

Legal Transplants and Economics: the World Bank and Third World Economies in the 1980s – a Case Study of Jamaica, the Republic of Kenya and the Philippines

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A. Introduction, Research Question and Methodology

I. Introduction

Legal transplant is the transfer of laws and other matters related to the law from one jurisdiction or institution to another. Many legal systems have similar laws to suggest that either there is one source of such laws or systems adopted from each other. Another possibility considered is that some of these systems have such similar political and social environment that the cultures are the same and similar laws automatically arose out of these societies. Both these possibilities are true of many legal systems as there is usually a combination of laws transplanted from another system and the country's own indigenous laws. The composition of the combination of transplanted law and indigenous laws often depend on the history, geographical location and the politics of the country. Some countries' subservient positions have made them the recipients of much transfer of laws and institutions.

Many comparativists of laws have debated among themselves whether or not laws can be easily transferred or not. Some are of the view that laws can be easily transferred and that history shows that many countries have received laws and those laws are still subsisting, further proving that these transferred laws have survived over time. The others are of the opinion that laws are not easily transferred and the survival of the transplanted laws depend greatly on the similarities of the social and political environments of the donor of the laws and the host of the laws. Many law makers look to other legal systems for inspiration but they do so conscientiously and conduct comparative studies into the similarities and differences between their systems and the others before making transplants and these laws are scrutinised after application so that appropriate amendments can be made or maybe repeals if necessary. However some transferors of laws are not of similar kiln and they are not as careful and cautious when transferring laws. These are the ones that believe that laws are easily transferred and received and

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their method of transfer is one of an authoritarian style applying an ends-means approach, which by-passes meaningful and conscientious comparative studies and discounts post-legislative scrutiny.

The trend developing is that the transfer of laws is made after a comparative study involving intense research and consultation. This is an expensive time-consuming process and therefore is not employed by donors and hosts who have to act quickly and who are not able to allocate the finance to such a study. When conducted these studies are very essential to the legislative process. At this preliminary stage it is ascertained whether or not the laws to be transplanted are appropriate for the host and whether or not there are factors that would prevent the laws from achieving their purpose. This essential stage of research and consultation is before any drafting is involved but will determine what will be drafted and what will go to the legislature for debate. In a perfect world this stage would be conducted before the drafter is given instructions, however as stated before it is expensive and time-consuming. To describe how essential this step is to the legislative process we will make the analogy to the building of a colossal dam. This is a tremendous engineering feat and before any brick is laid the site of construction has to be carefully studied, this study will include checking the density of the soil, the structure of the slopes, the surrounding areas and population. Many environmental impact assessments would be prepared. If this is not done, even if the architectural plans are perfect, the building of the dam may spell disaster. Similarly, if consultations and research are not done before the transplant of laws, it does not matter how talented the drafter is, the application of such laws may spell disaster. The papers prepared in the consultation and research stage of the legislative process would be made available to the drafter upon his request and would guide his hand in the preparation of the draft before any syntax or sentence construction becomes an issue.

This article will be about this step and how essential it is. This will be done by reviewing the World Bank's¹ policy-based lending in the 1980s and its transplant of the neoclassical economic model on third world² economies in response to the economic problems faced by these countries. The World Bank was the donor of the laws and the third world countries were the hosts and in the process of transplant there were no meaningful consultations and research so as to ascertain what laws for transplant were appropriate. The results were dismal proving that the transplant of laws is rarely successful if the political and social environments of the donor and give rise to culture and values, which do not readily receive such laws. This article sides with the comparativists that are of the opinion that

¹ The World Bank Group came into existence on 27 December 1945 following international ratification of the Bretton Wood Agreements and consists of five institutions, however references to the World Bank usually refer to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). See information at <http://www.worldbankgroup.org/>. (Accessed 18 July 2006).

² 'Third world' is a term first coined in 1952 to distinguish nations that aligned themselves neither with the West nor the Soviet Bloc during the Cold War. Now the term is used to denote nations with a low UN Human Development Index. Other terms used instead of third world are: 'Global South'; 'less wealthy nations'; 'developing countries' and 'least developed countries'.

laws between systems are not easily transferred if the systems are not similar. This debate between comparativists is a long on-going debate however with rapid globalisation and interactions between legal systems and organisations the uniformity of laws has now again become a heated topic. The uniformity of laws means the increase of transplants of law among systems that have completely different values in culture and politics. It is this renewed debate that justifies the review of previous failures of transplanted laws to see what went wrong, hence this article. What comes into focus now are the issues of the successes and failures of legal transplants as indicated below.

II. Research Question

Does the success of a legal transplant depend on the donor taking into account the particular political and social environment of the host of such transplant? This question will be answered in the affirmative and complemented by other specific questions, such as:

- (1) Should a donor of legal transplants conduct comprehensive pre-legislative studies of the host's social and political environment as part of the legislative process before requiring changes in the law?
- (2) Should a financial institution, acting as a donor of legal transplants, consider which policies are politically feasible, in addition to economic and administrative considerations?
- (3) Did the World Bank in applying Watson Legal Transplant Theory imposed its neoclassical economic model on countries unsuitable for such a model?
- (4) Was Legrand Legal Transplant Theory more suited for the World Bank's policy-lending in the 1980s?

The research question and the supplement questions arising will be answered proceeding in accordance with the Methodology below.

III. Methodology

This article will seek to answer the research question by analysing the transplant theories of Alan Watson and Pierre Legrand, comparativists and professors in law. Their theories oppose each other: Watson proposes that legal rules, norms and systems may be successfully borrowed even where the circumstances of the host or recipient are different from the donor, while Legrand believes that legal transplants will only be effective and take root if the transplants are incorporated in an environment similar to the environment which they were previously successful. Their theories, referred to as Watson Legal Transplant Theory and Legrand Legal Transplant Theory, will be juxtaposed with a demonstrative approach to highlight the fundamental differences, one answering the research question in the negative while the other in the affirmative. A few other comparativists will be mentioned to support Legrand Legal Transplant Theory.

The transplant of the neoclassical economic model is the subject of testing the theories of Watson and Legrand. The World Bank will be used as the donor, the organisation which in the 1980s insisted that the laws of the hosts, those are the borrowers, are changed to facilitate the transplant of the neoclassical economic model. The article will argue that the World Bank applied the Watson Legal Transplant Theory in the 1980s to enforce its policy-based lending regime and transplanted the neoclassical economic model upon its borrowers as part of the loan conditions, and that the World Bank ignoring the political and social environment of the borrowers caused the transplants to fail.

In answering in the affirmative the research question, as to whether a donor should take into account the particular political and social environment of the host, this article will examine the experiences of Jamaica, the Republic of Kenya and the Philippines in the 1980s. The worsening of their economies after the strict application of neoclassical economics transplanted Watson-style by the World Bank supports the affirmative answer of the research question. The adjustments made by the Bank in the late 1980s to take into account the social and political environments and the consequent relative improvement of the economies prove Legrand Legal Transplant Theory. However, Legrand Theory would have been previously proven by the failure of the transplants caused by non-legal factors not taken into account by the World Bank.

The article will look at the legal transplants theories of Watson and Legrand in Section B. Their theories are briefly, but comprehensively, outlined to provide the base for the debate. Section B will then consider these theories in relation to the legislative process. Section C will start with the explanation of the Economic Policies Transplant Process, that is generally how laws affecting the fiscal and monetary policies of a country are transplanted. The process explained is specific to a third world country as the host and an international lending agency as the donor. Section C will then continue with the culture specificity of economic policies transplants touching on the debate as to whether laws in relation to economics are culture specific making transplant and reception more difficult. Section D will apply the Watson Legal Transplant Theory and the Legrand Legal Transplant Theory to the third world economies using the jurisdictions of Jamaica, the Republic of Kenya and the Philippines, these are third world countries representing the Caribbean and Latin America, Africa and Asia. Since one of the arguments in this article is that the political and social environment of a host affects transplants the Section will introduce each country with its history and the economic problems faced before the intervention of the World Bank. The article will then examine the approach of the World Bank outlining the changes in law or legal reform the borrowers had to make in order to receive funds. It will then complete Section D by looking at the factors not considered by the Bank, indicating that the social and political environment had much to do with the failure of the transplants, therefore proving the Legrand Legal Transplant Theory. Section E will look at the adjustment of the World Bank policy-based lending in the 1980s and the subsequent improvement of the economies of the borrowers. Since the World Bank's adjustments in the 1980s were not systematic and just temporary responses to the constant failures and criticisms, Section E will

conclude with further institutional recommendations to facilitate a Legrand-style approach to policy-based lending and recommend a process for the transplant of fiscal and monetary laws. Finally, Section F will make conclusions following from the previous arguments.

B. Theories of Legal Transplants: Alan Watson and Pierre Legrand

Legal transplants refer to the transferring of rules, systems of law, institutions, doctrines, ideas, methods, from one country, body, organisation or jurisdiction to another. Although the description is of a relatively simple process much debate has been generated amongst comparativists. This debate is not the rambling of idle minds because as simple as it appears, legal transplants have shaped societies and changed the path of certain recipients, for better or for worse. Ideas can be infectious and an example of wide-scale transplant is the spread of Roman law into Europe and from Europe the received laws were transplanted to the New World and much of Africa.³ As seen from this example, legal transplants were often received by the unhappy conquered.

Many comparativists agree that there is the spread of law, which affects most, if not all, aspects of life: acquisition of property; finances; human rights; management of estates; monetary and fiscal policies; and travel. This spread of law affects us all from cradle to the grave. So what exactly does the debate concern? In a nutshell the debate is whether law reflects society or society is shaped by the law. Which determines the other? This is where it all starts and this question has triggered a series of debates and there are roughly two teams, on one side there is the transferists and on the other, the culturists.⁴ The transferists believe that law can be easily transferred from one society to the next, while on the other hand, the culturists believe that it is society that creates law and that law reflects society, that is, law is a matter of culture. This is where the comparativists, Alan Watson and Pierre Legrand enter the scene, Watson being a true transferist and Legrand a culturist. They have had spirited exchanges and it would seem sometimes that their differences of opinions more stemmed from differences of definitions than of substance. One caricatures the other and hard lines are taken just to stress opposition. There are also accusations that one has misrepresented the other. It is this lively debate between Watson and Legrand why they have been chosen as the main exponents for the transferists and culturists, respectively.

I. Watson Legal Transplant Theory

The crux of Watson Legal Transplant Theory is that the main source of legal change is imitation. He asserts that, “the two most startling, and at the same time

³ A. Watson, *Comparative Law and Legal Change*, 37 Cambridge Law Journal 313, at 313 (1978).

⁴ N. Foster, *Transmigration and Transferability of Commercial Law in a Globalized World*, in A. Harding & E. Orucu (Eds.), *Comparative Law in the 21st Century* 59 (2002).

most obvious, characteristics of legal rules are the apparent ease with which they can be transplanted from one system or society to another, and their capacity for long life.”⁵ Watson believes that the frequency of legal transplants proves the fallacy of the correlation of developments in law with the internal evolution of society.⁶ He even goes further to criticise common law by stating that, “The judge in a customary law system can decide that a custom exists when it does not, inventing it or adopting it from elsewhere. But he can only invent within the confines of the case, and he must give plausibility to his invention.”⁷ He asserts that law generating from within, in the form of case law, is a slow and inefficient way of law reform because a doctrine may only emerge from a line of case over a considerable period of time.⁸ Watson is more in favour of legislation, maybe because he believes that legislation is the work of parliamentarians, dictators or kings and is the best method to direct society along particular economic, religious or political lines.⁹ Legislation is more efficiently transferred and can cause a major overhaul of the legal system.¹⁰

Watson divides his transplant theory into three main ideas. Firstly, he states that, “law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structure, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or the members of the particular society on the other hand.”¹¹ This idea follows from his thesis that legal transplants are made with little difficulty with extensive power of survival, as there is no close inseparable link between society and the law. Secondly, he states that, “... law develops by transplanting, not because some such rule was the inevitable consequences of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it.”¹² He asserts that lawmakers rely heavily on foreign law and the transplanted law becomes similar, even if not identical.¹³ Thirdly, he states that, “When several systems borrow a rule from the same source and the course of development varies from one system to another ... the factors which produce the changes can be isolated and evaluated. The precise role of economics and political circumstances ... and so can be plotted in detail.”¹⁴ In mentioning the role of economics and political circumstances Watson gets into

⁵ Watson, *supra* note 3, at 313.

⁶ D. Nelken, *Legal Transplants and Beyond: of Disciplines and Metaphors*, in A. Harding & E. Orucu (Eds.), *Comparative Law in the 21st Century* 21 (2002).

⁷ A. Watson, *Legal Evolution and Legislation*, 1987 Brigham Young University Law Review 353, at 353.

⁸ A. Watson, *Aspects of Reception of Law*, 44 *The American Journal of Comparative Law* 335, at 342 (1996).

⁹ Watson, *supra* note 7, at 354.

¹⁰ Watson, *supra* note 7, at 366.

¹¹ Watson, *supra* note 3, at 315.

¹² *Id.*

¹³ A. Watson, *Legal Transplants and European Private Law*, Ius Commune Lectures on European Private Law, 2. Ius Commune Research School (undated).

¹⁴ Watson, *supra* note 3, at 316.

not just the transplant of law but the reception, which he sometimes ignores in making the point of the success of transplant and which has the weakness of his theory.

This article argues that Watson Legal Transplant Theory is simplistic and will give the reasons the research question should be answered in the affirmative using the examples of the World Bank's transplanted economic rules on the selected third world countries. Not every facet of Watson's theory is proven false but his hard line approach on legal transplants opens him up to easy falsification of his theory. Watson seems sometimes to waiver in his conviction, sometimes called the 'Weak Watson' who argues against the theory that law is the mirror of some set of forces (social, political, economic, or other) external to the law, but he does so a bit cautiously.¹⁵ It is the 'Strong Watson' who opposes the mirror thesis recklessly¹⁶ who seems to aggravate Legrand and cause the back and forth of words between them. Unfortunately, it is also the 'Strong Watson' who seemed to be the knight of the World Bank, which also recklessly applied their economic policies in the 1980s. William Twining referred to Watson as a 'juristic hedgehog' by stating that:

Isaiah Berlin reminds us that the fox knows many things, but the hedgehog knows one big thing. Watson is a juristic hedgehog. He struck persistently to the theme that there are enormous apparent similarities between legal systems around the world, that these similarities are a result of imitation, and that most law exists largely independent of local social, economic, and cultural conditions. He has done a great service as an agent provocateur, but one is left wondering how his thesis can be transplanted, refined, or adapted into a form that is capable of detailed empirical testing.¹⁷

It is this persistence of Watson that allows the barrage of criticisms against his theory charging him with: ignoring the differences between interest groups; judging the appropriateness of every law by a single standard; and imposing his own values on the societies he studies.¹⁸ These criticisms are similar to ones levelled against the World Bank policies in the 1980s due to its broad classification of economic systems and the legal transplants to impose changes on these systems ignoring the history, politics and social environments of its borrowers.

II. Legrand Legal Transplant Theory

Legrand is the converse of Watson, he is described as a culturist,¹⁹ and supports the 'mirror thesis' of law. Legrand believes that, "Law is mainly an outgrowth of local society. Law is embedded holistically in local culture. This makes reception

¹⁵ W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *The American Journal of Comparative Law* 489-510, at 491 (1995).

¹⁶ *Id.*

¹⁷ W. Twining, *Generalizing About Law: The Case of Legal Transplants*, *The Tilburg-Warwick Lectures General Jurisprudence*, 1-39, at 22 (2000).

¹⁸ Ewald, *supra* note 15, at 505.

¹⁹ Foster, *supra* note 4.

and assimilation of foreign ideas problematic.”²⁰ He concedes that legal systems interact and influence each other, but the processes tend to be slow and complex.²¹ Legrand is not a hardliner like Watson, so his theory is not over-specific so as to invite criticism and ease of falsification. Legrand Legal Transplant Theory allows for the unexpected results, that is how a host country reacts to a legal transplant being injected into its system. His theory also allows for multiple results, although he is not as optimistic as Watson and often expects rejection of the transplant. There are other comparativists whose ideas seem to fit within Legrand Theory of Legal Transplant, examples, Otto Kahn Freund, G. Teubner and Ann and Robert Seidman. The combination or synergy of all these theories holds a viable alternative to Watson’s theory. Combining Legrand’s theory with others does not suggest that his theory on its own is weak. Rather the combination proves that Legrand’s theory has its support, its yea-sayers. It is a theory that concurs with many of the ideas or theories of legal transplants. It is a practical theory, which prescribes cautious application of legal transplants, unlike Watson, he is not the optimist on the success of transplants.

Legrand believes that comparativists should be responsible in that they should be aware of deep cultural differences between legal systems to be compared and that law may not be viewed separately from the culture in which it exists.²² He believes the law is a culturally determined artefact. Legrand’s view is summed up in this statement describing Frank Lloyd Wright’s view: “... a legal system should be made of local materials sensitively used; it should become part of the landscape rather than appear as an alien imposition; and it should embody and express local values in a coherent fashion. In short it should be in harmony with its context.”²³ The same rules and institutions when applied to a different context have widely different results, some completely unexpected. Legrand advocates that the differences in a legal system are just as important, if not more, important than the similarities.²⁴ He stated that:

... by thinking of law in ways that sever it from its life-world, the ‘comparatist’ deprives herself of insights of great importance for comparative thought. Specifically, because the ‘comparatist’ ignores the socio-historical or socio-cultural context.²⁵

He opposes the trend of globalisation where there is a tendency towards uniformity in economic, legal and social institutions. He goes against the tide of many comparativists’ search for uniform law or harmonisation and convergence of legal systems. He believes the traditional emphasis of comparativists is seeking consistency rather than contrast and differentiation.²⁶ It is on this basis that he

²⁰ Twining, *supra* note 17, at 24.

²¹ *Id.*

²² S. van Erp, *European Private Law: Postmodern Dilemmas and Choices Towards a Method of Adequate Comparative Legal Analysis*, 3(1) *Electronic Journal of Comparative Law* (1999). Text available at <http://www.ejcl.org/ejcl/31/art31-1.html>. (Accessed 12 October 2005).

²³ Twining, *supra* note 17, at 25.

²⁴ P. Legrand, *Against a European Civil Code*, 60 *Modern Law Review* 44-63, at 45 (1997).

²⁵ P. Legrand, *How to Compare Now*, 16 *Legal Studies* 232-242, at 236 (1996).

²⁶ R. Cotterrell, *Seeking Similarity, Appreciating Difference: Comparative Law and Communities*, in A. Harding & E. Orucu (Eds.), *Comparative Law in the 21st Century* 40 (2002).

opposes a European civil code as it amounts to the production of uniform formal rules without taking into account the local culture of the different Member States of the European Union.²⁷

Otto Kahn-Freund is another culturist comparativist, whose theory complements that of Legrand. For Kahn-Freund, the social, and even more the political factors, should be considered in order to avoid rejection of the legal transplants. Later, this article will demonstrate how the World Bank's disregard for these factors caused its legal transplants to fail. Kahn-Freund believed that "some areas of law are more closely linked to society than others (which are more 'organic') and that the success of transplants of more organic areas of law depends primarily on the political system."²⁸ These are further arguments to the argument of Montesquieu who believed that environmental difficulties, such as culture and political factors, stood in the way of transplantation from one system of law to another.²⁹ Teubner has a similar theory in that he believes that "some areas of law are more or less strongly 'coupled' to 'social processes', and that the degree of success of a transplant depends on the degree of coupling."³⁰ Ann and Robert Seidman have similar sentiments and assert that:

It follows that a law or a presumed 'international standard' can only induce in its new home the same behaviours as in its original one if both the implementing agency in the new country, and all the other relevant factors in the addressees' social surround closely resemble those of the law's addressees' in its place of origin.³¹

Converging all these transplant theories, while reiterating that Legrand Legal Transplant Theory can stand on its own, this article can argue that, the successful reception of legal transplant depends on similarities of values between the donor and the host and the probability of rejection depends on how much the transplant will impact on the culture of the host.

The combination of these theories offers a sensible and responsible approach for any comparativist embarking on a project of legal transplant. A sensible approach enhances the chance of success. This leads to the question: were the economic policies transplanted by the World Bank culture specific? This question is similar to the one asked of commercial law by Nicholas Foster.³² In response, he stated that most people say that commerce is culture-neutral and it is believed there is a similar response regarding economic law. Section C will argue, however, that economic policies are culture-specific and that the loan conditions imposed by the World Bank meant changes in local laws which were bound up in the social process and consequently affected the daily lives of the people of the host country. The next Section will also argue that the World Bank failed to recognise

²⁷ Van Erp, *supra* note 22.

²⁸ Foster, *supra* note 4, at 58.

²⁹ P. Leyland, *Oppositions and Fragmentations: In Search of a Formulae for Comparative Analysis?*, in A. Harding & E. Orucu (Eds.), *Comparative Law in the 21st Century* 216 (2002).

³⁰ Foster, *supra* note 4, at 60.

³¹ A. Seidman & R. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 *The American Journal of Comparative Law* 1-44, at 12 (1996).

³² Foster, *supra* note 4, at 60.

this culture-specificity and that as a result optimistic predictions were made and the Watson-style approach persisted to the detriment of the host countries before the World Bank accepted that adjustments needed to be made.

Also ignored by the World Bank is the importance of investigations in the social surround of a potential host as part of the legislative process to ensure coherence in the legal system and a greater probability of success. This article takes a wide meaning of the term 'the legislative process' by taking into account the preliminary stages such as research and consultations and post-enactment process such as review and scrutiny.

III. Legal Transplant Theories and the Legislative Process

This debate between Watson and Legrand encompasses what should be the considerations of any body or government embarking on a project of legal transplants. Any changes in law are considered law reform especially if there is an extensive overhaul of a particular area of law, such as fiscal and monetary laws. The World Bank acting as donor of legal transplants should have considered whether or not the changes in laws it insisted on would have been properly received by the host country so as to bring about the results expected. These considerations would have been made before the legal draftsman would have put pen to paper to draft the amendments recommended in the monetary and fiscal laws. It is during this consideration process that legal transplant theories, including the theories of Watson and Legrand, would have been considered. If the Legrand Legal Transplant Theory were considered to be the most practical and sensible theory, then before any drafting of laws there would have been extensive consultations on the present legal system of the host country and the social and political environment to ensure coherence on application. As Victor Crabbe, one of the revered draftsmen stated:

Law does not operate in a vacuum. Statute law less. A statute is intended to guide, and regulate, the conduct and affairs of those to whom it is addressed. Its content thus takes cognisance of the cultural, economic, political and social conditions of the society within which it is intended to operate. A sound knowledge of these conditions is very necessary.³³

This process of being aware of the cultural, economic, political and social conditions facilitates the 'Five Stages of the Drafting Process' described by G. C. Thornton³⁴ in that before a drafter proceeds according to the drafting instructions given to him he would have to understand the problem by referring to the research documents produced by the consultation process. However, since the World Bank was of the view that social conditions were not relevant and that the theory of Watson was more appropriate in its legal reform process there was no comprehensive consultation process preceding any changes in law. This article by looking at the approach of the World Bank will demonstrate how considerations of the social and political environment are very important when considering

³³ V. Crabbe, *Legislative Drafting* 12 (1993).

³⁴ G. C. Thornton, *Legislative Drafting* 128-138 (1996).

changes in law. Examining what determines the success of a legal transplant is essential to any law reform process. The next section will examine the economic policies transplant process between the World Bank and the third world countries in the 1980s and within this process it will be shown that the conditions of the host countries were not considered when the laws were being changed.

C. Legal Transplants and Third World Economies

I. The Economic Policies Transplant Process

The economic policies transplant process usually involves the transfer of laws, transaction processes and institutions or systems, which relate to the fiscal and monetary economic policies from the donor country or organisation to the host country or organisation. The transplants usually manifest themselves as changes in the local law or re-organisations of local institutions. Many of these transplants are voluntary on the part of the host country, which may have invited the donor to participate in the change of its legal system to improve its economy. In cases like these the host countries have more autonomy on which laws are received and how they are received. The success rate is relatively high and Watson uses such examples to prove his theory of ease of transplant. However, the success rate is not due to the theory of ease of transplant but due to the host country's control of the situation and that country giving account of its culture and institutional differences in the consultation process. Even in cases like these, success is not guaranteed as the powers that facilitated the transplants may not predict well the reception or the force of rejection. Unlike these cases, other cases involve the potential host approaching the potential donor as a last resort and the potential host is not in a position to bargain and ultimately does not have much control over which laws are received and the manner of reception. The success rate in these cases is low, but there are instances of success especially if the laws transplanted are not culture specific and do not irritate the society in rejecting the law or rejecting the authorities that implemented the laws. It is difficult to make predictions on the effect of such transplants as the transplants will affect social processes if they are culture specific. However, failure is not automatic. In fact, it is quite possible to have unexpected multiple results, which is one of the points stressed by Legrand Legal Transplant Theory.

The poor bargaining position is usually evident in third world countries, which are forced to approach international lending agencies such as the World Bank for a loan, especially in times of economic crises. Generally, the process would proceed as follows: (1) Potential host is in economic crisis, e.g. balance of payment deficit, and is without the resources to restructure the economy; (2) Potential host approaches high interest international lending agency for a loan and over time interest accumulates and potential host economic situation worsens; (3) Potential host, in a very low bargaining position, then approaches the World Bank for a loan; (4) World Bank agrees to lend a sum for structural adjustment and after conducting a comparative study or based on previous studies concludes

that a certain economic policy would improve the economic situation of the potential host; (5) the loan is disbursed under the conditions that certain policies are to be implemented; (6) local laws are changed to accommodate the conditions (realisation of transplants); and finally (7) host reacts to changes in law (rejection or success).

The process usually starts to deteriorate at stage 4. The comparative study, if conducted, very often does not take into account the uniqueness of the host, the differences that may change predictions. The economic structure of the country, the focus of change, should not be the only subject of the comparative study, the overall social environment, especially politics, should be put in the equation as “cross-cultural experience may provide an invaluable mine of information; but policy-oriented researchers must venture down those dark and difficult shafts with care.”³⁵ Ann Seidman and Robert B. Seidman while grappling with the distorted allocation patterns of third world institutions³⁶ commented that:

To copy a country as a model can only mean to copy its institutions. That requires trying to induce in the receiving country the same patterns of behaviour that characterized the model country. Whether because of wisdom and deliberate choice, muddling through, or plain good luck, in the country of origin those behaviours ‘succeeded’ because of their interaction with their entire institutional, economic and political surround. That surround always includes the outcomes of historically-shaped, almost never reproducible conditions and choices.³⁷

The “dark and difficult shafts” and the “muddling through” are what Legrand described as a part of his transplant theory. Sometimes success is just a matter of “good luck” as a transplant may not succeed in the host even if its economic structure is similar to that of the donor as its surrounding environment may be very different from that of the donor. A comparative study is not to be used to make conclusive predictions on the effect of the transplant. It should be used merely as a guide and multiple unexpected results should be “expected”. To be used as a guide a comparative study should be conducted early as part of the five stages of the drafting process, described by Thorton, or preferably before the process has begun. This grounds any legislative proposals made but as later seen in this article neither comparative studies nor in depth consultations were essential parts of the Bank’s policy-based loan programme.

The economic policy that is usually transplanted by an international lending agency is the neoclassical economics³⁸ of the liberal economic model. The neoclassical model is based on mathematical logics. It is based on the assumptions that individual behaviour is based on maximising one’s personal utility, value

³⁵ A. Seidman & R. B. Seidman, *State and Law in the Development Process. Problem-Solving and Institutional Change in the Third World* 51 (1994).

³⁶ *Id.*, at 40, where they defined ‘institution’ as “repetitive patterns of social behaviour”.

³⁷ *Id.*, at 46.

³⁸ J. Eatwell, M. Milgate & P. Newman, *The New Palgrave A Dictionary of Economics* 625 (1987). ‘Neoclassical economics’ is a term first used in the 1900 in order to characterize Marshallian economics. It was a perception of the continuity with classical economics on the alleged basis of a common assumption of a hedonistic psychology, methodological individualism and on the other hand marginal productivity theory of distribution.

preferences, and that the “invisible hand” of the market allocates scarce resources and determines the competitive equilibrium price.³⁹ The neoclassical model is seen as the most efficient way of allocating scarce resources. With these assumptions, neoclassical economics seeks to limit to a minimum anything that affects the economic forces from determining competitive equilibrium price and the consumer’s personal choice. This model limits government intervention, which is accused of impeding efficiency, leading to low productivity and poverty.

The neoclassical economic model was transplanted with Watson Legal Transplant Theory in mind as predictions were usually very optimistic based on mathematical models/calculations derived from studies of first world countries. The results were usually disappointing and this article argues that if Legrand Legal Transplant Theory were applied, preparations would have been made for multiple results and adjustments would have been made early in the process to increase the likelihood of successful transplants. Watson’s theory states that a transplant will be successful despite the differences in the donor and the host, however the failure of the neoclassical model on third world economies proves there is a fallacy in his theory. A comparativist would be irresponsible if he ignored the social environment and the history of third world countries. Whatever economic model was used had to be filtered through the institutions of the third world economies, and these institutions were not borne out of a free market economy. These institutions still carry the weight of past political domination described by the Seidmans below:

At independence, third world institutions reflected much more than past political domination. The colonial rulers had employed the state and law to institutionalize and sustain an exploitative process through which colonial companies and settlers creamed off super-profits generated by low-paid indigenous labour using local natural resources. Political independence left intact the institutions, which sustained the colonial economic order – some called it ‘neo-colonialism’ (Nkrumah, 1965). The new states’ failure to restructure these inherited institutions both fostered and reflected the emergence of a new fraction of the ruling oligarchy: the bureaucratic bourgeoisie.⁴⁰

The third world economies did not correspond to the assumptions of the neoclassical economic model, their social environments were different from first world countries where such a model had proven on occasions successful. No matter how much Watson had asserted his theory of the ease of transplant, his theory proved false in the cases of neoclassical economic legal transplant on third world economies. Firstly, the model assumes that no single producer or consumer is large enough to influence the price of a good. In third world reality, transnational corporations in key sectors, with access to international financial markets, exercised great leverage.⁴¹ Secondly, the model assumes that entrepreneurs can shift resources from an unprofitable economic activity to a profitable one, adapting to the invisible hand. In third world reality, adaptation was slow as

³⁹ *Id.* at 179. ‘Competitive equilibrium price’ is price of goods and services determined by the balance between the forces of demand and supply.

⁴⁰ Seidman & Seidman, *supra* note 35, at 107.

⁴¹ Seidman & Seidman, *supra* note 35, at 216.

reliance on overseas capital and technology hindered re-allocation.⁴² Thirdly, the neoclassical model assumes that producers and consumers know the present and future equilibrium prices of their inputs and outputs so that they can respond quickly to changing markets. In third world reality, producers and consumers lacked knowledge due to illiteracy, language barriers, and poor rural road access. Transnational corporations had the knowledge and used it to their advantage to destroy the competition.⁴³ Fourthly, the model assumes that producers respond to the market forces to achieve equilibrium and maximise their profits while consumers seek to maximise their satisfaction, this is the hedonistic element of neoclassical economics. In third world reality, neo-colonialism institutions instead of neoclassical economic institutions existed and pre-existing modes of production often persisted. Further, consumers did not always seek to maximise their satisfaction as they sometimes forego satisfaction for the sake of other individuals.⁴⁴ Finally, the neoclassical model assumes that there was sufficient income equality so that producers while meeting market demand also fulfilled the needs of the majority of the population. In reality, there were extreme disparities in income and profit-maximising producers primarily produced products for high-income markets, and low-income markets hardly attracted investment. This was evident in the worsening of the plight of the poor when the World Bank insisted on limiting government investment in certain industries and the private sector failed to fill the gap, as those industries were low income and did not generate investor interest.

With all these factors, this article argues that third world economic laws were culture specific, in that the social context of a society affected the application and the outcome of these laws, and therefore any economic transplant would be culture specific, which would decrease the likelihood of success upon transplant if all the social factors were not taken into account and predictions made accordingly with preparations made for adjustments. This is more in line with Legrand Legal Transplant Theory as Watson Legal Transplant Theory totally ignored third world reality.

II. World Bank Economic Policies Transplant Relating to Watson and Legrand Legal Transplant Theories and Culture Specificity

According to the World Bank's International Bank for Reconstruction and Development (IBRD) Articles of Agreement one of its purposes is to encourage the development of productive facilities and resources in less developed countries.⁴⁵ In the 1980s when many third world countries experienced failures in

⁴² *Id.*

⁴³ Seidman & Seidman, *supra* note 35, at 217.

⁴⁴ *Id.*

⁴⁵ Article 1 of IRBD Articles of Agreement states:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of

development strategies and external price shocks to their main exports, the World Bank had the opportunity not only to assist in the balance of payments crises but to transfer its economic policy as a condition of its assistance.

When considering the transplant of its economic policies to promote recovery of the third world economies in decline, the World Bank had more of a Watson-style approach and proceeded on the assumptions of the Big Bang strategy as Seidmans commented,

The Big Bang strategy rests on neoclassical economics' explicit premise that markets work basically the same way everywhere. The same laws can work in any market economy. In that model, institutions constitute a 'black box' which require no analysis. Neoclassical economic theory, therefore, seems to imply that if everyone simply pursues their own interests, *mirabile dictum*, there will emerge the optimal social allocation of goods and resources. In principle, therefore, to draft laws for a Big Bang transformation requires no examination of a country's specific institutional context.⁴⁶

This article continues to argue that Watson Legal Transplant Theory does not translate to reality and Legrand Legal Transplant Theory, especially when enhanced with the theories of Khan-Freund, the Seidmans and Teubner, is more practical, as before drafting laws for economic reform there should be thorough examination of a country's institutional context. This article disagrees vehemently with the Big Bang theory, which was applied by the World Bank in the 1980s, to the detriment of third world borrowers. In criticising the World Bank's neoclassical economic policies Jane Harrigan when studying the devastating effect of the World Bank's policies on Guyana in the 1980s commented that:

Conventional text-book economics is not written for economies in decline, but for static or growing economies. One can structurally adjust an economy which is growing but growing inefficiently, or one that is static. But an economy in cumulative decline forces one to confront a systemic problem. Such economy requires transformation of a Keynesian⁴⁷ type, in which the emphasis is on the quality and quantity of investment, particularly the stimulative role of public sector investment. The Bank's structural adjustment programmes however are rooted in the marginality theories of neo-classical text book economics with their emphasis placed on price incentives, exchange rate adjustments and trade liberalisation.⁴⁸

In applying the conventional text-book economics in implementing its structural adjustment programmes the World Bank had similar comprehensive

productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

⁴⁶ Seidman & Seidman, *supra* note 31, at 34.

⁴⁷ Keynesian economics is derived from the economist John Maynard Keynes, one of the great intellectual innovators of the first half of the 20th century. Keynes is known primarily for his fundamental contributions to monetary policy. The term 'monetary policy' refers to "actions taken by central banks to affect monetary and other financial conditions in pursuit of the broader objectives of sustainable growth of real output, high employment, and price stability." as defined by Palgrave, *A Dictionary of Economics*, *supra* note 38, at 508.

⁴⁸ P. Mosley, J. Harrigan & J. Toye, *Aid And Power The World Bank and Policy-based Lending Case Studies*, Volume 2, at 391 (1994).

policy packages for all its third world borrowers. Firstly, it offered aid only to governments which reduced their intervention in domestic and foreign markets upon the neoclassical assumptions that excessive governmental intervention is the reason for inefficiency and poverty; then it insisted on privatisation to encourage the growth of the private sector competition; thirdly, it insisted on the opening up of the economy to international competition by relaxing import/export licensing and tariffs laws in the aid of promoting efficiency among local producers; fourthly it requested the devaluation of currency to render exports more competitive by lowering export prices; and fifthly it insisted that governments cut public expenditure to reduce budget deficits; finally, it demanded that the governments create a hospitable investment climate by offering tax free incentives and a modern commercial legal system. Once the third world borrower agreed to these conditions structural adjustment loans and sectoral loans were disbursed in instalments. If the borrower breached the conditions, then disbursements would be suspended.

According to Watson and the Big Bang theory the unimpeded market forces would create a stimulus to the economy with the results that: production would become efficient, attracting investment to high income generating industries; international investors would be attracted to the hospitable investment environment; exports would increase being more competitive and the government would balance its budget. As a result the economy would revive and the benefits would trickle down to the least fortunate, even those in the most rural of areas. Again, according to Watson, the legal transplants would not be rejected, as the different social environment of the borrower would not matter. Figure 1 demonstrates Watson Legal Transplant Theory in relation to the transplant of neoclassical economics, encompassing monetary and fiscal laws.

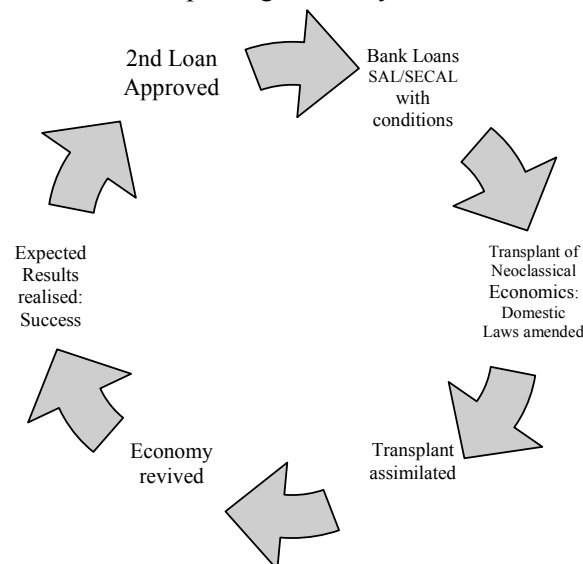


Figure 1: WATSON LEGAL TRANSPLANT THEORY (in relation to the World Bank's neoclassical economics transplant on third world economies)

However, in contrast to Figure 1, the economic laws transplanted affected crucial aspects of the third world societies. The laws were not just a gloss on the economy, they perforated and found themselves in the groves of the social environment that Watson could not have predicted. The laws impinged “on the distribution between the judicial and the administrative decision and policy-making power and therefore on the minutest details of legislation affecting economic and social policy, especially industrial relations.”⁴⁹ Firstly, the policies caused a political fervour and actually toppled government, no surprise to Legrand. Many governments lost legitimacy with their citizens, this translated to lost of voter support, which left them open to intense criticisms from the opposition parties. The citizens did not see the changes in the law as development of the many but more riches for persons in power, and many vowed to support any other political party except the party in power and in a two-party system with strong trade unions, like Jamaica, this led to political unrest and loss of election. In some cases, there were riots after the removal of food subsidies designed to reduce government spending and strikes after the imposition of stamp duties on imports. Producers who gave their political support in return for economic benefits were demoted to ordinary status during reforms and in response they incited disfavour against the government whose ministers were sometimes their own family members, this was the case in the Philippines.

Secondly, the prediction that reforms would benefit the most disadvantaged did not happen as the poor suffered. The neoclassical prescription of reduced government spending meant changes in the law for the removal of subsidies and the withdrawal of government investment in low-profit essential industries. Basic necessities’ prices increased and certain labour-intensive agriculture industries became unprofitable and closed. This meant unemployment, which in part caused migration from rural areas to urban areas and, consequently, the congestion of those urban areas and slumming. Living conditions were deplorable, also working conditions as the ex-agriculture workers became workers in tax free zones in factories of transnational companies, which invested due to investment incentives offered by the government as a World Bank condition, this was the case of Jamaica. The government guaranteed to keep wages low at the expense of its citizens, which awaken the labour unions campaign against the government causing the government to lose more voter support. Further, urban congestion and low wages fuelled crime and violence, in addition to riots against government policies. These riots were often in political garrisons, which were located in the centre of slums inhabited by the poor workers.

Thirdly, the opening-up of the economy to promote foreign trade, which would cause local producers to be more efficient just resulted in the worsening of balance of payment problems as there was an increase in demand on foreign exchange to pay for more imports, as in the cases of Kenya and Jamaica. Exports did not increase, as expected, as the industrial sector could not quickly re-invest to competitive export goods. In addition, although devaluation made exports

⁴⁹ O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Modern Law Review* 1, at 12 (1974).

more competitive on the world market there was no real increase in profits for the exporters and so no incentive to produce more. However, importers could respond more quickly and in the culture of the desire for foreign goods the balance of payment problem became worse.

In contrast to Figure 1, Figure 2 demonstrates the Legrand Legal Transplant Theory demonstrating the adverse effects of neoclassical economic theory as explained above.

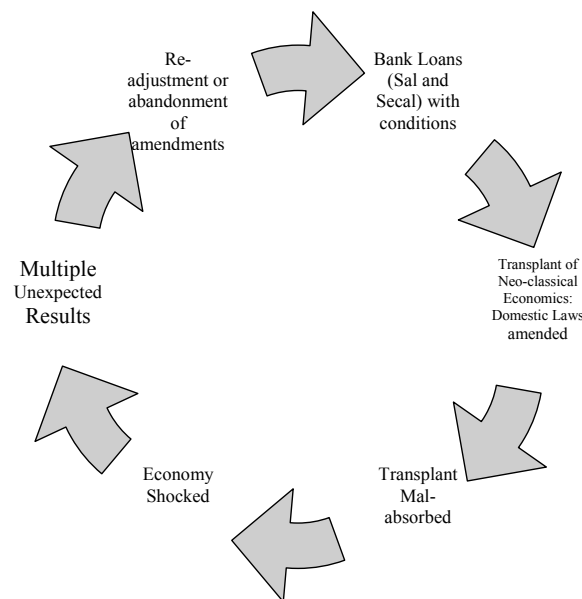


Figure 2: LEGRAND LEGAL TRANSPLANT THEORY (in relation to the World Bank's neoclassical economics transplant on third world economies)

As indicated before, the economic policies transplant process usually involves the transfer of laws, transaction processes, institutions or systems, which relate to the fiscal and monetary economic laws from one organisation or country to another. Legrand Legal Transplant Theory in relation to neoclassical economics would have predicted that third world economies would be shocked and then there would be reactions in the form of readjustment or abandonment of the recommended amendments in law. This readjustment or abandonment would be part of the post-enactment scrutiny or review of the legislations. However, what this article continues to advocate is that in-depth examinations of the social and political factors should be considered as part of the legislative proposal before any changes in the law to bring about economic reform. Often in law reform the actual drafting process of laws is emphasised as if an enactment excellently drafted, clear and precise to both judges and the layperson would translate into success and the purpose of the statute would be realised. This is not the case as whether or not a law brings about its objectives depends on the context within which it is applied, therefore the context, that is the society, has to be studied carefully

to ascertain which provisions are to be included in the legislation proposed or if legislation would achieve the results desired. The element of study conducted before instructions are given to the draftsman and continued after enactment is very often neglected as it involves time-consuming consultations into the social and economic factors, which often are not within the sphere of interest or expertise of persons proposing the legislative changes. However, it is believed that the World Bank had the resources to conduct these pre-legislative consultations but thought them unnecessary as its thinking was more in line with Watson Legal Transplant Theory. The following section will examine what should have been thoroughly considered by the World Bank before it insisted upon changes in the monetary and fiscal laws of the selected third world countries.

D. Jamaica, the Republic of Kenya, the Philippines and the World Bank in the 1980s

Jamaica, the Republic of Kenya and the Philippines are all third world countries which experienced debt crises in the 1980s and which approached the World Bank for financial assistance. Jamaica is from the region termed Caribbean and Latin America, Kenya is on the continent of Africa and the Philippines is an Asian country. There are miles and oceans separating each country, however they have similar histories with the World Bank in the 1980s. Countries from separate regions/continents were deliberately chosen for a wide cross section of examples for a comprehensive illustration of the World Bank's policy-based lending regime in the 1980s. Apart from the deliberate choice of contrasting regions these countries were also chosen for their similar colonial histories and vulnerable economic environments. All had delicate labour intensive agricultural industries and under-developed secondary industries as they had not yet undergone rapid industrialisation. In addition, they had very responsive political environments represented by either an authoritarian regime with a small supporting demanding elite or a two party political system where the opposition party exploited the failing economy to its advantage. Also they were vulnerable to external shocks on the international markets and therefore were unable to project with enough certainty for planned development. Furthermore, their political and economic institutions and cultures were derived from historical arrangements where the majority of essential consumer goods and manufacturing producer goods were imported and mainly non-competitive agricultural goods exported. These arrangements made the countries susceptible to balance of payment problems and high deficits in government budgets. When these countries approached the World Bank at the start of the 1980s they had the unfortunate co-incidence of being in a poor bargaining position⁵⁰ facing an international bank owned mainly by large first world countries and which bank was on the verge of policy-based lending. This meant the imposition of very impacting changes in law to access its loans.

⁵⁰ A. Abu-Akeel, *World Bank Perspective*, 15 California Western International Law Journal 552,

For each country this Section will glance at the historical, political, social and economic setting and then examine the economic problems in the late 1970s early 1980s, which caused these countries to seek financial assistance. The Section will then illustrate the approach of the World Bank and the factors not considered by the Bank in transplanting its economic policies and the impact of those legal transplants.

I. Jamaica

1. History and Economic Problems in Jamaica

In 1962 after independence Jamaica's economy was relatively stable with agriculture resources mainly in banana, coffee and sugar. However, the economy was very vulnerable and the government instituted a highly protectionist trade regime to protect an inefficient capital-intensive and monopolistic domestic and manufacturing sector.⁵¹ This was still a boom period for Jamaica and the tourism and bauxite/alumina sectors had begun to develop⁵² and the government had increased public expenditures on social services. Unfortunately the economy started to deteriorate after the oil price shock of the early 1970s and there was a rapid increase in the price of imported goods with no import-substituting local production. Then there was the deterioration of the highly-relied-on bauxite industry in the 1970s, which worsen to a collapse in 1985. Also by the 1970s there was double-digit inflation caused by the government's loose monetary policy and the rapid increase in import prices and nominal wages. The balance of payment problem that arose out of the government strategy of the 1970s forced Jamaica to approach the International Monetary Fund (IMF) for a stabilisation programme.⁵³

at 555 (1985), where the senior legal counsel of the World Bank legal department itself commented that,

Many developing countries do not have access to the information and lack the technical skills needed to bargain with the multinationals over basic issues such as the choice of technology, the limitation on the repatriation of profits, the accounting method to be used, the training of local personnel, the protection of the environment, etc.

⁵¹ Mosley, Harrigan & Toy, *supra* note 48, at 312 where Jane Harrigan commented that this was following the conventional wisdom of economic theory of the 1960s.

⁵² S. Hudson & R. Stennett, *Current Account Sustainability in Jamaica*, Research Services Department, Research and Economic Programming Division, Bank of Jamaica, at 5 (2003). Text available at http://www.boj.org.jm/uploads/pdf/papers_pamphlets/papers_pamphlets_current_account_sustainability_in_jamaica.pdf. (Accessed 9 August 2006). The writers stated that Jamaica can be classified as having a persistent current account deficit and that in the period leading up to 1970, the current account deficit averaged 5.7 percent of gross domestic product, they wrote that,

Economic policies at that time focused on the promotion of rapid economic growth with the aim of achieving self-sufficiency. Significant capital goods were imported to facilitate the expansion of the bauxite and tourism industries, which contributed to the widening deficit.

⁵³ The International Monetary Fund is an international organisation created by a treaty whose main responsibility is the stabilising of the exchange rate system. See W. E. Holder, *The International*

After an Extended Fund Facility given by the IMF, manipulation of the exchange rate, a sharp reduction in government spending and decline in real wages Jamaica did not improve, instead there was political and economic upheaval and after a bloody election⁵⁴ the Peoples National Party led by the Michael Manley Administration lost power. This loss of power was directly attributed to the IMF's policy, which was criticised as harsh and unrealistic and it was commented that, "the political and economic events of the past years had not only severely polarised Jamaican society, they had also exerted considerable economic hardship on vast numbers of the population such that the election resulted in a landside victory for Edward Seaga's JLP [Jamaica Labour Party] party."⁵⁵

It is at this point that the World Bank entered the picture with its first structural adjustment loan (SAL) and its neoclassical economic legal transplants ignoring the particular setting of the Jamaica's economy and the recent history with the IMF.

2. The World Bank Economic Legal Transplants in Jamaica

The World Bank's intervention in the Jamaica's economy in the 1980s was illustrated by three SALs and a series of Sectoral Adjustment Loans (SECALs).⁵⁶ There were similar objectives and approaches for all the loans as they were all designed for balance of payment management,⁵⁷ savings and investment, industrial sector policies and agricultural policies on a neoclassical big bang theory. Each subsequent loan, with its conditions, was designed to improve upon the one before but continued in the same vein of the Watson-style approach, that is, ignoring the pressing social and political environment to determine what appropriate changes

Monetary Fund: A Legal Perspective, 91 American Society of International Law Procedures 201, at 201-204 (1997). The writer discusses the nature and changing role of the fund.

⁵⁴ World Bank (2006), Jamaica – Inner City Basic Services for the Poor Project (2006). Text available at <http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P?2006.txl>. (Accessed on 9 August 2006). The document reports that high levels of violent crime can be linked to politically motivated violence established in the 1970s and 1980s.

⁵⁵ Mosley, Harrigan & Toy, *supra* note 48, at 320.

⁵⁶ The Structural Adjustment Loans and the Sectoral Adjustment Loans are development policy loans of the World Bank originally designed to provide support for macroeconomic policy reforms, over time they evolved to focus on the financial sector and public sector resource management. See G. Brucculeri, *A Need To Refocus The Mandate Of The International Monetary Fund And The World Bank*, 17 Windsor Review Legal and Social Issues 53, at 53-73 (2004), discussing the Articles of Agreement and the need to review the loan process.

⁵⁷ R. Longmore & C. Henry, *Current Account Dynamic and the Real Effective Exchange Rate: The Jamaican Experience*, Research Services Department, Research and Economic Programming Division, Bank of Jamaica (2003). Text available at http://www.boj.org.jm/uploads/pdf/papers_pamphlets/papers_pamphlets_current_account_dynamic_and_the_real-effective_exchange_rate.pdf. (Accessed 9 August 2006). The nature of the current account of the balance of payments was stated as a

statistical record of exports and import of goods and services transfers ... It measures the extent to which an economy is a net borrower or net lender vis-à-vis the rest of the world over a particular period. The current account balance is the outcome of investment and saving decisions of optimising agents.

should be made in the law. Coming to the end of the 1980s the World Bank began to drift away from Watson's theory and became more cognizant of how impacting social factors were and began to make some small adjustments, which had positive effects as expected by Legrand.

The first SAL of US\$ 76.2 million was agreed in 1982 followed closely by SAL II in the amount of US\$ 60.2 in 1983. Both were designed to reduce an excessive level of public sector consumption, low productivity, the flight of scarce capital and brain drain, with the ultimate aim of improving the balance of payment.⁵⁸ These loans were disbursed after the government of Jamaica agreed to relax the import licensing laws to improve export and productivity. Secondly, the government agreed to gradually remove quantitative import restrictions and introduce export incentives. Thirdly, for the agricultural sector there were managerial and marketing legal reforms and the government sold land to private farmers to aid privatisation. Fourthly, the government attempted to reduce its expenditure and increase its savings by implementing large tariff increases, cutting staff and privatisation of the main transport system. SAL III was approved in 1984 in the amount of US\$ 55 million. The third loan had similar emphasis but it focussed on financial reform in the equity market. After 1985 the World Bank continued its programme lending by a series of SECALs oriented towards promoting open market operations. The results of the economic policy legal transplant fell short of expectations as changes in local laws and rules were not well absorbed by the economic system due to factors such as the political climate, spending habits of consumers and the vulnerable open economy.

3. Factors Affecting Transplants in Jamaica

According to Watson, the differences between the systems of the donor and the recipient should not affect how successful the legal transplants are. However, in Jamaica its particular situation resulted in poor results and Jamaica's economy did not improve as expected by the neoclassical economic theory. Firstly, the spending habits of consumers were not as expected and the balance of payment situation became worse instead of improving. The liberalisation of the import-export licensing laws, with the relaxation of tariffs, was designed to increase the import of capital goods for an increase in production, which would lead to more production and exports. Increased exports would lead to an increase in foreign exchange and the resultant improvement of the balance of payments. However, consumers did not react as expected as there was a culture of importing luxury items and the relaxation of import licensing laws led to an increase in luxury

⁵⁸ IBRD Articles of Agreement Article 1 states:

- (i) ...
- (ii) ...
- (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.

goods instead of capital goods and this did not lead to an increase in production. At the same time, there was a decline in bauxite/alumina exports resulting in a dramatic fall in revenues. To exacerbate the situation, the IMF had previously insisted on a significant devaluation of the currency and consequently there was no export incentive for the agriculture industry as the prices on the international market were low. The result was an “import-led growth without a medium-term export supply response and lack of improvement in the balance of payment,”⁵⁹ instead of an increase in exports. Not only did the Bank did not expect a sharp increase in the import of luxury goods instead of capital goods but there was also inconsistency in its adjustment programme as:

in the early years of the adjustment programme ‘a sharp deterioration in the current account of the balance of payments ... was foreseen’ since the programme was designed to ‘increase imports to stimulate economic activity, to be financed by a higher level of borrowing until the economy could be reoriented towards exports’. Clearly, the implication of such statement is that the success of supply-side reorientation would take several years to emerge⁶⁰

The implication of the policy would not even emerge after several years as the increase in imports did not consist of capital goods for production, which would have led to a growth in the economy. Furthermore Jamaica was characterised by an imperfect market with high levels of uncertainty and there were constant speculations of impending devaluations of the exchange rate giving rise to a constant demand of foreign currency which further created a downward pressure on the exchange rate.⁶¹ This led to further increases in import prices and cost-push inflation.⁶²

Secondly, Jamaica’s political environment was one that was very sensitive to economic changes, especially those that affect the standard of living of the masses. The ruling party was very sensitive to its vulnerability and resisted the application of the conditions but not enough to be in breach. This, resistance however did not prevent the dramatic effect on the standard of living of the majority of the population and the consequent loss of votes that led to the loss of election for the ruling party, the Peoples’ National Party.

⁵⁹ Mosley, Harrigan & Toy, *supra* note 48, at 327.

⁶⁰ Mosley, Harrigan & Toy, *supra* note 48, at 328.

⁶¹ Mosley, Harrigan & Toy, *supra* note 48, at 338.

⁶² W. Robinson, *Labour Market and Price Behaviour in Jamaica The Jamaican Experience*, Research Services Department, Research and Economic Programming Division, Bank of Jamaica, at 2 (1998). Text available at http://www.boj.org.jm/uploads/pdf/papers_pamphlets_labour_market_and_price_behaviour_in_jamaica.pdf. (Accessed 9 August 2006). The writer discusses the structuralist and monetarist concepts of inflation referring to Jamaica’s inflation profile,

The first commenced in 1982/3. This episode lasted for about three years with the annual point to point inflation rate moving from 6.97 percent in 1982 to 26.82 percent in 1984 and 23.35 percent in 1985. In fact between 1982 and 1985 prices rose by an overall 88.8 percent. Price movements in this period maybe linked, amongst other things, to oil prices changes and exchange rate devaluations resulting from changes in the foreign exchange regime.

Another political factor not considered was the play between the government during the Seaga-led regime of the newly elected Jamaica Labour Party and the United States Government, which disrupted the predictions of the economic policies. The World Bank's predictions were based on the adherence to strict conditions, even though those predictions were based on flawed assumptions, the situation became even more complicated when the other big players, such as the United States of America entered the equation. The third world has always been a political battle field between the communist and capitalist regimes. When the Peoples' National Party lost the election and the Jamaica Labour Party led by Edward Seaga came to power the United States saw this as a major shift in the geopolitical alignment of forces in the Caribbean region and Jamaica saw a dramatic increase in bilateral aid.⁶³ Jamaica in favour of the United States and receiving alternative funds severely undermined the Bank's policy as Jamaica was in a stronger bargaining position and could argue on the imposition of conditions.

Thirdly, the Jamaica foreign exchange earning capacity was concentrated in a few export products such as bauxite and coffee while most of its energy source for production was imported. This combination made Jamaica exceptionally vulnerable to external shocks to the oil market and its exporting market. There was not an extended period where predictions of the economy were not pushed out of alignment by external shocks.

These factors, which were particular to Jamaica, twisted the results of the legal transplants of economic policies upon the economy. If Watson were correct, the changes in the law to incorporate the transplants would have brought about a recovery as predicted by the World Bank, however this was not the case so the transplants can be said to be rejected as evidenced by the outcome. The results were more in line with Legrand Legal Transplant Theory as indicated in Figure 2, except that in the early 1980s there were no adjustments to the loan strategy. If these factors were considered before, as part of, and after the legislative process then any laws drafted would have had a greater likelihood of success. However, as stated before, extensive consultations by the World Bank in social matters were not considered part of its programme of policy-based lending.

Kenya also had its own particular features which took the World Bank's legal transplants through its own prism, creating multiple unexpected results.

II. The Republic of Kenya

1. History and Economic Problems in Kenya

Kenya gained its independence in 1963 after a period of European involvement in land ownership, agricultural production, export and administration. Up until 1959, approximately half of high-potential land in the country was reserved exclusively for European occupation and cultivation, providing most of the country's exports of food and beverage crops. African farmers were not allowed to grow cash

⁶³ Mosley, Harrigan & Toy, *supra* note 48, at 331.

crops or keep grade cattle. Kenya's government in the 1950s up to independence could be described as protectionist and it became heavily involved in economic management. There was a structure of protective tariffs personalised to favour specific transnationals. However, from the late 1950s the government encouraged African farmers to grow coffee, tea and pyrethrum, this later became the market for import-substituting industry. In addition, the government established marketing boards to protect the vulnerable farmers of maize and wheat.⁶⁴ Even with the system of favouritism to white farmers and specific transnationals, Kenya's economy grew at a steady rate and was more favourable than those in other Sub-Saharan countries. However in 1974, Kenya experienced its first economic shock since independence with the oil crisis. This showed how vulnerable Kenya's economy was to external shocks as this was the start of the post-independence inflationary problem. Kenya's growth was still above the average for low-income countries and there were the coffee and tea booms of 1976-7, which lifted the economy almost to that of middle-income status. Political leadership and development strategy showed remarkable continuity and the structure and dynamism of the economy in the late 1970s reflected the previous policy environment.⁶⁵ Sadly, the economy seemed to have never really recovered from the shock of the oil crises and economic management deteriorated in the late 1970s and the economy began to slide. Capital-output ratio deteriorated significantly, meaning a severe decline in productivity of investment. Further, there was a rapid growth in the public sector and a collapse of financial discipline affecting the government's efficient use of scarce resources. The situation worsen in 1979 when there was the sharp fall of coffee prices coupled by the high increase of the price of imported oil. Kenya sought assistance of the IMF as it had on two occasions since 1975 and the conditions for the assistance were agreed in 1979. However, certain conditions were not satisfied and the government in desperation approached the World Bank.

At this point Kenya had an over-extended public sector, high government expenditure and government involvement. These were the factors, according to neoclassical economics, which lead to inefficiency and poverty. Kenya appeared to be a good subject for the application of neoclassical economics, the World Bank's favourite administered therapy in the 1980s. Within the confines of the strict neoclassical equation the economic laws transplanted should have improved Kenya's economy. However, again we see that the surrounding social and political environment had more to do with the effect of the transplants than the transplants themselves.

2. The World Bank Economic Legal Transplants in Kenya

Kenya's experience with the World Bank in the 1980s consisted of a series of SALs and SECAIs targeted at import liberalisation, agricultural marketing legal

⁶⁴ Mosley, Harrigan & Toy, *supra* note 48, at 271.

⁶⁵ Swamy Gurushri, Kenya Structural Adjustment in the 1980s (1994). Text available at <http://www-wds.worldbank.org/external/default/WDSContentServer/9for>. (Accessed on 12 August 2006).

reform, industrialisation and the retraction of government involvement in the economy. The first SAL in 1980 was in the sum of US\$55 million. This loan was disbursed quickly with broad attached conditions recommending a schedule for replacing quantitative restriction with tariffs, which would be gradually reduced. Basically, the conditions required the opening up of the economy, which had previously been strictly protected. The second SAL came quickly after in 1982 and continued with the conditions of the first with further conditions, such as the privatisation of maize and the provision of incentives to exporters. This was to break up the oligopoly of maize and create free trade, which according to neoclassical economics was more efficient as the true price equilibrium could then be reached and scarce resources effectively distributed.⁶⁶ Kenya failed to fulfil the conditions of the SALs and the Bank terminated its adjustment programme, but in 1985 there was a reconciliation and the Bank started a series of SECALs, which lasted until 1989. The SECALs were targeted at the agricultural sector and the financial sector. The Agricultural Sector Adjustment Credit of 1986 required the government to fully implement measures to improve fertiliser marketing, increase user charges for livestock services and make satisfactory progress with the financial restructuring of the National Irrigation Board, the South Nyanza Sugar Company and the National Cereals and Produce Board. The restructuring of the Boards was again designed to promote free trade as farmers sold only to the Boards creating a monopoly of redistribution. The further SECAL in 1988, the Industrial Sector Credit, was aimed at reducing public sector fiscal deficit.

Kenya's economy did not improve as expected with the intervention of the World Bank's credit and conditions. The legal transplants were not faulty within themselves but an agricultural, previously colonial-based, protectionist economy did not respond as expected.

3. Factors Affecting Transplants in Kenya

According to the big bang theory of neoclassical economics, the opening up of the economy will result in producers being efficient at production due to the increase in competition and scarce resources would be efficiently utilised and distributed. Oligopolies and monopolies would no longer exist to distort prices and the true equilibrium price would then exist to the benefit of both producers and the consumers. Privatisation would take control from the government, whose involvement creates inefficiencies and the resulting free market would reach the true price of products and services efficiently. The liberalisation of Kenya's economy and the promotion of the use of fertilisers for maximum output should have revived the economy. However, this was not the outcome as ignoring Kenya's indigenous environment proved fatal for the structuring of the economy. As the World Bank itself admitted later:

⁶⁶ Eatwell, Milgate & Newman, *supra* note 38, at 701 which states that,

according to the traditional (neoclassical) conception markets in competitive conditions are formed by a great number of firms, each of which is so small as to be unable to influence price. Each firm, then, is bound to accept the market price ...

... during the first phase of adjustment, the design of the structural adjustment loans in the early 1980s, and the first agricultural sector adjustment loan in 1986 were faulty, at least in retrospect. A fairly rapid pace of liberalization was postulated when the country was attempting to control one of its worst financial crisis. In addition, the design of the grain marketing conditionality contained a basic flaw-market liberalization was seen to occur simultaneously with increases in official procurement prices. Each loan was fettered with too many conditions, which were too general, focusing on studies and action plans partly because of there was inadequate sector understanding (sector work on industry and trade was dated) and partly because of political considerations.⁶⁷

The inadequate sector understanding and political considerations took several forms, firstly privatisation of the marketing of maize meant the removal of a system that was historically and politically imbedded. It has been commented that the World Bank attempting this change from outside the country was 'a feat of political muscle which had defeated all liberalising pressure from inside for over forty years.'⁶⁸ This system of persistent control was to the benefit of large farmers, including the President, who gained from the oligopoly profits and it was not in the interest of these producers to change a system so profitable to them, even if the industry would become more efficient and the equilibrium price would be reached. The decontrol of maize was one of the Bank's key condition and even when the Minister of Finance announced in 1986 that farmers were to be allowed to sell directly to consumers the Minister of Agriculture announced a year later that the government had decided to restore the monopoly and anyone that flaunted the directive would be prosecuted.⁶⁹ This system was inherited from the colonial predecessors so it has been in existence for a significantly long time and the practice of this distorted distribution has been institutionalised for generations. Surely this factor would affect the success of any trade liberalisation laws transplanted.

Secondly, liberalisation of imports worsen the balance of payments deficit as this put a strain on the foreign exchange resources, as was the case in Jamaica. As stated before conventional text book economics is not written for economies in decline and instead of wholesale liberalisation it should have been specific only to vital capital goods to promote production. The government in compliance in principle made all imports automatically licensed and took advantage of the lack of transparency in the implementation of law reforms to, in practice, restrict imports that competed with domestic production.⁷⁰ Decades of protectionism could not be removed by Kenya signing on the dotted line at the end of loan agreements and changing laws, which only seemed to exist in a vacuum and did not infiltrate the culture of the economy.

Watson would have been just as disappointed as the Bank who found that,

... price-related policy changes (sometimes referred to as 'push-button' changes) have proved easier to implement than institutional changes, which are

⁶⁷ Swamy Gurushri, *supra* note 65, at 3.

⁶⁸ Mosley, Harrigan & Toye, *supra* note 48, at 285.

⁶⁹ Mosley, Harrigan & Toye, *supra* note 48, at 294.

⁷⁰ Swamy Gurushri, *supra* note 65, at 2.

administratively more complex ... these are variables which can be altered in an afternoon by one individual in the central bank or the Ministry of Agriculture, as the case may be: which is not true of the decontrol of maize or the rationalisation of protection, which require the collaboration of thousands of people over a period of years.⁷¹

Again, the results did not reflect Watson Transplant Theory as in Figure 1 but Legrand Transplant Theory as in Figure 2, again no readjustment until the late 1980s and each loan disbursement before then was made ignoring the obvious failure of the one before.

So far for Jamaica and Kenya, laws relating to trade and investment were not culture neutral or at least it can be said that changing these laws set off a chain reaction, which had repercussions for the standard of living of the poor, spending habits, political parties (the ruling and opposition) and workers. Even if it is argued that these laws were not culture specific, it cannot be successfully argued that changes in these laws only affected import/export ratio and the exchange rate, as changes in these laws seeped into the crevices of the habits of the consumer, many living below the poverty line and also influenced the popularity of the government.

Similarly in the Philippines, changes in the laws to bring about recovery can be said to be mathematically correct but the society and politics did not respond as expected to calculated expectations.

III. The Philippines

1. History and Economic Problems in the Philippines

The Philippines' reaction to the World Bank's transplants had more to do with politics than neoclassical economics, therefore proving, as in Jamaica and Kenya, that success of economic legal transplants in these third world societies had more to do with the surrounding circumstances than demand/supply theories.

In the years leading up to the 1980s, the Philippines was seen as one of the East Asian Economic Miracles, along with Hong Kong and Singapore. But many of these miracle economies began to deteriorate with the quadrupling of oil prices and world recession in 1979 and early 1980s.⁷² By the 1980s, the Philippines was known as the 'sick man of Asia' as with the failure of development strategy implemented in the 1960s and the 1970s. The decline leading up to the 1980s has been blamed on backward agriculture; deficiency of domestic purchasing power to stimulate the internal market; high cost and low quality inputs for manufacturing; and the misallocation of resources based on state intervention.⁷³ A classic feudal model existed supported by President Ferdinand Marcos and a

⁷¹ Mosley, Harrigan & Toye, *supra* note 48, at 291.

⁷² E. S. Browning, *East Asia In Search of a Second Economic Miracle*, 60 *Foreign Affairs* 123, at 124 (1982).

⁷³ World Bank, Operations Evaluation Department, *Debt Management in the Philippines* (1996). Text available at <http://www-wds.worldbank.org/external/default/main>. (Accessed on 8 August 2006).

network of relationships with clients, who delivered political support in return for selective economic benefits.⁷⁴ The economic regime was almost synonymous with the political regime and built:

around the conferment of rents to selected barons in the agribusiness, trade and consumer goods sectors, whom Marcos hoped to build up in due course into leaders of industrial conglomerates on the East Asian model. These rents were created not only through the classical instruments of protection – tariffs, quotas and subsidised credit ... An important additional vehicle of patronage was the fostering of state-owned enterprises, which grew in number from 70 to 245 between 1972 and 1984; such enterprises were exempt from the personnel rules and pay scales governing the regular civil service and could in consequence be used to provide rewards of flexible size of government clients. To the extent that the inefficiencies described above surfaced as balance-of-payment deficits ...⁷⁵

To make matters worse a financial scandal involving a runaway financier and textile magnate linked to the President at a time of overall economic weakness touched off a run on several investment banks, this was known as the Dewey Scandal.⁷⁶

State intervention diseased the economy and caused the government to have chronic recourse to the IMF.⁷⁷ After many stand-by disbursements by the IMF without improvement, the Philippines decided to approach the World Bank for a more systematic approach.

2. The World Bank Economic Transplants in the Philippines

The World Bank intervention in the Philippines took the form of three structural adjustment loans, the last one termed an Economic Recovery Loan. The Bank's basic approach was trade liberalisation, tariff reduction and modernisation of the labour-intensive inefficient textile industry.⁷⁸ This was a logical approach as the Marcos government had stifled competition and created inefficient oligopolies and monopolies ran by favoured political supporters. As a condition for the loans the Philippines government had to effect laws and rules to liberalise import licensing laws, implement energy policy reform, establish a monitoring system for public investment and effect an indirect tax system.⁷⁹ The aim was to create a capitalist economy to counteract years of inefficient government intervention but there were no specifics and the agriculture sector, with all its inefficiencies, was ignored and the financial institutions were still stressed.

⁷⁴ Mosley, Harrigan & Toye, *supra* note 48, at 41.

⁷⁵ *Id.*

⁷⁶ Browning, *supra* note 72, at 137.

⁷⁷ J. Gold, *The Role of the International Monetary Fund in International Monetary Reform, with Special Reference to Developing Countries*, 2 *International Society Stanford Law School* 39, at 40 (1967). The writer commented that the purpose of the fund was to supplement member countries' reserves of gold and currency to supplement temporary imbalances.

⁷⁸ Browning, *supra* note 72, at 138.

⁷⁹ World Bank, *Philippines-Rural growth and development revisited-policy issues* (2006). Text available at <http://www-wds.worldbank.org/external/main>. (Accessed 18 August 2006).

The IMF was still involved and its policies sometimes clashed with that of the World Bank, so some of the unexpected results may more be the results of the IMF's policy than the World Bank's disregard for the social and political scene. For example, in 1984 the IMF introduced a deflationary package, which caused the deficit in the balance of payments to go into surplus but the Bank's microeconomic reform was seriously affected by the IMF's macroeconomic reform. The World Bank also had to factor in the United States government's intervention by its bilateral assistance, done whenever the political situation suited it. It can be argued that the IMF and the United States government's intervention should have been factored into the World Bank's legal structural reform. These factors were not novel as the Bank's policies and the United States involvement in the third world often clashed and therefore these factors were foreseeable. However, in assessing the unexpected results of the World Bank's economic transplants this article will not examine the IMF and the United States government factors but look purely at the inherent pre-existing political environment, which was the very institution that policy reforms were to be implemented and therefore the World Bank, as with Watson, was naïve in its initial expectations.

3. Factors Affecting Transplants in the Philippines

Any condition imposed by the World Bank and implementation of any changes in law would go through the institutions set up by the government, which in the 1980s could be described as a regime to favour Marcos' political supporters.

Firstly, in compliance with the World Bank's conditions, tariffs were reduced in an effort to promote competition, yet industrialists with connection to the President and his family sought special exemptions from tariffs to have access to cheap imports. This meant that the playing field was not being levelled although the government was in compliance with conditions.

Secondly, politics caused the financial sector to be unstable, an event that demonstrated this was the assassination of Benigno Aquino, the banned opposition leader, which caused the overseas commercial banks to terminate their short-term loans causing international reserves to fall and affected the projections of the Bank. One should remember that the financial sector did not have the confidence of the international markets as the heavy debts and serious weakness of a number of leading companies were already revealed in the Dewey Scandal.

Although it was the Philippines government that sought the assistance of the World Bank and agreed to the conditions for changes in the economic regime it should be expected that any changes in the economic and financial laws would be designed to maintain the institutions of corrupt and favour established over the years by the Marcos regime itself. Similarly, to Jamaica and Kenya, the results were more in line with Figure 2.

The histories and the factors affecting the legal transplants of the World Bank were very impacting and foreseeable but these factors only revealed themselves to the World Bank retrospectively due to the lack of consultations before changing the laws. These changes in the law related to tariffs, import/export licensing, duties and taxes, government expenditure and international

financial investments and were designed to restructure the economies and bring about a revival. The changes in the laws were made quickly by-passing essential research and consultations, which were essential for the law reforms. The process of consultations and research should have begun before any enactment is passed through the legislature and should have continued after implementation. Such a programme is usually conducted by law commissions or law reform committees. However, in the 1980s the World Bank did not make provisions for pre-legislative consultations and post-legislative scrutiny, as is shown by the following section it employed an ends-means approach backed by the theory of Watson and it was not until repeated failures that a more Legrand-approach was employed.

E. Adjustment to the World Bank Policy-Based Lending in the 1980s and Further Recommendations

I. Adjustment to World Bank Policy-Based Lending in the 1980s

When the World Bank intervened to assist Jamaica, Kenya and the Philippines in the 1980s it found emerging markets, which have not yet matured in stability and could be described as small boats and “even with a competent crew and a seaworthy vessel, a big storm can sink a small boat.”⁸⁰ After a significantly long period of external rule, transnational companies owned most of the natural resources. There were also institutions that were shaped in this historical context to perpetuate the dependency of these import dependent countries. In addition, there was a myriad of social problems, which included economic problems such as inflation, balance of payment deficit and low productivity.⁸¹ These countries had an inherited dependency for imports for manufactured goods and luxury items from capitalist industrialised countries and simultaneous they were dependent on the export market of these industrialised countries to gain foreign exchange, which was quickly depleted by repayments of debt from international financial institutions. These countries were not always indebted but the oil crises and shocks to their external markets shook the “small boats” and to prevent sinking they sought the assistance of the World Bank.

The World Bank, based on theories previously developed with an assumed acceptable success rate, predicted that if a neoclassical economic model was transplanted onto these countries then the economies would respond favourable and regenerate themselves. On the disbursements of loans, the desperate recipients agreed to: change their local laws to deregularise import/export controls to promote trade; reduce their currency value to make their exports more attractive; simplify foreign investment rules and lower corporate taxes for transnationals to attract foreign investment; expend in industries to increase output; and decrease government spending in essential services to reduce the budget deficit. According

⁸⁰ N. Birdsall, *The World Bank of the Future: Victim, Villain, Global Credit Union?*, 7 *Brown Journal of World Affairs* 119, at 120 (2000).

⁸¹ Seidman & Seidman, *supra* note 35, at 39.

to Watson Theory of Legal Transplants this method should succeed and the economies should recover. He stated that law possessed a life of its own and there was no natural or inevitable relationship between law and the desires and the political economy of a society. He stressed that legal transplants are made with little difficulty with extensive power of survival. The World Bank was also of this opinion and in transplanting the neoclassical economic model it applied an ends-means approach and went directly from stating its goals to proposing solutions, without extensive or sometimes without precursory investigations in the causes of the social problems.⁸² The Seidmans described the authoritarian perspective of the ends-means approach:

... ends-means implies an authoritarian perspective. If law-makers need not bring experience to bear upon their choice of ends, they need not provide the public with evidence to justify their proposals. They need only claim that these goals represent the values of society's leaders ... In this view, the legitimacy of policies turns, not on rationality based on experience, but on the presumed legitimacy of the policy-maker.⁸³

In the case of the economic model transplants, the World Bank could be seen as the law-maker and its legitimacy was the seemingly correct theory of neoclassical economics. The Bank is seen as a law-maker as changes in local laws were compulsory for the disbursement of loans. Further, the Bank did not have to bring experience to bear upon its choice as, according to Watson, there is no intimate relationship between law and the society, therefore investigation on the society before transplant is unnecessary.

The economies did not recover as expected, they worsen instead as surrounding factors had more to bear on the results than the transplants themselves. As Legrand had indicated a comparativist should be aware of deep culture differences between legal systems. It seems, these emerging economies, even though capitalist, did not respond as older first world economies. As Legrand had advocated, the differences in system are more important than similarities. He is supported by Kahn Freund, who believed that some areas of law are more closely linked to the society than others and Teubner who believed that some areas are more coupled with the social process and that the degree of success of a transplant depends on the coupling. It may seem at first that laws relating to changes in the economic structure are not closely linked to the society, but laws that affect the spending power of consumers and the strength of political parties are very closely linked to the society. In a society whose institutions of resource allocation are remarkable different from the assumptions of neoclassical economic model, a neoclassical economic transplant may more than likely be rejected and the economy would not respond as predicted therefore producing multiple unexpected results as indicated by Legrand.

The Seidmans addressed the issue of non-transferability of law by stating that:

⁸² Seidman & Seidman, *supra* note 35, at 70.

⁸³ Seidman & Seidman, *supra* note 35, at 71.

Inevitably, people chose how to behave, not only in response to the law, but also to social, economic, political, physical and subjective factors arising in their own countries from custom, geography, history, technology and other, non-legal circumstances

Role occupants perceive the commands of the law as either hindrances or incentives that they must take into account

So with a legal transplant. In addition to the new incentives or punishments a new law introduces, role occupants will inevitably take into account a host of pre-existing, country-specific non-legal factors. As a result, the transplanted law will only by an unlikely coincidence induce the same behaviour in both places.

This article is not arguing that law is non-transferable, but there is agreement that people make choices in response to a variety of factors, the law just being one of the factors considered, therefore the social and political environment of the host country must be considered when transferring law and making predictions of the effect of transfer. According to neoclassical economics, mathematically the World Bank was correct in its predictions, but like Watson's theories, there was little translation to reality. The successes of transplants were sometimes just coincidence. The article is also not arguing that taking into account surrounding circumstances is a guarantee of success of transplant. However, to be "forewarned is to be forearmed" and instead of an authoritarian narrow perspective, the comparativist lawmaker would expect varied results and plan for adjustments, in an effort, to reach closer to the most desired result. The lawmaker may, after a few adjustments without success, abandon the legal transplant and judge it a failure. He might also realise that changes in law might not be the solution to the problem or that law reform may have to come later after certain non-legal matters have changed, for example a change in government. Whatever the multiple of solutions considered with the multiple of results expected, the point is that one cannot ignore the social and political environment before changes in law are undertaken.

The World Bank did not proceed through the 1980s chanting the mantra, "Watson is right, the legal transplants must work" as in the latter part of the decade it made adjustments. These adjustments cannot be perceived as defection to the Legrand Camp but more reactions to frustrations from the lack of positive results. The change in perception was more sporadic and not a systematic overhaul of the approach to third world debt. However, it was an admission that social and political culture and the existing resources of the host country do matter, proving the Legrand Legal Transplant Theory. So the desired result should only be one of the predictions of transplant, therefore: devaluation of currency may not result in increase in exports; deregularising import/export controls may not increase foreign trade; lowering corporate taxes for transnational may not increase foreign investment; and industrialisation may not increase productivity.

When the World Bank made some adjustments to its policies there were some positive results. In Jamaica, after several years of the Watson-style application of transplant, the Bank and the Government began to review the fiscal and monetary policy together and realised they both did not make adequate allowance for the

political economy within which programmes were implemented. Liberalisation, incentive structures and international competitiveness were then re-assessed within that context.⁸⁴ It is stated that,

... the Jamaican experience suggests that the internalisation of policy reform is crucial to its success. A reform programme which does not have the genuine support of the recipient body politic often results in a lack of consistent and coherent policies.⁸⁵

The Jamaican economy responded well in the late 1980s but it had mortgaged its future with crippling debts.⁸⁶

In Kenya, it was concluded that enjoyment of high growth rates was the result of not suffering major price distortions in the major export crop, and during the latter years of the decade Kenya's relative freedom from price distortion was more a result of indigenous technocrats and the political strength of large farm lobby and not the Bank's influence. In relation to the experience of Kenya in the 1980s, it is stated that:

The adjustment program in the second half of the 1980s benefited from greater experience and preparation at least in some areas. Instead of grouping many reforms in one operation, the adjustment agenda was parcelled into sectoral programs. The design of the reform program in trade liberalization and export development was better based on updated information....The relative success of the trade liberalization program is attributable to these factors of better design and to intensive supervision.⁸⁷

Although, the Bank's results improved in the latter part of the 1980s after adjustment to its programme, the overall effect of the Bank's assistance in the 1980s is seen as negative as the economic, social and governance conditions were poorer in the 1990s than they were in the 1970s.⁸⁸

In the Philippines, a change of the political regime and institutional reform presented a better environment and the economy responded more favourably to change. It is stated that:

very little of the Philippine programme consisted of push-button adjustments to government-determined prices. Most of it consisted of institutional change, which it has historically found more difficult to achieve; ... a great deal of the institutional

⁸⁴ Mosley, Harrigan & Toye, *supra* note 48, at 354 & 357.

⁸⁵ Mosley, Harrigan & Toye, *supra* note 48, at 358.

⁸⁶ In addition to huge debts in 1991 there was still sustained recession and in 2006 the private sector is still burdened with excessive taxation compared to the favourable tax position of transnationals. See World Bank, Central Government Administration, Jamaica – Social Safety Net Project, Volume 1 (2001). Text available at <http://www-wds.worldbank.org/external/default/WDS&entityID=000094946>. (Accessed 10 August 2006). See also K. Collister, *Why Jamaica is failing to grow*, Jamaica Gleaner, 1 July 2006. Text available at <http://www.jamaica-gleaner.com/gleaner/20060701/business/business1.html>. (Accessed 1 July 2006).

⁸⁷ *Supra* note 65, at 3. See also World Bank, Public Administration Sector, Kenya – Economic and Public Sector Reform Credit Project (2004). Available at <http://www-wds.worldbank.org/external/default/main?print=Y&pagePK=64193027>. (Accessed 11 August 2006).

⁸⁸ World Bank, Historic Non-sector specific, Kenya – Country Assistance Evaluation (2004). Available at <http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=641>. (Accessed 11 August 2006).

transformation which has taken place since 1986 has been highly successful, in particular because blueprints for change in financial and tax systems had already been worked out before that date and because it was very much to the political advantage of a new regime to publicly eliminate the rents and special privileges which had enriched its predecessors.⁸⁹

At the end of the 1980s the Philippines had no balance of payment deficit and was experiencing growth in exports.

Figure 3 below shows the negative position of the current account of Jamaica, Kenya and the Philippines at the start of the 1980s. Kenya being in the most unfavourable position at 15% deficit in the current account and the Philippines being in a better position at approximately 6% deficit. Conditions worsen between 1981 and 1983 after the World Bank imposed its conditions. There was improvement later after more comprehensive loan strategies were employed taking into account other non-legal factors. By the end of the 1980s only the Philippines had a positive balance. There is a line showing the improvement that the Watson Legal Transplant Theory would have expected. None of the countries showed that sort of improvement.

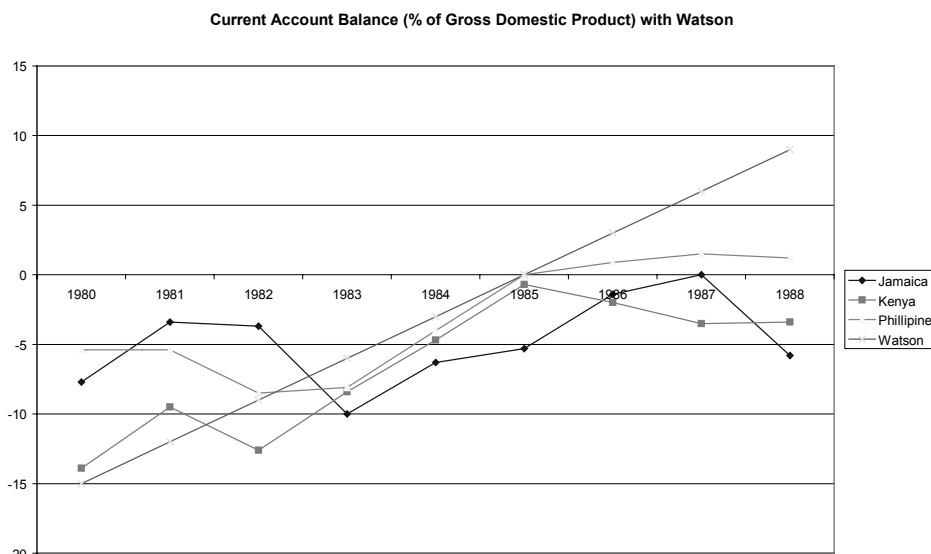


Figure 3⁹⁰

The relative improvement of Jamaica, Kenya and the Philippines economies was a result of non-legal factors more than the legal transplants themselves. The World Bank made some adjustment in its policies to take into account political and social circumstances. Overall, the World Bank still had an ends-means approach which ignored a country's specifics, declared irrelevant to transplant by Watson, and

⁸⁹ Mosley, Harrigan & Toye, *supra* note 48, at 65.

⁹⁰ Statistics taken from Mosley, Harrigan & Toye, *supra* note 48, sourced from the World Bank archives.

thereby excluded any pre-legislative consultations and research from its process. However, there seemed to be a move towards a Legrand-approach indicated by the changes made by the World Bank. If this trend continues the World Bank would experience better results but there is still room for improvement.

II. Further Recommendations

Instead of sporadic Legrand-style responses representing only brief reluctant departures from the Watson-style method of legal transplant, the World Bank needs to develop an approach to minimise the failure rate of transplant.

There have been tremendous criticisms of the World Bank, especially in regard to its policy-based lending in the 1980s. The critics have the benefit of hindsight but so does the Bank and even though some of the critics were politically motivated their comments can be developed upon. The International Financial Institution Advisory Commission often referred to as the Meltzer Commission because of its chair, Professor Allan Meltzer, was established in 1998 to consider the future and efficacy of certain international financial institutions, one being the World Bank. Financial markets have become interconnected and dependent on each other so the debt problems suffered by Latin America in the 1980s, along with other financial crises later gave rise to a need for evaluation.⁹¹ Briefly, the Meltzer Report indicated that:

The Commission believes that the effectiveness of foreign aid and progress against poverty would increase and financial crises would be reduced in number, frequency and severity, if current programs of the IMF and the development bank change focus attention on institutional reform, incentives for improved domestic arrangements and policies, greater transparency and accountability, reduced opportunities for corruption in developing and restructuring countries and the provision of global public goods.⁹²

If the report was not so politically generated it might have been better received by the World Bank and the initial responses seemed to be unpleasant verbal exchanges between the Bank's president and Alan Meltzer.⁹³ If the institutional reform suggested does not take into account reforming the conditions attached to loans, and taking into account the borrower's specific conditions, then it is doubtful that the failure rate of legal transplants would decrease. The Bank however had previously made changes to allow for more feedback by the creation of the Inspection Panel in 1994, where citizens of developing countries could now make direct grievances regarding environmental and social cost of the World

⁹¹ A. Moyers, Meltzer Commission Report, University of Iowa (undated). Text available at <http://www.uiowa.edu/ifdebook/faq/Meltzer.shtml>. (Accessed 9 August 2006).

⁹² International Financial Institution Advisory Commission, The Meltzer Report (1998). Text available at http://www.womensgroup.org/meltze_20000903.html. (Accessed on 10 August 2006).

⁹³ A. H. Meltzer, The World Bank One Year After The Commission's Report to Congress, Carnegie Mellon University (2001). Text available at <http://www.dundee.ac.uk/cepmlp/journal/html/vol8/article8-14.html>. (Accessed 10 August 2006).

Bank projects. This promoted feedback was lacking in the World Bank ends-means approach however the Inspection Panel's proved to be indirect and minimal as there were no consequences to its report after addressing complaints.⁹⁴

Whatever reforms are implemented by the World Bank, whether in response to external criticisms or internal impetus, such reforms have to start from the premise that legal transplants are very sensitive to its host's environment and not guaranteed of success as indicated by Watson. The World Bank has to be a responsible comparative law-maker and adopt the cautious approach of Legrand. Watson, unfortunately is an enthusiast and such enthusiasm is destructive when applied to reform of the economies of third world countries. The World Bank should move from the ends-means approach which excludes investigation of the host country's social and political environment. The Bank should allow feedback, not just after the fact as with the Inspection Panel, but during the negotiations of the loan and the conditions attached. If the World Bank does apply neoclassical economics it should be after a thorough investigation, which allowed the Bank to cautiously conclude that the economy would respond favourably and that there will not be unacceptable casualties such as the worsen of the condition of the poor; and while applying such conditions there should be an open avenue for feedback to allow for feedback to facilitate adjustment of policies. This does not guarantee success of legal transplants but the failure rate would decrease.

Similarly to some of the third world countries, which received loans, the World Bank could benefit from institutional changes. Firstly, to make the Bank more accountable for the adverse effects of conditions attached to its loans the Inspection Panel reports should have more of an impact and the Articles of Agreements, especially that of the IBRD should be amended⁹⁵ to allow for liability to the Bank and recourse of the complainant to the International Court of Justice, which would have jurisdiction over the Bank. In addition, the procedure for complaints should be less complex so as not to deter complainants.⁹⁶ Secondly, the weighted voting system should be changed allowing for 'one country one vote' or the countries with large voting shares should sell their votes to allow other countries, which are mostly affected by the World Bank's policy, to increase their share and therefore

⁹⁴ J. A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 *Global Governance* 279-318, at 299 (2000). The writer comments that the Inspection Panel had an indirect effect by causing the Bank's staff to work from a checklist to make sure they have a paper trail to demonstrate policy compliance in the event of a challenge.

⁹⁵ Article VII(a) of the IBRD Articles of Agreement states:

Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent (1) of the total voting power, have accepted the proposed amendments, the Bank shall certify the fact by formal communication addressed to the members.

⁹⁶ D. Bradlow, *Lessons from the NGO Campaign against the Second Review of the World Bank Inspection Panel: A Participant's Perspective*, 7 *ILSA Journal of International and Comparative Law* 247, at 249 (2001).

have more of a say in the policy of the Bank. This allows for more considerations in the social and political environment of borrowers. Currently the United States of America has 3,175 shares equalling eighteen percent of the weighted votes.⁹⁷ They can block any reform and amendments to the IBRD Article of Agreement, which requires eighty-five percent majority. Thirdly, Article IV (10) of the IBRD Articles of Agreement,⁹⁸ which prohibits consideration of the Bank of the politics of the borrower should be amended to allow for the inclusion of such considerations and extend its responsiveness.⁹⁹ As indicated in Jamaica, Kenya and the Philippines politics have much to do with the success of transplants.

These changes suggested are just to create institutional change that would facilitate a more Legrand-style method of transplanting economic policy to increase the success rate of transplants. The 1980s showed that blindly transplanting the neoclassical economic model on third world countries did not produce the expected results as the Watson Legal Transplant Theory ignored the differences between the donors and the recipients of the transplants. If the World Bank is institutional constituted to take into account the social and political environment of its borrowers then the changes in legal systems of the borrowers would produce better results.

Figure 4 below recommends a legal transplant process for economic policies transplants, which takes into account consultations and research into the social and political environment of the host of the legal transplants before the commencement of the legislative process. This recommended process also takes into account the theories put forward by Legrand and other supporting comparativists, that the social and political environment of the host does matter when transplanting law. It also takes into account the fact that economic laws are culture specific, therefore sensitive to the culture setting into which they are placed. Further it takes into account recommended legislatives processes for pre-legislative research and post-legislative scrutiny.

⁹⁷ See Schedule A of the IBRD Articles of Agreement.

⁹⁸ Article IV(10) states:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

⁹⁹ N. Wendt, *Part Two: Citizens, National Governments, and International Financial Institutions: Changing Conceptions of Development in the 1990s*, 9 *Transnational Law and Contemporary Problems* 165, at 171 (1999).

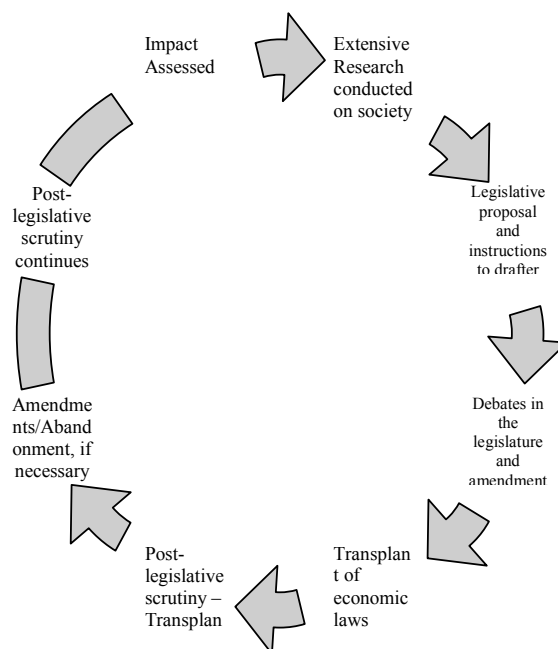


Figure 4: RECOMMENDED TRANSPLANT PROCESS FOR FISCAL AND MONETARY LAWS

F. Conclusions

The legal transplant theories of Watson and Legrand provide the debate for which the research question is answered. They have opposing theories, which give different answers to the research question as to whether the success of a legal transplant depends on the donor taking into account the particular political and social environment of the host of the transplant. Watson believes that law possesses a life and vitality of its own, therefore there is no natural and inevitable relationship between the law and the society. He asserts that law, transplanted in an environment that is different from the environment in which it has been previously successful, will still succeed. With this theory the donor does not have to take into account the particular political and social environment of the recipient of the transplant. Watson would answer the research question in the negative, and would assert that the law of a society develops by transplanting from a foreign source and such transplanted law has an extensive power of survival no matter the differences in the environments. This article disagrees with these theories of Watson and concludes that there is no guarantee of survival of the transplanted law but reception and assimilation of such law would be greatly enhanced if the environment of the host was one that would receive such a law with little difficulty and if the law transplanted was the appropriate solution for what ails the society. The appropriate solution can only be determined after extensive consultations

and research into the society that is to receive the law. Such research would not only look for the similarities between the potential host and other systems where the law was previously successful but look especially for the differences, which could be the key to the success or failure of the transplant. This preliminary process of in-depth study of the host is the responsibility of a comparativist law maker as stated by Legrand.

Legrand believes that law is mainly an outgrowth of the local society and is embedded holistically in the local culture making assimilation of foreign ideas problematic. He concedes that legal systems interact and influence each other but a comparativist should be aware of the deep cultural differences between legal systems. He would answer the research question in the affirmative. This article has argued that the affirmative answer to the research question is more practical and sensible based on empirical evidence provided by the World Bank policy-based lending in the 1980s. Legrand is supported by other comparativists in law, who go further to state that the more closely a law is linked to the culture and social processes of a society the more the society would react to a legal transplant of such a law. This article concludes that economic law, though dealing with fiscal and monetary laws on a macroeconomic level, is closely linked to the society and therefore culture specific. This conclusion is based on the fact that a host's inhabitants would be personally affected by any changes in their spending power and living conditions. Legrand, and also this article, is not stating that law is non-transferable but comparativist should not think of a law in ways so as to sever it from its life-world. As the Seidmans stated law can only induce the same behaviours in its new home as in the original one if the implementing agency and all other relevant factors in the new home closely resemble those of the original. As Crabbe had indicated, and this article also concludes, law does not operate in a vacuum and one should take cognisance of the cultural, economic and social conditions of the society within which it is intended to operate.

To test the theories of Watson and Legrand and to prove the affirmative answer of the research question this article used the experiences of the World Bank in the 1980s in Jamaica, Kenya and the Philippines. The World Bank was of the opinion that the political and social environments of its borrowers did not matter in relation to the transplant of the neoclassical economic model and therefore by-passed extensive consultations and research of the societies of the hosts. The histories and social environments of the third world countries were outlined to demonstrate how their peculiar circumstances caused reactions, which conflicted with the assumptions of the neoclassical economic model. As indicated by Figure 3 all the countries' economic situations worsen. They had inherited institutions and behaviour settings that did not respond well to the neoclassical economic transplants. Intensive studies of the social surround would have forecasted these dramatic reactions and if the World Bank had conducted pre-legislative studies of the hosts' social and political environments the solution to these countries' economic problems would have been designed to take the peculiar third world situation into account. However, in following Watson Legal Transplant Theory, such studies before law reform were considered unnecessary. To concretise the Watson Legal Transplant Theory the World Bank, itself, is instituted to ignore

the social and political setting of the host countries by its Articles of Agreement, which exclude consideration of political matters. Also its voting regime puts third world countries in a subservient position.

Following a Watson-style approach to legal transplants employs an end-means approach in an authoritarian manner that goes directly to the assumed solution. This article concludes that unfortunately this approach excludes an essential process in law reform. This essential process is the in-depth investigation of the context within which the laws transplanted will be applied. This process comes before any instruction is given to the parliamentary counsel's office and it is a most essential process, which provides the building block for the drafting of the legislation. Intense investigation would indicate what provisions would be appropriate, which laws need amending or repealing and how these laws are to be applied. Research papers of such an investigation would be available, upon request, to the drafter and guide his hand. An excellent draft can be fruitless if this essential process is not performed so as to provide a sound legislative proposal and provisions for post-legislative scrutiny. This pre-legislative process was not a part of the World Bank's lending programme and it proceeded on the assumptions of the neoclassical economic model, which conflicted greatly with third world reality. This led to the failure of the transplants proving that the social environments of the hosts of transplants do matter.

Legal rules, institutions and systems do pass from one country or organisation to another and such transplants can provide a great impetus for legal change and development. However, legal transplants have a minimal chance of success if the social and political environment of the recipient is not considered. Such lack of pre-legislative examination can derail the good intentions of donors and legislatures and result in the application of laws, which are not suited and are out of sync with the recipient's legal systems leading to unexpected repercussions. Pre-legislative examination of the society and post-legislative scrutiny increase the chance of a legal transplant being successful as the law would be drafted with the environment of the host in mind and amendments would be made for better coherence with the legal system. This article answers the research question in the affirmative, the success of a legal transplant does depend on the donor taking into account the particular political and social environment of the host of the transplant.