' refers to:
'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.
See: Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), para. 6 and the United Nations Rule of Law Indicators, Implementation Guide and Project Tools. Note here that the word "implementation" is used as part of the name given to this Guide.

contained in successive Commission of Inquiry Reports hidden on the back shelves of the Bermuda Archives and the Bermuda Library.[530]

Within the successive Reports can be found a historical review of Bermuda's social and economic problems, with modest positive change having been made between each Report's creation, most notably in regards to race relations. A review of Bermuda's social and economic history from the 1960s is akin to reading about the continuous demolition of villages of wooden houses by hurricanes and their rebuilding. This is to say, successive Bermudian and UK Governments have appeared only to be interested in finding temporary solutions to the Island's social and economic problems, rather than finding long term solutions, such as replacing wooden houses with more storm-resistant brick houses. Like all countries, Bermuda has and will continue to have its share of social and economic problems. In order to prepare for these problems, Bermuda needs to move toward relying on solid solutions but first it needs to deal with the results of the problems it faced in the 1960s, most notably racial and economic inequality.

In any event the specific subject warning signs of things to come, and of their possible solutions, can be found in the rule of law indicators as encapsulated by the:

1. Wooding Report;[531]

2. Pitt Report;[532]

3. Tumin Report;[533] and

4. Mincey Report.[534]

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[530] Wooding Report, Pitt Report,.
[531] Wooding Report, Bermuda Civil Disorders 1968.
[532] Pitt-Report-1978, Report of the Royal Commission into the 1977 Disturbances. See also: Sir Peter Ramsbotham's Declassified Written Report of 15th February 1978, sent to the UK Foreign and Commonwealth Office in the aftermath of the 1977 Riots.
[533] Tumin Report, 1992, Report of the Criminal Justice Review Board.
[534] Mincy Report, A Study of Employment, Earnings, and Educational Gaps between Young Black Bermudian Males and their Same-Age Peers.

Almost all of these Reports were commissioned by the Bermudian Government or the UK Government in the aftermath of failed Bermudian Government policies on education, or civil unrest which has usually been the result of economic or racial tensions. The Reports allowed the Bermuda and UK Governments to be seen to be doing something in the short term, but there appears to have been no political will to seek long term or sustained means for implementing the recommendations made in the Reports.

7.1.1 The Wooding Report, 1968

The Wooding Report's primary area of examination were racial tension, a lack of job opportunities, Bermuda's artificial society, drink and drugs, a general disaffection with the police; and Bermuda's education system. Unfortunately, each and every one of these issues has continued unchecked and, arguably, has deteriorated 1968. By way of the Wooding Report's primary area heads of examination, which remain unresolved and alive today in Bermuda, I now use the same as a means of offering solutions to the specific social, economic and legal problems currently being faced by Bermuda.

7.1.1.1 Race relations

Problem: According to the Wooding Report, racial conflict or racial division was, in the late 1960s, an ongoing problem within Bermuda. Regrettably, it continues to be a problem today. This is most evident in Bermuda's party politics. Its majority black population, for example, has tended to vote for the Progressive Labour Party. The minority white population has tended to vote for the One Bermuda Alliance (formerly the United Bermuda Party).[535]

Solution: Bermuda needs to address its poor and toxic race relations problem. This can be done by both political parties leading by example to address the issue head on, rather than taking advantage of it as a means of garnering votes. This can be done by way of a Bermudian type of Truth and Reconciliation Commission, with a mandate to:

(a) invite open discussion on specific unresolved racial injustices that have occurred in the past; and

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[535] Reuters World Online, Bermuda Opposition Party hurt by charges of racism, January 21, 2007.

(b) invite solutions from the Bermudian people and businesses for the resolution of specific unresolved racial injustices.

In an effort to ensure that it does not become a mere venue to just talk or vent, the Commission's mandate needs to be one of actually finding solutions. To do otherwise is to only perpetuate the toxic racial division that exists within Bermuda.

7.1.1.2 Job Opportunities and Bermuda's artificial society

Problem: According to the Wooding Report and successive census reports, the incomes of black Bermudians are consistently lower than those of white Bermudians. Because of Bermuda's image as a playground for the wealthy many people outside of Bermuda could be forgiven if they were of the view that extreme poverty does not exist in Bermuda, and that job opportunities are very different for black and for white Bermudians. The wealth gap is continuously widening. During a recent exposé and documentary on Bermuda's poor, *Poverty in Paradise: the Price We Pay***,** shocking revelations were made that there were single black Bermudian mothers and their children living rough in abandoned cars, on beaches and in caves as these mothers could not afford to pay the high rents and high food prices.[536]

During one of the interviews, it was noted by one of the black Bermudian mothers that the black gang members were born in the 1990s, the period in which Bermuda's international business sector began to take root and flourish in terms of the numbers of international businesses entities moving to Bermuda. This was also a time when Bermudian employers began to hire unskilled or low skilled workers from overseas, to do the menial and low paid jobs that unskilled or low skilled Bermudians would not do or could not afford to do. In the case of the latter, the wages would not be enough to allow a single unskilled and in some cases skilled Bermudian mother to be able to pay for rent, utilities and for food. Some of the mothers also said that there may have been a very real possibility that the black young men, born in the 1990s to single mothers, may have seen their mother struggle to feed them and to keep a roof over their heads. By seeing this, the exposé mothers suggest, the

[536] This is a video documentary that illustrates the level of hidden poverty that exists within Bermuda, most notably affecting single young black Bermudian mothers and their children. Copies of the video can be obtained in Bermuda from CURB (Citizens Uprooting Racism in Bermuda).

black Bermudian males would be easily lured into the fast money making illegal drug business, businesses that became franchises run in competition by the then developing gangs.[537]

Solutions: Bermuda's economy needs to become more diversified, rather than relying on income generated from the tourism and international business sectors.[538] Doing so could mitigate against the harsh effects often incurred by societies generally during times of global recession.[539] In addition, Bermuda needs to become more self-reliant rather than having its people at the mercy of overseas food producers.[540] This would allow every Bermudian the dignity of being able to be part of the workforce and be able to sustain themselves and live a decent life in Bermuda.

Bermuda also needs to change its inequitable taxation system from one relying on import duties to one being reliant on income. Doing so would allow each person, based on income, to pay into the government coffers their fair share of taxes. To do otherwise is to allow the wealthy Bermudian to pay a lower level of taxation than a Bermudian in a medium to low income bracket.[541] All of these cumulative solutions, too, would go a long way to make Bermuda a more equitable society, regardless of one's race.[542]

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[537] Ibid.

[538] See Chapter 6.4 of this thesis and its sub-chapters, for suggestions put forward by the author of this thesis on how Bermuda can diversify its economy.

[539] A, T. Piketty, and E. Saez, 'Top Incomes in the Long Run of History', Journal of Economic Literature, 49, no. 1(2011), 3 to 71;

[540] According to the 2015 CIA World Fact Book, Bermuda's annual produce production rate (compiled on the basis of 2013 information gathered) was a shocking 0.7%. This information affirms that Bermuda is heavily reliant on produce imported into Bermuda for its survival. This information also indicates that Bermuda is in dire need of diversified economy, especially one that would allow it to grow its own produce at such a level that it could comfortably feed its own people. See: http://www.theodora.com/wfbcurrent/bermuda/bermuda_economy.html
SOURCE: 2015 CIA WORLD FACTBOOK AND OTHER SOURCES.

[541] In order to gain an understanding of the issues surrounding poverty in the world, in particular the issue of world's wealth being held only by a select few, see: A, T. Piketty, and E. Saez, 'Top Incomes in the Long Run of History', Journal of Economic Literature, 49, no. 1(2011), 3 to 71.

[542] During his discussion about the lack of economic parity in Bermuda, in his chapter entitled 'Then & Now: Two Bermudas', Cordell W. Riley (a former Bermudian Government Statistician) indicated that on the basis of his research between the years 1991 to 2010, the median monthly income earnings of Bermudians by race in administrative and managerial positions, and by level of qualification, white Bermudian incomes consistently

7.1.1.3 Drink and Drugs

Problem: The Wooding Report identified drink and drugs as major causes leading to the continued societal erosion of Bermudian society, most evident within the black population.[543] Since the publication of the Report, successive Bermudian Governments have made great strides in trying to tackle these substance abuse problems that were, at the time of the Wooding Report's publication, becoming endemic. In relation to Bermuda's fight against the illegal drugs trade, successive Bermudian Governments and the UK Governments do not appear to have taken the damaging impact of this scourge seriously. This is best illustrated by the fact that Bermuda does not have a dedicated Coast Guard Service (with air and waterborne assets), with the primary mission to monitor and intercept suspect marine traffic entering Bermudian territorial waters. At most Bermuda has a few unarmed boats (made of rubber and fiberglass hulls), manned by unarmed members of the Bermuda Police Service and on occasion the Bermuda Regiment (Bermuda's local defence force).[544]

Solution: Bermuda needs to create its own full time armed Coast Guard Service to stop the importation of illegal drugs by sea into Bermuda. However, the UK in the form of the Royal Navy is responsible for the defence of Bermuda's territorial waters. The role of the Royal Navy in the case of Bermuda, presents as something of a conundrum. Does the defence of Bermuda mean:

(a) the use of Royal Navy assets only to deter or repel aggressive actions such as an invasion by a foreign State; or

(b) the use of Royal Navy assets to deter or repel aggressive actions such as an invasion by a foreign State *and* the illegal importation of drugs into Bermuda?

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outpaced the incomes earned by black Bermudians. This clearly demonstrates that Bermuda is dire need of actions (perhaps on the part of the Bermudian Government) that would bring about economic parity between black Bermudians and white Bermudians. See: Jonathan D. Smith, Island Flames, Ten Ten Publications, 2015. 267 to 279.

[543] Wooding Report, Bermuda Civil Disorders 1968: Report of the Commission and Statement of the Government of Bermuda, The Island Press, 1969.
[544] Bermuda Police Service 2007/2008 Annual Report, 7 to 9.

The answer is surely the latter. There is precedent for this as illustrated by the Falkland Islands conflict of 1982, and the Royal Navy's routine anti-drug patrols in the Caribbean Sea and North Western Atlantic in the form of dedicated Caribbean Guard ships.[545] Having Royal Navy assets many miles from Bermuda serves to render the presence of the Royal Navy in the nearby Caribbean Sea as feckless.

The lack of a dedicated Bermudian Government or a UK Coast Guard Service, therefore, continues to leave Bermuda wide open for drugs to be smuggled into Bermuda by sea. Any measures taken on land by the Bermudian Government to deter the use of imported illegal drugs into Bermuda is simply rendered useless as long as Bermuda cannot interdict import.

One major solution for dealing with Bermuda's illegal drugs problem would be the creation of a full time armed coast guard service, of a size commensurate with Bermuda's size but similar in role to that of the US Coast Guard Service (i.e. having the tasks of armed illegal drug interdiction, water pollution prevention, and search and rescue).[546]

7.1.1.4 General disaffection with the police

Problem: The Wooding Report highlighted that the Bermuda Police Service was then made up of mostly white non-Bermudian police officers from the Caribbean and the UK. It is obvious why this factor alone would give rise to general Bermudian disaffection with a mostly white non-Bermudian. A majority of Bermudians in the 1960s appeared to be against a police force that was majority white and majority non-Bermudian. White officers from the UK, when viewed objectively, would remind 1960s Bermudian's of their status as a colonial people, with the inference that they are people of lessor value within the colonial construct.[547] Although great strides have been made to reduce the number of non-Bermudian and white police officers in the Bermuda Police Service over the years, the Bermuda Police Service still remains a police service that is composed of a majority of non-Bermudian police officers.

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[545] Ministry of Defence: Overseas Territories: The Ministry of Defence's Contribution, 2015, 1 to 5.

[546] For a full understanding of the roles performed by the United States Coast Guard, see the document entitled: The United States Coast Guard in the 21st Century, President's Interagency Task Force on United States Coast Guard Roles and Missions Washington, D.C. January 2000, 1.

[547] Eva Hodgson, Black Power in Bermuda by Quito Swan; and Jonathan D. Smith, Island Flames, Ten Ten Publications, 2015.

This matter highlighted by the Wooding report may not just be a problem about racial or ethnic diversity. The general disaffection with the Police may then, as may currently be the case, be enflamed the draconian laws that the Bermuda Police Service was then and still is now being called upon to enforce. As indicated in the Tumin Report, Bermuda has a long tradition of draconian laws, in the form of legislation that tends not to have the goal of regulating human behaviour, but rather of punishing bad behaviour.[548] These elements as a collective (the combination of draconian laws of Bermuda and the nationality and the racial makeup of the Bermuda Police Service) may also explain why the Bermuda Police Service has continued to have difficulty in attracting sizable numbers of Bermudians to join its ranks.[549]

Solution: Bermuda needs to put in place a fully functioning Law Commission, with one of its mandates being a focus on ensuring that Bermuda's laws are effective and not overly punitive or outright draconian. Although Bermuda enacted legislation in 2009 for the creation of a Law Commission, it has yet to be set up.[550] By having a Law Commission in place, Bermuda would be able to continuously reform its laws to ensure that they remain current, and as a means of trying to ensure that its laws have a preference for regulating human behaviour rather than for punishing human behaviour.[551] This, in turn, could allow the officers of the Bermuda Police Service not be seen as enforcers of draconian laws that have become tainted as the tools of colonial masters, but of laws generally, without regard to race or nationality.

7.1.1.5 Bermuda's Education System

Problem: One of the various problems raised by way of the Wooding Report was the fact that Bermuda's education system in the late 1960s was one of two systems: one where white Bermudian children from wealthy families were afforded a quality education; and

[548] Tumin Report, 1992, Report of the Criminal Justice Review Board.
[549] Jonathan D. Smith, Island Flames, Ten Ten Publications, 2015.
[550] Law Reform Commission Act 2009.
[551] Such as the Law Commission of the UK, established by the Law Commissions Act 1965; Law Reform Commission of Manitoba (Canada) established by the Law Reform Commission Act 1970.

one where black Bermudian children, coming from mostly poor families, were afforded an inferior education.[552]

White Bermudian children went to schools that were better housed, better staffed, and better supplied with equipment and materials than the schools that black Bermudian children attended.[553] It is therefore obvious that white Bermudian children were given a greater chance at attaining economic success and social stability than their fellow black Bermudian children, with race being the primary deciding factor.

Solution: The obvious solution here is that the Bermudian Government, in the 1960s, had to do away with legalised racial segregation; do away with the economic disparities existing between the two education systems; and integrate the two school systems.

Although schools in Bermuda were desegregated in 1965, racial and economic division still remain factors within Bermuda's education system, with more white Bermudian children attending affluent private schools than black children.[554] In the case of the latter, black Bermudian children are in the majority at the Government funded public schools.[555] Therefore, the matters of racial division and economic inequality in Bermuda's schools still remain as matters that require resolution.[556]

7.1.2 The Pitt Report, 1978

The Pitt Report examined, primarily, the following issues:

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[552] Wooding Report, Dissatisfaction and Inquiry, para. 132, 96.
[553] According to the Mincy Report, between 1991 to 2000, only 12 percent of white students attended public, senior secondary schools, while 70 percent of black students attended public schools. See: Mincy Report, 6.
[554] Keith Forbes, Bermuda's History from 1952 to 1999: http://www.bermuda-online.org/history1952-1999.htm.
[555] According to the Mincy Report, between 1991 to 2000, only 12 percent of white students attended public, senior secondary schools, while 70 percent of black students attended public schools. See: Mincy Report, 6. By comparing these Mincy Report findings with those of the Wooding Report, it is clear that much changed in terms of the racial and economic disparity existing between the reporting periods of these Reports (i.e. 1968 and 2000 or a stunning time span of forty years).
[556] Jonathan D. Smith, Island Flames, Ten Ten Publications, 2015, 273 to 275.

1. A history of being a small and isolated colonial society which meant that Bermuda developed not as a singular society, but as dual societies (made worse by the existence of racial segregation);[557]

2. Post racial segregation struggles;[558] and

3. Capital accumulation in the hands of a select few (mostly the white inhabitants of Bermuda).[559]

Problem: The publication and content of the Pitt Report served as proof that not much had changed between the writing of the Wooding Report in 1968 and the writing of the Pitt Report in 1977, in relation to racial and economic disparity, a period of nine years.

Solution: The Bermudian Government, after the publication of the Wooding and the Pitt Reports, urgently needed to address their contents. By the time of the Pitt Report's publication, a period of thirty-nine years had elapsed but leaving the issues of racial and economic inequality still unresolved. All of this serves to create the appearance of a Bermuda society that was refusing to dislodge what was an entrenched system of racial and economic inequality, amounting to institutionalised racism and economic inequality.[560] Racial and economic inequality are prime indicators of why those affected by them can feel disengaged from mainstream society.[561]

According to Tumin, sociologist define 'institutionalised racism' as: habits of discrimination that have become crystallised into the social structure, in institutional patterns of housing, schooling, employment etc. These patterns continue despite an absence of conscious deliberate discrimination. He then went onto conclude that the ending of legal discrimination in Bermuda did not bring in its immediate wake social integration, or

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[557] Pitt-Report-1978, Report of the Royal Commission into the 1977 Disturbances, para. 4.21(i).
[558] Ibid, para. 4.21(ii).
[559] Pitt-Report-1978, Report of the Royal Commission into the 1977 Disturbances, para. 4.21 (iii).
[560] Tumin Report, 1992, Report of the Criminal Justice Review Board, 7 to 9.
[561] G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (New York: Pantheon, 1944); and Focus, Racial Stigma and its consequences, University of Wisconsin-Madison Institute for Research and Poverty, Vol. 24, Number 1, Fall 2005, 4 to 5.

anything like it. Tumin went on further to state in the Report that institutional racism is not the same as individual racism.

Individual racism is based on attitudes and misinformation about other groups. Institutions do not have attitudes but they do have policies, practices and traditions. Some of these may form the part of written constitutions or mission statements for everyone to see. However, there are often unwritten policies, practices and traditions that are subtle, which have the effect of keeping certain groups out of the institution. Therefore, it can be easily argued that by being born within a society with deeply entrenched racial and economic inequality, Bermuda's soon-to-be-gang members were predestined to appear on the Bermuda scene in the 2000s.

7.1.3 The Tumin Report, 1992

The Tumin Report examined, almost exclusively, negative systemic problems concerning Bermuda's criminal justice and prison system.[562] The Report also raised the ongoing historical and cultural issues of racial and economic inequality that existed in Bermuda, issues that were linked to the extremely high level of incarcerated black Bermudian males within Bermuda's prison system.[563] The Tumin Report also identified Bermuda's draconian laws as the means by which black Bermudian males were being incarcerated.[564]

Problem: The Bermudian Government after the publication of the Tumin Report, not only needed to deal with the problem of Bermuda's draconian laws but it also to address and resolve what had clearly become, by the time of the Report's publication, a Bermuda with deeply embedded institutionalised racism and economic inequality.

Solution: The Bermudian Government needs to find a way to make Bermuda's laws less draconian, with an emphasis on regulating human behaviour rather than having an emphasis on punishing human behaviour. Further, the Bermudian Government (including any future Governments) must turn their attention to ripping from the roots Bermuda's problems of institutionalised racism and economic inequality.

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[562] Tumin Report, 1992, Report of the Criminal Justice Review Board.
[563] Ibid.
[564] Ibid.

7.1.4 The Mincy Report

The Mincy Report, although focusing on Bermuda's school education system, also considered the consequences of its poor performance, most notably young black males at risk of engaging in crime.

Problem: The Mincy Report indicated that the Bermuda's public education system was failing to educate Bermuda's young black male students to a high standard.

Solution: The Bermudian Government must find a way to make sure that Bermuda's public education system is brought up to and maintained at a standard that ensures that all young Bermudian students, regardless of race or economic background, are afforded a high standard of education. If they continue to fail to address this problem, Bermuda's young black males may find that they have no choice but to engage in criminal activity as a means of ensuring that they and their families are provided for, based on primal human desire to survive. This is because the absence of a quality education will more than likely cause them to have no effective educational means by which to survive in an affluent and expensive society like Bermuda.[565]

7.1.5 Race, racial stigma and its consequences[566]

Embedded in the Reports has been the ongoing cultural and historical problem of poor to mediocre race relations in Bermuda, which have been a part of Bermuda's history and culture for many years. Unfortunately, as the very presence of these Reports illustrates, Bermuda cannot move forward as a people until its cultural and historical problem of race relations is resolved.

Racism may be a cause for the disconnect that young black Bermudian males have in relation to Bermuda society as a whole, with the disconnect erupting in the form of Bermuda's gang problem. This is because, according to some who have studied the issue of racial stigma or racism, it leads to vicious circles of cumulative causation: self-sustaining processes in which the failure of blacks to make progress justifies whites' prejudicial

[565] Focus, Racial Stigma and its consequences, University of Wisconsin-Madison Institute for Research and Poverty, Vol. 24, Number 1, Fall 2005, 4 to 5.
[566] Ibid.

attitudes that, when reflected in social and political action, ensure that blacks will not advance.[567] This lack of advancement, when objectively considered, logically anticipates that young black Bermudian males would become disengaged from mainstream Bermuda society. This is illustrated in the form of what has become the black Bermudian gang member, showing no belief in or respect for human life, or for the laws of Bermuda. Therefore, the advent of Bermuda's gang problem pointedly indicates that race relations in Bermuda must be addressed, not in a mediocre fashion but with a sense of collective boldness by all of Bermuda's people.

7.1.6 Lessons from South Africa

Race relations in Bermuda have been a constant source of deep division. Its roots stem from a time when Bermudian society was overtly racially segregated. According to the Wooding Report and other authors of works on race relations in Bermuda, hotels, neighbourhoods, churches, schools, and businesses were all racially segregated.[568] Still today there remains racial segregation and friction in Bermuda, only now racial segregation has been obscured by varying degrees of economic affluence enjoyed by some of Bermuda's black inhabitants.[569]

A possible way of moving Bermuda towards a truly racially integrated society by borrowing South Africa's Truth and Reconciliation Commission as a template for obtaining candid discussions about race relations in Bermuda, past and present. The topic of racism can often be a sensitive one but as long as the topic of racism remains deeply rooted within Bermuda's past and present, Bermudian society cannot move forward as a single and unified entity. To facilitate a true open discussion on racism in Bermuda, perhaps the Bermudian Government could implement a rule as a pre-condition of a Bermudian Truth and Reconciliation Commission being set up. Doing so may very well encourage

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[567] G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (New York: Pantheon, 1944); and Focus, Racial Stigma and its consequences, University of Wisconsin-Madison Institute for Research and Poverty, Vol. 24, Number 1, Fall 2005, 4 to 5.

[568] For a comparison of Bermuda and present day, in particular what little has changed in terms of racial and economic parity, see: *Report of the Commission of Inquiry into the Civil Disorders of 1968* ('the Wooding Report') and Jonathan D. Smith, Island Flames, Ten Ten Publications, 2015, generally, but in particular 267 to 279.

[569] Ibid.

Bermudians generally and past and present employees of Bermudian businesses to speak openly of past and present racially discriminatory acts or practices that have taken place or are taking place, with verbal or written testimonials protected by immunity from criminal prosecution or civil suit.

7.1.7 Lessons from France

The lesson to be learned from France is that there needs to be one identified 'thing' that can be used to bring a country of diverse people from different racial, religious, cultural, ethnic, socio-economic backgrounds, and places of family origin together. Unfortunately this lesson from France is not one that they have learned within the current context of their multicultural society. Still, this 'lesson' had been known of by France for centuries. It first emerged at a time when France was focused on its survival of France as a singular state and at a time when its people were a predominantly homogeneous.[570] France failed to learn its own lesson? Because the people of mainland France never truly saw its colonial people as French.[571] The people of mainland France appear to have never truly understood or wanted to understand the need to embrace the people of their colonies as their own.

France, a country that continues to be negatively impacted by a colonial history similar to that exists between Bermuda and the UK, has for many years struggled with the issue of national identity. In other words, although there has been concerted efforts made by state actors to bring about greater racial, ethnic, socio-economic and religious tolerance, there appears to have been less effort to definitively identify what it means to be French. This has also been a problem for the UK in relation to what it means to be British, and Bermuda in relation to what it means to be a Bermudian, resulting in crises of national identity for all three countries. This situation has only been made more difficult because of their societies becoming increasingly more multicultural societies or perhaps due to the absence of state sovereignty in the case of Bermuda.

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[570] For a general understanding of the emergence of France's growing multicultural society, see: Nora Fellag, The Muslim Label: How French North Africans Have Become 'Muslims' and not 'Citizens', Journal on Ethnopolitics and Minority Issues in Europe, Vol. 13, No. 4, 2014, 1-25.

[571] Nora Fellag, The Muslim Label: How French North Africans Have Become 'Muslims' and not 'Citizens', Journal on Ethnopolitics and Minority Issues in Europe, Vol. 13, No. 4, 2014, 1-25.

There have been varying attempts by state actors in Bermuda, France, and in the UK, to bring their respective people together as a singular multicultural society. Unfortunately, these actions have been neutralised by other actors engaged in spewing or allowing to be spewed volatile fuels of division to or through the forces of division in the form of nationalist groups like the National Front and newspapers such as Charlie Hebdo, the latter mocking leaders of religion, all under the guise of freedom of speech, and fanning the flames of racial division and tension within France.[572] These forces of division are people or agents opposed to the greater good of national unity and, therefore, appears to be a primary reason why national unity in the form of a national identity has yet to be achieved. These forces of division, when they have put forward solutions of national unity or national identity, have usually been with the exclusion of visible minorities or the financially deprived in mind. National unity has always, historically, been hard to achieve within the context of a multicultural society.[573] The battle for national unity must still be fought by each person, as a collective, from within the respective multicultural societies of Bermuda, France and the UK. An argument can be made that this lesson to be learned is too simplistic or too ideological. Not so, as what other choice do the named multicultural societies have but to fight, as a collective, for and toward national unity? If they do not, their present situations of divided peoples can only get worse, perhaps leading to increased gang activity or increased numbers of foreign terrorist fighters.

7.1.8 Bermuda's 'tax haven' problem

The scrutiny of Bermuda's TEIAs (which includes Bermuda's tax information regime as a whole), by way of this thesis and its reliance on the combined microscope of the Watson, Legrand, and the combined Zhreing and Zweigert & Kotz theories (see Section 2.2), serves to home in on the fact that tax havens, however defined, have historically been used for

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[572] Michelle Hale Williams, A new era for French far right politics? Comparing the FN under two Le Pens, Analise Social, Vol. XLVI (201), 2011, 679 to 695; and Rashad Ali, Blasphemy, Charlie Hebdo, and the Freedom of Belief and Expression, The Paris attacks and the reactions, Institute for Strategic Dialogue, 1 to 12.

[573] This is perhaps the reason why countries with multicultural societies, such as Canada a country whose inhabitants are of different races, religions, languages (inclusive of a very large linguistic minority of Francophones in the Province of Quebec), seek to stimulate the growth and increasing cohesion of multiculturalism by way of legislation. See: 'Canadian Multiculturalism: An Inclusive Citizenship', http://www.cic.gc.ca/english/multiculturalism/citizenship.asp; and Canadian Multiculturalism Act R.S.C. 1985 c.24, and in particular s 3 which illustrates Canada's multiculturalism policy.

criminal and immoral purposes, purposes which are at the core of the OECD's ongoing efforts to eradicate them.

7.1.9 The criminal and immoral use of tax havens

Tax havens have long been considered to be immoral by the OECD (especially during periods of economic decline or economic recession) because they have been used as a tool by financially savvy companies and the rich but unscrupulous as a means to reduce their tax liability in their home countries. Had these unpaid taxes (either by tax evasion, which in most countries is a criminal offence, or by tax avoidance, which in most countries is not criminal, but is arguably immoral) been paid to their respective countries, they could have been used to better education systems, health care systems, and to assure that each person was paying their fair share.

Although there is no definitive definition of what a tax haven is, or any settled notion on whether tax avoidance is morally correct or incorrect, the certainty associated with the criminal act of tax evasion allows one to understand why the likes of the OECD would like to get rid of tax havens.

However, this could cause those countries and territories to incur catastrophic financial loss. The only way of avoiding that loss, especially in the case of Bermuda, would be to levy taxes on the companies and individuals investing there, which could, of course result in disinvestment and re-domicile in less tax adverse countries. For this reason, before any country that relies heavily or solely on income generated from their tax haven status was to begin to apply such taxes, they would first have to find other sources of revenue

Ever since the late 1960s and early 1970s there have been calls for the eradication of tax havens, and these are now almost deafening, something symbolic of the OECD's intensifying wish to put an end to actual or perceived tax havens, and clearly has no intention of abandoning its war on them.

Rather than Bermuda continuing to fight this war with the OECD, a war that it cannot win,[574] maybe it is now time for Bermuda to explore or consider options as they relate to the question of being labelled as a tax haven and as it relates to exempted companies[575] benefiting from Bermuda's tax haven status.[576] Three come to mind and they are:

Option 1: consider requiring exempted companies to pay taxes on profits, income, dividends, and capital gains to their countries of origin, using Bermuda as a conduit for facilitating the same;

Option 2: consider requiring exempted companies to pay taxes on profits, income, dividends, and capital gains to the Bermudian Government; or

Option 3: consider requiring exempted companies pay taxes, at a 50/50 rate, on profits, income, dividends, and capital gains to the Bermudian Government and to their countries of origin respectively.

These three Options would clearly serve to benefit public coffers of Bermuda and the member states of the OECD, in the form of additional revenue by which various goods and services could be made available to their respective peoples. Each would serve to clearly demonstrate that Bermuda is no longer a tax haven, and may very well cause the OECD to remove Bermuda from being branded as a tax haven. However, the obvious issue from these three options is the consequences of Bermuda implementing any of them. The most likely consequence for Bermuda would be the wholesale fleeing of Bermuda's entire offshore business sector (most notably its reinsurance business sector) to other jurisdictions, especially to those that remain as low taxation jurisdictions and have the ability to fend off the threats by the OECD, such as Delaware and Nevada, Switzerland or London.

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[574] As indicated by Mr. Kenneth Robinson, during the interview for the purposes of this thesis supra. Bermuda has no natural resources such as oil on which it could rely.

[575] An Exempted Company (also known as an offshore company) according to Bermuda Law, is generally a company that is domiciled within Bermuda but does not actually conduct business in Bermuda. See: Appleby, A Guide to Companies in Bermuda 2015, and sections 127 to 132B of the Bermuda Companies Act 1981.

[576] The Exempted Undertakings Tax Protection Act 1966 requires that such companies must have advance notice of the change. Be that as it may, before Bermuda could begin imposing taxes on exempted companies, it would have to repeal this and the Companies Act 1981, which currently prohibits the Bermudian Government from imposing taxes on exempted companies.

In the event that exempted companies were to leave Bermuda in significant numbers, Bermuda would most certainly have to quickly find viable alternatives to the lost revenue. These alternatives, although viewed primarily in the context of being alternatives or substitutes for the loss of revenue, should also be seen as the first steps on the ladder toward diversifying Bermuda's economy.

7.2 The introduction of new industries

Introducing new industries would not serve as a means of removing Bermuda from the cross hairs of the OECD but could be the first stepping stones from which to launch the effort for making Bermuda into a more self-sufficient country, less influenced by the negative concerns or even the outright intimidation by other countries.

International business has exposed Bermuda to criticism that it is a tax haven, and it is under threat from the OECD. Perhaps it is now time for Bermuda to call a truce with the likes of the OECD, and move away from its reliance on international business.

Bermuda could begin to tax international businesses at levels comparable to the levels of tax that they would pay onshore or at levels comparable to the tax levels paid by businesses within Bermuda. However, both of these options would obviously lead to the international businesses fleeing Bermuda to find jurisdictions where they would be paying lower taxes. This situation, therefore, amounts to a lose/lose situation. So what, then, is the solution? Again, the obvious solution is for Bermuda to move away from offering itself to international business as a jurisdiction from which international business can do business but with the goal of diversifying Bermuda's economy but before doing so, put into operation options for diversifying the Bermuda Economy.

7.2.1 Affordable housing industry

The cost of rents and mortgages in Bermuda has been, for quite some time, one and if not the most expensive commodity for Bermudians, so expensive that rents and the cost of

housing make the act of renting or buying a home in Bermuda out of reach for a number of low to middle income Bermudians.[577]

Bermuda homes are constructed using thick brick walls and with roof tops made from Bermuda slate stone.[578] The rationale for using these building products, over the centuries, is due to the fact that Bermuda is seasonably prone to being hit by tropical storms and hurricanes. These products provide increased strength or resistance to strong (and sometimes violent) tropical storm winds and hurricane winds. Unfortunately these bricks and slate are very expensive and serve to make renting or buying a home in Bermuda even more expensive.[579]

As an alternative or solution for using these high expensive building materials, providing a low cost solution for providing affordable housing in Bermuda, Bermuda could increase its use of modular housing units. Bermuda could also import shipping containers as a means of providing affordable and hurricane resistant housing. In keeping with the topic of diversifying the Bermudian economy, these varied types of building affordable housing in Bermuda would also to stimulate the home construction business in Bermuda, encouraging Bermudians to acquire new skill sets required for building and fitting out new types of affordable housing in Bermuda.

7.3 The imposition of Orders in Council on Bermuda by the UK; A time to rethink the matter of state sovereignty for Bermuda?

Problem: How can Bermuda put an end to the imposition of Orders in Council, by the UK?

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[577] See: 'Poverty in Paradise: the Price We Pay'. This is a video documentary that illustrates the level of hidden poverty that exists within Bermuda, most notably affecting single young black Bermudian mothers and their children. Copies of the video can be obtained in Bermuda from CURB (Citizens Uprooting Racism in Bermuda) or the Human Rights Commission of Bermuda.
[578] Bermuda Residential Building Code 2014.
[579] See: 'Poverty in Paradise: the Price We Pay'. This is a video documentary that illustrates the level of hidden poverty that exists within Bermuda, most notably affecting single young black Bermudian mothers and their children. Copies of the video can be obtained in Bermuda from CURB (Citizens Uprooting Racism in Bermuda).

Solution: The only plausible way for Bermuda to put an end to the imposition of Orders in Council, by the UK, is by Bermuda obtaining outright independence from the UK, extinguishing its colonial relationship with the UK and by attaining sovereign status.[580]

The matter of state sovereignty has long been a topic of interest for Bermuda but almost every time independence has been brought forward for consideration within Bermuda, the people of Bermuda have, usually by way of majority vote, rejected it, primarily due to economic fears.[581] State sovereignty for Bermuda is an obvious answer to the problem of imposed Orders in Council, but this singular answer may very well be too costly for Bermuda to accept. On becoming a sovereign state, there will be sovereign state issues that Bermuda will have to deal with on a regular basis. For example, Bermuda would most certainly have to deal with the issue of having its sovereignty recognised by other sovereign states and the issue of regional foreign affairs or regional politics. In order to bolster its appearance and status of a sovereign state, Bermuda would have to continuously

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[580] For the purposes of this Thesis, I am reluctant to rely on the classical definition of State Sovereignty used by John Alan Appleman, who defines State Sovereignty to mean that a Sovereign State, to be a Sovereign State, is one where it is not restricted by any other Sovereign State other than itself. However, as Appleman rightly indicates, this classical definition of State Sovereignty contradicts the very existence of International Law, which is the reason I do not rely on this classical definition outright. If no Sovereign State or its actions can be restricted by another Sovereign State then how can a treaty exist as a regulating force over Sovereign State actions, especially in a case where a Sovereign State agrees to become or is made party to various international bodies (such as the United Nations, CARICOM, Caribbean Court of Justice, OECD, NAFTA, OAS, EU, and NATO, etc.), thereby subscribing to become bound by the resultant treaties and trade agreements or to allow treaties to be used as a means of assisting Sovereign States to settle trade or military wars between Sovereign States? Even in the context of Sovereign States within the Caribbean preferring to rely on the Caribbean Court of Justice or on the Privy Council in London, as a final court of appeal, in both instances there is a surrender of State Sovereignty to these respective final courts of appeal, inclusive of those instances where the Privy Council has been replaced by the Caribbean Court of Justice by them. Of course, in this latter case, the argument could be made that doing so allows a Caribbean Sovereign State to no longer have to rely on its colonial master, the UK, in legal decision making. Still, this doesn't change the fact that State Sovereignty is still being surrendered to the body of the Caribbean Court of Justice, and not to an indigenous court of final appeal. This overall dichotomy, serves to indicate why the concept of State Sovereignty is nebulous and, arguably, impossible to truly give definition. At best, to determine if State Sovereignty exists, is to look for the visual indicators of State Sovereignty, which are also non-exhaustive. See: John Alan Appleman's Military Tribunals and Crimes, 14 1954, Chapter IV; and W. Jethrow Bown on Sovereignty, 18 Jurid. Rev. 1 1906-1907.

[581] In 1995 Bermuda held a referendum on independence, which was rejected by a majority. An Independence Commission was established in 2004, and here too, Bermudians rejected the notion of Independence.

look for and create its own visible features of state sovereignty.[582] State sovereignty for Bermuda would also have to be considered in the real world context of which sovereign state and how many sovereign states will recognise its existence for the purposes of legitimising its existence.[583]

In terms of regional sovereign state politics, Bermuda's existence and status as a sovereign state would most certainly be influenced by the foreign policy or 'regionalism' interests of the sovereign states within the Western Atlantic Region[584] and the Caribbean Region[585] but most notably by way of the dominant presence of the US. Regionalism, for Bermuda's purposes, can be best understood if it were to mesh the concepts of 'State Sovereignty' and 'regionalism' into one entity, leading to the creation of what the author has coined as 'Caribbean real politic'.[586] [587] Caribbean real politic would lend itself well as a contribution to academic study. This is because the subject regions, collectively, appear to be ripe for testing the subject theories of this thesis.

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[582] Thomas A. Garaci, 'Overflight, Landing Rights, Customs, and Clearances', 155 to 168, 37 A.F. L. Rev. 155 1994.
[583] Ibid.
[584] Namely Canada, the Bahamas and the United States of America.
[585] This is not an exhaustive list but I include in this list: Barbados, Cuba, Dominican Republic, Haiti, Jamaica, and Trinidad and Tobago.
[586] The author of this study, for the purposes of this study, has created the phrase of Caribbean real politic. Caribbean real politic means, according to the author of this thesis:
'an instance where the state sovereignty of the States or countries within the Caribbean and Western Atlantic, as in relation to the United States of America's (aided at times by other Sovereign States of the Caribbean) military and non-military intervention in the affairs of the entities within the Caribbean and Western Atlantic internal affairs. This type of intervention has and will most likely continue to represent threaten the erosion of the classical definition of State Sovereignty'.
For the rationale for the creation of 'Caribbean real politic' by the author of this thesis, see: Thomas Romig, The Legal Basis for United States Military Action in Grenada, The Army Lawyer, Department of the Army Pamplet 27-50-148, April 1985; Elisabeth Wallace, The West Indies Federation: Decline and Fall, 17 Int'l J. 269 1961-1962, 269 to 288; and Vilma McIntosh, Jamaica: Forty Years of Independence, Revista Mexicana del Caribe, vol. VII, núm. 13, 2002, 181-210 Universidad de Quintana Roo Chetumal, México, 190 to 209 (specifically the retaliatory actions of the United States of America against the Island Sovereign State of Jamaica for its state to state engagement, under the Norman Manley Government, with Fidel Castro's Cuba during the 1970s).
[587] Ibid.

Aside from the non-exhaustive and at times nebulous features of statehood or state sovereignty,[588] there are primarily two visible features of State Sovereignty. The first is recognition, often illustrated by the mutual setting up of embassy facilities by the respective sovereign states. The second most prominent visible feature of state sovereignty is the peaceful acknowledgment but at times continual testing of state sovereignty by other sovereign states. Examples of this can be found in the case of international borders between sovereign states, territorial waters and air space above a sovereign state.[589]

7.4 Summary

This chapter, on reflection, reads as something akin to a political speech. This, however, is not the author's intent. On the contrary Chapter Six, by way of the illustrated Bermuda specific problems and the inherent need for recommendations to be put forward by the author, simply demonstrates that badly transplanted laws have been allowed to take root in Bermuda. The chapter also proves that alternative policy routes, those beneficial to Bermuda as a whole, have not been effectively explored, as laws have simply been imposed without naturalisation having taken place. Although the path to attaining effective transplantation (which is a necessary ingredient for attaining naturalisation) can often be a torturous one, a failure to stay on that path can and often does lead to long term and devastating consequences, as illustrated by the test case example of Bermuda.

[588] James Crawford, The Criteria for Statehood in International Law, Downloaded from http://bybil.oxfordjournals.org/ at DePaul University, 123 to 182.
[589] Thomas Geraci, 'Overflight, Landing Rights, Customs and Clearances', 37 A.F. L. Rev. 155 1994, 155 to 168.

Chapter 8. Summary

The hypothesis of this thesis is that laws and rules cannot, unconditionally, be transplanted to Bermuda. In order to test this, three research questions were put forward to be tested using the Watson theory, the Legrand theory, Kahn-Freud theory, Jhering theory, and the Zweigert & Kotz theory (see section 1.1).. It concludes that laws and rules cannot, unconditionally, be transplanted to Bermuda because the variable of effectiveness, a necessary precondition for bringing about effective transplantation, is required for the purposes of truly effecting transplantation, aided by the sub-variables of Bermuda's culture and history. Embedded into this variable of effectiveness is the troublesome sub-condition of always having to determine from whose perspective is one to determine effectiveness.

8.1 Summary

Effectiveness, in relation to the effective operation of a transplanted rule or law, occurs when a rule or law operates according to:

(a) its intended purpose as determined by the perspective of the country or entity that first authored the rule or law;

(b) its intended purpose as determined by the perspective of the recipient or host country prior to the impending; or

(c) unforeseen but still beneficial purposes which may also include purposes (a) and (b), but;

(d) in each case, the rule of law, its existence, must be used as the bench mark and final indicator of whether or not a law or rule is effective.

The best way to achieve effectiveness is by ensuring that the transplanted or borrowed law has been modified or naturalised, taking into account the donor country's or the recipient country's history and culture, along with the existence of the rule of law thereby ensuring that the law or rule is generally fit for purpose within the recipient country.

The crucial question to be asked is from whose perspective one should look; that of the primary end user or users or the ultimate end user or users.

8.1.1 The primary end user

Let us take, as our first example, the perspective of an author country – the original primary end user. In this example the donor country opts to create a law to be transplanted

to its former colony as a means of addressing a mischief it deems to be of great importance, relative to its obligation to ensure good governance over its former colony. The transplanted law is being used to cure a problem not within the parent country itself but within its colony. In order to determine if the transplanted law has been effective, the parent country will have ask itself whether or not the transplanted law has addressed the mischief.

8.1.2 The secondary end user

The secondary end user is the recipient country or former colony which opts to transplant or borrow a law to itself from another country or entity in order to address a mischief. In this example the transplanted law may also act as a means of curing the country-wide problem or it may be seen by the people of that country as their government's attempt at trying to fix the problem.

8.1.3 The ultimate end user

Within the academic discourse concerning transplantation and the added (but equally important) variable of effectiveness, is the people's perspective which, in the case of a sovereign country, is often ignored as it is with the people of former colonies who are the ultimate end users of the law.

8.1.4 Using the rule of law as a plausible benchmark for determining effectiveness

The benchmark to be used for determining whether a law has been effectively transplanted, from an entity to Bermuda, is the rule of law itself. In other words, a law transplanted to Bermuda from an external entity can only be deemed effective as long as the transplanted rule or law serves to maintain the rule of law; that the law or rule applies to everyone and not just a select few.

According to Hachez and Wouters,[590] the rule of law is the characteristic of a society which is governed by a legal system yielding formally sound, effective, and legitimate rules which

[590] Nicolas Hachez and Jan Wouters, Promoting the Rule of Law, A Benchmarks Approach, Working Paper No. 105, April 2013, 26.

serve to indicate that the legal system connects to the social order in three ways – cognitively, empirically, and axiologically – that ensure that the law will not be oppressive and arbitrary, but will act as a vector of harmony.[591] The way the legal system is able to ensure that the rules it produces bear those qualities is by using them as validity conditions. A legal system whose validity conditions are formal soundness, effectiveness and legitimacy is more likely to produce legal rules which will be 'ideal' in the sense bestowed to it by the social order considered: it will ensure predictability and coherence to the legal system (formal cognitive soundness), it will ensure that the rules 'govern' and that personal designs backed by violence are averted (effectiveness), and finally it will ensure that the substantive content of the rules reflects, or at least takes into account in a fair manner, the aspirations of society (legitimacy).[592]

Unfortunately due to the nebulous nature of the concept of the rule of law, something that a country can only aspire to obtain, this means that there can be no set criteria for determining whether a law has been effectively transplanted from an entity to Bermuda. At best, one can only aspire to attain the rule of law based on criteria in existence at any given point in time (an ever changing aspirational target).

8.2 Synthesis Conclusion

Section 7.1 affirms the conclusion of this thesis that laws and rules cannot, unconditionally, be transplanted to Bermuda. Even when one tries to establish a benchmark for determining if a law has been effectively transplanted to Bermuda, by using the rule of law as a benchmark, this does not result in a benchmark that can be used in all instances of transplanted law. At best, the example of the rule of law used by this thesis can only be used for determining effectiveness in relation to Bermuda.

Therefore the author has determined that laws and rules cannot, unconditionally, be transplanted to Bermuda, as the variable of effectiveness as seen through the multi-ended and troublesome sub-condition of perspective represents the conditions by which laws and rules are transplanted to Bermuda.

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[591] Ibid.
[592] Ibid.

8.3 Comments on strengths and limitations of the thesis research

This thesis relied on laws and rules from countries or entities such as Canada, France, the OECD, the US, and the UK, inclusive of the cultural, economic and historical matters that were common or of a similar nature between these countries and Bermuda (e.g. racial matters, cultural matters, disaffected racial or ethnic young males who have resorted to using acts of terror or terrorism, economic matters specific to the imposition tax avoidance and tax evasion).

8.3.1 Difficulties in locating primary and secondary sources

During the author's time of conducting the necessary research for this thesis, it became apparent that primary and secondary sources of information were going to be difficult or even impossible to obtain. This was the case in relation to the matter of government produced statistical information, by the Governments of Bermuda, Canada, France, and the UK.

8.3.2 Research bias

As the author was born in and is currently living and employed in Bermuda, he was able to overcome various obstacles to research that would have impeded or even halted the efforts of a legal academic researcher not having any links to Bermuda or an understanding of Bermuda and its laws and people. However this also represented a research dilemma for the author. Although several Bermudians have written articles and books about Bermuda's culture, laws, and history, the author was reluctant to rely on them because they had the appearance of being produced with various political agendas at their core.

The author took great pains to avoid writing and structuring this thesis in a way that would cause the reader of this thesis to think that the same is a mere attempt to bash or attack the colonial relationship existing between Bermuda and the UK, thereby causing the reader to no longer focus on the positive contributions that this thesis was making to academic study. This thesis, in no way, has been written as a means to bash the UK as the parent country of Bermuda.

The author also took pains to avoid turning this thesis into a study into the murky depths of Bermuda politics. On the contrary; the recommendations should be seen as tools by which the political parties of Bermuda, the Government of Bermuda (present and future), and the people of Bermuda (independently and as a whole) can advance into a more modern age of a united Bermuda, irrespective of one's race or economic circumstances.

8.3.3 Contribution to academic study

By using Bermuda as a model by which to test the four legal theories (in regards to the hypothesis used in this thesis), this not only serves to contribute to academic study in relation to legal transplant theory but it also serves to contribute to this area of academic study specific to the subjects of colonies and colonialism. A residual consequence of such a contribution is the fact that this thesis will not only be of interest to legal academics but also to entities such as the world's remaining colonies, the parent countries of the remaining colonies, and to entities such as the United Nations and the OECD, as this thesis offers an inside look into the practical realities of laws or rules that have been transplanted willingly, by intimidation, or where the recipient colony has no choice but to transplant or borrow a law unto itself, due to threats or intimidation imposed by other countries or entities.

Using Bermuda as a model for testing the four legal theories also serves to contribute to academic study in relation to what the author has newly coined as 'Caribbean Real Politic'. This is illustrated by way of Bermuda's close proximity to the US, which causes it and the other island countries in the Western Atlantic and the Caribbean to be forever overshadowed and influenced by the political and military interests of the US. This means that, whether former colony or a sovereign country, the regional actions or wishes of these islands will always be acted upon subject to the political or military interests of the US, an indication that state sovereignty (in the event that Bermuda was to seek it) will not mean a truly independent Bermuda.

The author's decision to use Bermuda to test the four legal theories resulted in the finding of a lacuna within the Legrand theory. Specifically, this was in regard to the original 'shelf life' of the 1986 Treaty, (1986 to 1998, or the date of inception until the US's Cold War concerns and with it, the need to have two naval bases in Bermuda). This suggests that the Legrand theory may have a lacuna within it, a lacuna which strongly suggests that the theory only applies to laws or rules that are not subject to contingent events. In this regard, this lacuna is something that can be explored by way of future academic study, thereby keeping alive and keeping current academic study in relation to legal transplant theory.

8.4 The application of the research findings

By using Bermuda as a model by which to test the four legal theories, this not only serves to contribute to academic study in relation to legal transplant theory but it also to contribute to the ongoing debate, within the United Nations, in reference to the issue of colonialism and decolonisation of the world's remaining colonies, and the economic sustainability of small island countries. Bermuda's primary means of earning income for its people is

pegged to two industries: tourism and offshore international business. Such a reliance causes Bermuda and its people to be highly vulnerable to the ebbs and flows of global markets, the global economy, and the economic bullying or intimidation exerted by larger countries (especially countries that have very large geopolitical influence globally).

Chapter 9. Conclusion

The hypothesis of this thesis is that laws and rules cannot, unconditionally, be transplanted to Bermuda. In order to test this, three research questions were put forward to be tested using the Watson theory, the Legrand theory, the Kahn-Freud theory, the Jhering theory, and the the Zweigert and Kotz theory (see Section 1.1). Further, the benchmark variable of the rule law, its existence, was used as the final determining factor for determinng if a law or rule had been transplanted effectively to Bermuda.. It concludes that laws and rules can be transplanted but not unconditionally to Bermuda. This is because the variable of effectiveness, a necessary precondition for bringing about effective transplantation, is required for effective transplantation, modified by the variables of Bermuda's culture and history and the need to satisfy the principle of the rule of of law- that a law or rule must not be applied in an arbitrary fashion. . Embedded into this variable of effectiveness is the task of identifying whether the rule of law exists and always having to determine from whose perspective is one to determine effectiveness. Still, one is left questioning whether effectiveness can be determined in those cases where the law or rule was never intended to apply to an entire population of a country- as was the case for the criminal rules ss. 29A, 315F, 70JA, 70JB transplanted to Bermuda to Bermuda to help them combat its unlawful gang problrm.

9.1 Conclusion

Effectiveness is the effective operation of a transplanted law and it occurs when it operates according to:

(a) its intended purpose as determined by the perspective of the country or entity that first authored the rule or law;

(b) its intended purpose as determined by the perspective of the recipient or host country prior to the impending; or

(c) unforeseen but still beneficial purposes which may also include purposes (a) and (b), but most crucially when;

(d) the rule of .law exists (i.e. the law or rule is not applied in an arbitrary fashion).

The best way to achieve effectiveness is by ensuring that the transplanted or borrowed law has been modified or naturalised, taking into account the rule of law, the donor or recipient country's history and culture, thereby ensuring that the law is generally fit for purpose

within the recipient country. The crucial question to be asked is from whose perspective one should look; that of the primary end-user or users or the ultimate end-user or users.

A donor country – the original primary end-user – elects to create a law to be transplanted to its former colony as a means of addressing a particular mischief. The transplanted law is being used to cure a problem not within the doner country itself, but within the former colony. To determine if the transplanted law has been effective, the donor country will have ask itself whether or not the transplanted law has addressed the mischief.

The secondary end-user is the recipient country or former colony which receives the law from another country or entity in order to address a mischief. In this example the transplanted law may also act as a means of curing a national problem or may be seen by its people as their government's attempt to fix the problem.

Within the academic discourse concerning transplantation and the added (but equally important) variable of effectiveness, is the people's perspective which, in the case of a sovereign country, is often ignored as it is the people of former colonies who are the ultimate end-users of the law.

9.1.1 Using the rule of law as a benchmark for determining effectiveness

The benchmark to be used for determining whether a law or rule has been effectively transplanted is the rule of law itself. A transplanted law rule can only be deemed effective if it maintains the rule of law. According to Hachez and Wouters,[593] the rule of law is the characteristic of a society which is governed by a legal system yielding formally sound, effective, and legitimate rules which serve to indicate that the legal system connects to the social order in three ways – cognitively, empirically, and axiologically – that ensure that the law will not be oppressive and arbitrary, but will act as a vector for harmony.[594] The way the legal system ensures that the rules it produces bear those qualities is by using them as validity conditions. A legal system whose validity conditions are formal soundness, effectiveness and legitimacy is more likely to produce legal rules which will be 'ideal' in the

[593] Nicolas Hachez and Jan Wouters, Promoting the Rule of Law, A Benchmarks Approach, Working Paper No. 105, April 2013, 26.
[594] Ibid.

sense bestowed on it by the social order: it will ensure predictability and coherence to the legal system (formal cognitive soundness); it will ensure that the rules 'govern' and that personal designs backed by violence are averted (effectiveness); and it will ensure that the substantive content of the rules reflects, or at least takes into account in a fair manner, the aspirations of society (legitimacy).[595]

Unfortunately, due to the nebulous nature of the concept of the rule of law, something that a country can only aspire to achieve, there can be no set criteria for determining whether a law has been effectively transplanted. At best, one can only aspire to attain the rule of law based on criteria in existence at any given point in time, an ever changing aspirational target.

9.2 Conclusion

Section 7.1 confirms that laws and rules cannot, unconditionally, be transplanted to Bermuda. Even when one tries to establish a benchmark for determining if a law has been effectively transplanted to Bermuda using the rule of law as a benchmark, this does not result in a metric that can be used in all instances of transplanted law. At best, the example of the rule of law used by this thesis can only be used for determining effectiveness in relation to Bermuda.

Therefore, laws and rules cannot, unconditionally, be transplanted to Bermuda, as the variable of effectiveness as seen through the condition of perspective represents the conditions by which laws and rules are transplanted to Bermuda.

9.3 Strengths and limitations of the thesis research

This thesis relied on laws and rules from countries or entities such as Canada, France, the OECD, the US, and the UK, and the cultural, economic and historical matters that were common to them.

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[595] Ibid.

9.3.1 Difficulties in locating primary and secondary sources

During the course of this project it became apparent that primary and secondary sources of information were going to be difficult or even impossible to obtain. This was the case in relation to the matter of government-produced statistical information, by the governments of Bermuda, Canada, France, and the UK.

9.3.2 Research bias

The author was born in and is currently living and employed in Bermuda; he was able to overcome various obstacles to research that would have impeded or even halted the efforts of a legal academic researcher not having any links to Bermuda or an understanding of Bermuda and its laws and people. However this also represented a research dilemma for the author. Although several Bermudians have written articles and books about Bermuda's culture, laws, and history, the author was reluctant to rely on them because they had the appearance of being produced with various political agendas at their core.

The author took great pains to avoid writing and structuring this thesis in a way that would cause the reader of this thesis to think that the same is a mere attempt to criticise the colonial relationship between Bermuda and the UK, thereby causing the reader to no longer focus on the positive contributions that this thesis was making to academic study. He also took pains to avoid turning this thesis into a study of Bermudian politics. The recommendations should be seen as tools by which the political parties of Bermuda, the government of Bermuda (present and future), and the people of Bermuda (independently and as a whole) can advance into a more modern age of a united Bermuda, irrespective of race or economic circumstances.

9.3.3 Contribution to academic study

By using Bermuda as a model by which to test the four legal theories, this thesis contributes to academic study in relation to legal transplantation theory and the area of academic study specific to colonies and colonialism. A consequence of this contribution is that it will not only be of interest to legal academics, but also to entities such as the world's remaining colonies, their parent countries, and to entities such as the United Nations and the OECD, as this thesis offers an inside look into the practical realities of laws or rules that have been transplanted willingly, by intimidation, or coercion.

Using Bermuda as a model for testing the four legal theories also serves to contribute to academic study in relation of the Caribbean Real Politic in which close proximity to the US which causes it and the other island countries in the region to be overshadowed and influenced by the political and military interests of the US. Whether former colony or not,

the regional actions or wishes of these islands will always be subject to the political or military interests of the US, an indication that state sovereignty (in the event that Bermuda was to seek it) will not mean a truly independent Bermuda.

The decision to use Bermuda to test the four legal theories resulted in the identification of a flaw in the Legrand theory in the original 'shelf life' of the 1986 Treaty. This suggests that the theory only applies to laws or rules that are not subject to contingent events. In this regard, this lacuna is something that can be explored by way of future academic study.

9.4 The application of the research findings

By using Bermuda as a model by which to test the four legal theories, this not only serves to contribute to academic study in relation to legal transplant theory but it also to contribute to the ongoing debate within the United Nations on the issue of decolonisation, and the economic sustainability of small island countries. Bermuda's primary means of generating income is pegged to two industries: tourism and offshore international business. This causes Bermuda and its people to be highly vulnerable to the ebbs and flows of global markets, the global economy, and the economic bullying or intimidation exerted by larger countries, especially those that have a very large geopolitical influence globally.