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OPEN FOR BUSINESS: A SOCIO-LEGAL ANALYSIS OF ECONOMIC DEVELOPMENT IN THE CARIBBEA

Sybblis, Martin

Princeton, NJ : Princeton University

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OPEN FOR BUSINESS: A SOCIO-LEGAL ANALYSIS OF ECONOMIC DEVELOPMENT IN THE CARIBBEAN

Martin W. Sybblis

A DISSERTATION

PRESENTED TO THE FACULTY

OF PRINCETON UNIVERSITY

IN CANDIDACY FOR THE DEGREE

OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE

BY THE DEPARTMENT OF SOCIOLOGY

Adviser: Kim Lane Scheppele

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ABSTRACT

This dissertation offers a novel way to understand how legal change occurs in the corporate and commercial context. It suggests that legal professionals, particularly commercial lawyers, are capable of enhancing the state's capacity for law reform in instances where legal rules are seen as a pathway to economic prosperity. They and other community leaders (typically political and business elites), however, are influenced in their reform efforts by the community economic identities ("CEIs") they have developed with respect to chosen commercial activities within their jurisdiction. CEIs affect how those who make the crucial development decisions think about the commercial activities and industries in their community (city, state, country or region), and these identities in turn shape what seem like logical choices for that community.

This project makes two contributions to the sociology of law and economic development. First, it suggests that the scholarly understanding of "state capacity" should be expanded to include the availability and role of private sector commercial lawyers who can help a state promote and achieve commercial law reforms. Second, the dissertation introduces the concept of CEI into the academic discourse on the relationship between law and economic development. It explores the role commercial lawyers and CEI have played in commercial law reform in the Commonwealth Caribbean post-colonies of Barbados and Jamaica. The institutional similarities between the two countries and the divergent paths they have taken in their approach to commercial law reform make them attractive sites for better understanding the determinants of legal change.

ACKNOWLEDGEMENTS

The acknowledgement section of books and articles confirm something we all know intuitively—no individual achieves their goals alone. We all require the help and support of others, and I am very fortunate to have a large community of mentors, friends and family who supported me during this journey.

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Without my wife, Martha Kim, I would not be writing an acknowledgement page, because there would have been no graduate school and, therefore, no dissertation. Seven years and two beautiful children later, she helped make that dream come true in more ways than I can count. She and our boys, Elias and Ezra, are the source of my happiness and motivation.

I am eternally grateful to Kim Lane Scheppele for not only agreeing to be my dissertation chair and my mentor, but for encouraging me daily to follow my passion for the study of law and development—particularly where it concerns the Commonwealth Caribbean. She reassured me on numerous occasions that my work made a valuable contribution to better understanding the phenomenon of economic development. Her support and encouragement made all the difference on those days when the end seemed out of reach. Importantly, Kim's brilliant mind and immense patience helped me make sense of all the materials and theories I encountered during my years of study and research.

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In closing, I would like to note where my journey began. My grandparents, Gwendolyn Bolt and Hezekiah Bolt, and my aunt, Yvonne Loraine Bolt, raised me from birth to my early teenage years in one of the humbler communities in Kingston, Jamaica. They taught me the virtues of hard work, honesty and love for others. Indeed, their journey was an example of self-sacrifice in the interest of a larger community. My grandmother, in particular, encouraged me to consider books my friends—a window into the world outside of our tough neighborhood—and to never leave home without one in my possession. Her goal was to ensure I never missed an opportunity to learn something important. I owe a debt of gratitude to Gwendolyn, who, whenever I claimed to be bored as a child, would proclaim: "Martin, go read a book!" Well, Grandma, I haven't stopped reading. Indeed, I am reading more than you ever imagined.

Despite all the help and support I received with this dissertation, all errors are mine, and mine alone.

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[1] Portions of each chapter were presented at workshops or talks at: Cornell University Law School; Duke University School of Law; Drexel University School of Law; Emory University School of Law; Pepperdine University School of Law; Stanford Law School; University of California, Berkeley School of Law; University of California, Davis School of Law; University of Chicago Law School; University of Connecticut School of Law; University of Kentucky School of Law; University of Maryland School of Law; University of North Carolina-Chapel Hill School of Law; University of Toronto Faculty of Law; University of the West Indies, Cave Hill Faculty of Law; Washington University in St. Louis School of Law; and Willamette University School of Law.

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LIST OF ABBREVIATIONS

- CDB – Caribbean Development Bank
- CEI – Community Economic Identity
- CLE – Council of Legal Education
- FDI – Foreign Direct Investment
- HDI – Human Development Index
- IDB – Inter-American Development Bank
- IFC – International Financial Corporation
- IFI – International Financial Institutions
- IMF – International Monetary Fund
- IO – International Organizations
- LEC – Legal Education Certificate
- MCC – Millennium Challenge Corporation
- MICAF – Ministry of Industry, Commerce, Agriculture and Fisheries (Jamaica)
- MSME – Macro, Small and Medium Enterprises
- OECD – Organization of Economic Corporation and Development
- OFS – Offshore Financial Services
- SALISES – Sir Arthur Lewis Institute of Social and Economic Studies
- SME – Small and Medium Enterprises
- WB – World Bank

- WGI – World Governance Indicators
- WJP – World Justice Project
- WTO – World Trade Organization
- UCC – Uniform Commercial Code
- UN – United Nations
- USAID – United States Agency for International Development
- UWI – University of the West Indies

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INTRODUCTION

There is an intuition that standard laws should govern how we transact business, regardless of jurisdiction. After all, the fundamentals of commercial transactions tend to be the same across the globe. The buying and selling of a widget or the borrowing and lending of money follows more or less the same process, whether one is in a wealthy or developing country. Parties exchange currency for a product and lenders ask for security when giving a loan.

The increasing integration of economic markets has encouraged the standardization of commercial laws around the globe to serve the needs of capital markets and a range of cross-border transactions (Pistor 2002: 98, Halliday and Carruthers 2009: 5-9; see also Halliday 2012b). This standardization project is driven in part by international organizations ("IOs") like the International Monetary Fund ("IMF"), World Bank ("WB") and United Nations ("UN"), to bolster the global framework for trade and finance by way of promoting a limited set of "efficient" and "high quality" commercial law regimes that promise economic growth (see, example, Dam 2006; Davis and Trebilcock 2008; La Porta et al. 1997, 1998).[2]

Despite this trend, it is also reasonable to suspect that context matters. There are probably some situations where the same business rules may not and should not apply in the interest of fairness, fit, societal values, and so on. This framework—that context matters when considering the standardization of commercial law—mirrors the discussion to date in the law and economic development literature (see, example, Watson 1980;

[2] Katharina Pistor (2002: 97-98) explains that "[t]he vehicle for building the legal architecture for global markets is the harmonization of law around the globe by way of developing legal standards. These standards may be incorporated into international conventions, bilateral treaties, or retain the nonbinding form of recommendations." Other scholars, such as Terence Halliday and Bruce Carruthers (2009) and Edward Cohen (2008), support this assessment.

Ewald 1995; Feest and Nelken 2001; Pistor 2002, 97-100; Berkowitz, Pistor, and Richard 2003; Davis 2010). The questions the literatures have not satisfactorily answered are when and how exactly context matters for legal reform. The sociological endeavor should be to identify and understand the contextual variables that indicate when the standardization of commercial law is helpful to economic development and when it is not. Commercial law, as used herein, refers to those laws that preside over business transactions. They include, but are not limited to, contract law, real estate law, bankruptcy law, and secured transactions law.[3]

This dissertation provides an explanation for why countries with similar colonial histories and legal traditions (such as the English common law) may diverge in the way they approach their commercial law reforms that support economic development. The project explores how two previously understudied social phenomena—a developmental commercial law community and a shared economic identity—are relevant to the manner in which technical commercial law reforms are pursued and implemented in the British post-colonies of Barbados and Jamaica.

This dissertation suggests that the availability and goals of the legal community matters when it comes to economic development. Developing countries are constantly in pursuit of rapid economic growth and often look to law for assistance, but insufficient scholarly attention has been paid to the legal communities in these countries as potential catalysts or capacity builders in this enterprise. Barbados and Jamaica provide valuable

[3] See: Legal Information Institute. Cornell Law School. Retrieved January 13, 2019 (https://www.law.cornell.edu/wex/commercial_law).

insight into how legally trained individuals when acting as a group[4] can contribute to the developmental capacity of the state.

Based on an analysis of the practices of commercial lawyers in both countries, this research proffers that the legal community in developing countries can be effective in commercial "cause lawyering."[5] In this regard, they are capable of organizing and pooling their intellectual resources to achieve the appropriate statutory infrastructure for the commercial transactions they deem important for economic development. As such, they can be an important complement to the state's capabilities for commercial law reform and implementation—and, to this extent, even economic growth. Their effectiveness is constrained, however, by their vision of the economy.

Commercial lawyers, along with other political and business leaders, can generate public and recognizable identities with respect to specific types of commercial activities in a community. These identities, in turn, influence how law reform is conceived and deployed within particular jurisdictional boundaries. Herein, this phenomenon is referred to as "community economic identity" ("CEI")—a concept elaborated from its origins in rural and environmental sociology. CEI (for example, "our country specializes in tourism" or "our country is known for offshore banking") comes to shape how communities see their policy options and, therefore, how they make their decisions about legal reform, public investment and political attention.

CEI is a constraint on legal reform. For example, in the United States, it is indisputable that Delaware is as iconic in corporate law as Silicon Valley is celebrated for

[4] This group is referred to herein as the "Legal Complex."

[5] "Cause lawyering" typically refers to the pursuit of a social justice agenda (see, example, Sarat and Scheingold 1998, 2008).

its world-renowned achievements in technology. But, how likely is it that other jurisdictions, with different pre-existing CEIs, will be able to replicate Delaware and Silicon Valley's success by way of law reform? Prior research suggests that, once jurisdictions become locked into a particular CEI, it becomes very difficult for them to change course (Bell and York 2010). When taken abroad, this insight helps to make sense of how small island nations build economic futures for themselves by creating particular CEIs that operate both as a brand for external consumption and as a rallying point for political and legal mobilization at home.

This dissertation introduces the CEI concept into the study of legal reform and industry development. It shows how CEI can be useful in understanding commercial law reform in Jamaica and Barbados, especially in more recent times with respect to their secured transactions regimes.

As this project shows, having a functioning secured transactions regime will matter more to some economic strategies than it does to others. This study of comparative secured transactions law demonstrates how black-letter law develops differently in places where it is seen as necessary because it is actually likely to be used more often by key constituents. Looking at these small but parallel countries that one might expect to have similar economic profiles, it becomes apparent that community leaders—including commercial lawyers—can build an identity tied to a particular industry or industries. This identity influences the local approach to law in the business realm, explaining which legal reforms are actually pursued and which are considered optional.

The divergence between Barbados and Jamaica in their secured transactions regimes makes sense once one considers their differing CEIs. By looking at how

countries portray themselves, this dissertation shows how economic interests alone cannot account for the choices states make about reforms to their commercial laws. Importantly, the black-letter business laws adopted by small island nations do not reflect the one-size-fits-all advice they are given by external consultants but, instead, reveals a drive for differentiation between each country's elites and the elites of neighboring—often very similar—countries.

While scholars have shown that law plays an important role in the rise of economically viable local economies (Trubek 1972, Dam 2006, La Porta, Lopez-De-Silanes, and Vishney 1997), it is clear that law alone is insufficient to explain economic development. Indeed, law combined with a variety of social factors contributed to the outstanding attainment of corporate Delaware, tech-hub Silicon Valley and other industries that are identified with particular locations (Gilson 1999; Saxenian 1994; Chander 2014). CEI is a social phenomenon that matters when it comes to the viability of certain business regulations because it reflects a society's goals—formulated by local leaders—to invest in developing and maintaining a particular economic profile. CEI is a way of identifying and projecting an image of both a current and future community and, as a powerful frame, blinds those who adopt it to alternative ways of seeing their options. Consequently, if future reforms are not complementary to or supportive of CEIs, they are likely to be rejected.

This research is relevant to the work of scholars and practitioners of economic development, as well as policymakers in developing countries. It provides an alternative perspective on the development economics of poor and emerging economies. It explores the social connection between law, state capacity, community identity and economic

development. Importantly, it accepts the intellectual and policy premise that law (as an institution) matters for economic development (see, example, Dam 2006). Whether law is a cause or a consequence of economic growth, or both, has been vigorously debated by economists and legal scholars (Besley 2015, Davis and Trebilcock 2008; Trubek 1972). This dissertation does not attempt to answer this important and longstanding question. Instead, it offers that, in order to understand the relationship between law and economic development, we must uncover the range of incentives and key intermediaries at the intersection of law and economic policy. This dissertation is therefore about the "social life" of law as it pertains to economic development.

The remainder of this introduction is divided into four main sections. The first section explains why Barbados and Jamaica are appropriate cases for the study of commercial lawyers and CEI. The second section provides a summary of previous studies on Caribbean economic development. The purpose of this section is to situate this study within the context of existing perspectives on the development trajectory of Caribbean states. The third section discusses the methodology used for collecting and analyzing data. The fourth section provides an outline for the remainder dissertation.

Choice of Cases

North American scholars interested in developing economies have slighted Caribbean island states (see Figure 1).[6] A relatively few studies have sought to understand the development experiences of the smaller countries in this region of the

[6] According to David Berry (2014: 8), the "English-speaking islands and mainland territories of the Caribbean…extend from Belize, located in Central America, all of the way along the Caribbean island chain to Guyana, on the South American continent."

world. Instead, many researchers have flocked to countries with larger populations and markets, such as Brazil, India, and China,[7] or those who have made a miraculous turnaround in their economic fortunes—such as South Korea, Taiwan and Singapore (East Asian Tigers). Still others have paid close attention to the struggling economies of the African continent. These cases are intellectually attractive for many reasons and provide useful insights for policy makers, but there is also much to be learned from the development trajectory of Caribbean countries. The Caribbean region constitutes a setting where researchers can control for colonial history and geographic context, while still finding substantial variation to explain.

[7] Currently, a prominent group of legal scholars are actively engaged in the "Globalization and Lawyering in Emerging Economies" (GLEE) project. They focus on the larger emerging economies of Brazil, India and China. The project is run out of Harvard Law School and is interested in the influence globalization has had on the practice of corporate law and the education of lawyers. Retrieved January 9, 2019 (http://law.wisc.edu/gls/glee.html). See also Wilkins, Khanna and Trubek (2017).



Figure 1: Map of the Caribbean[8]

On those occasions when Caribbean island states are included in economic development studies, they are often grouped with a large number of countries—primarily Latin American countries of greater physical size, populations and wealth.[9] This is a missed opportunity because Caribbean countries present an opportunity for rich learning

[8] Image by U.S. Central Intelligence Agency. Online. Perry-Castaneda Library Map Collection at The University of Texas at Austin. 2006. Retrieved January 9, 2019 (http://legacy.lib.utexas.edu/maps/americas.html).

[9] Most of the studies undertaken by the WB, for example, focus on the Caribbean and Latin America—lumping all the countries from that part of the world together. In fact, the WB has grouped the Caribbean and Latin America together in the same department. See: http://www.worldbank.org/en/region/lac.

due to their similar profiles and parallel development. First, many are islands with similar geographies, including relatively similar climates and access to international markets. Second, they are generally small in size, with enough sharing similar colonial histories (though with useful variation of French, Dutch or English colonial masters), including plantation economies. Third, despite these similarities, they have had divergent social, political and economic fortunes, allowing for variation to explain using factors that go beyond what they share.

Presumably, the small size of many of the countries in the Caribbean region is the reason they have been excluded from more prominent development studies. But smallness should not be a barrier to the knowledge that can be gained from comparative research in this region. Indeed, economist Peter Blair Henry (2013) in his book, *Turnaround: Third World Lessons for First World Growth*, argues that "big ideas" can come from "small places."[10] Barbados (Figure 2) and Jamaica (Figure 3), while small, represent two of the more economically developed Commonwealth Caribbean countries (see Table 1; Berry 2014). In terms of physical size, Barbados is smaller at 430 sq. km, while Jamaica is larger at 10,9990 sq. km. With respect to population size, as of 2012, Barbados had approximately 283,221 people, while Jamaica had approximately 2,712,100 people (Berry 2014). In making the case for comparing the economic

[10] Political scientists Wouter Veendendaal and Jack Corbett (2015: 544) have suggested that much can be learned about democratization and decentralization from small states. They argue that "systematically overlooking two of the most successful regions in terms of democratization—the Pacific and the Caribbean—greatly distorts our understanding of the causes and stimuli of transition and consolidation." The scholars further argue that: "As the average size of countries around the globe continues to decrease, and the call for power to be devolved to localized authorities grows, research on the political effects of size is increasingly relevant and warranted" (544).

development of these two countries, Peter Blair Henry and Conrad Miller (2008: 2-3; Appendix 1)[11] artfully note:

> Barbados and Jamaica are both former British colonies, small island economies, predominantly inhabited by the descendants of Africans who were brought to the Caribbean to cultivate sugar. As former British colonies, Barbados and Jamaica inherited almost identical political, economic, and legal institutions: Westminster Parliamentary democracy, constitutional protection of property rights, and legal systems rooted in English Common Law. Yet…the standard of living in the two countries diverged in the roughly forty-year period following their independence from Great Britain.

Additionally, Barbados and Jamaica are members of the regional trade and single market entity known as the Caribbean Community or "CARICOM" for short.[12]

[11] Appendix 1 shows a graph by Henry and Miller (2008: 14) depicting the divergence in standard of living between Barbados and Jamaica in the post-colonial period.

[12] CARICOM refers to the community of Caribbean states and territories that are bound by The Treaty of Chaguaramus ("Treaty") to engage in economic cooperation, including free trade, with each other. The Treaty became effective on August 1, 1973, with Barbados, Guyana, Jamaica, and Trinidad and Tobago being the first group of signatories. Other member countries include: Antigua and Barbuda, the Bahamas, Belize, Dominica, Grenada, Haiti, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Suriname. Associate members are territories (non-independent countries): Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands. CARICOM is headquartered in Greater Georgetown, Guyana. See: http://www.caricom.org/jsp/community/history.jsp?menu=community. (Last visited January 12, 2019).

Table 1: Basic Statistics for Commonwealth Caribbean Countries (2012) (Berry 2014)[13]

Country	Membership	Population	Surface area (Sq. Km).	GDP per capita (current US$)	HDI Rank
Antigua and Barbuda	CARICOM	89,069	440	13,207	67
The Bahamas	CARICOM	371,960	13,880	21,908	49
Barbados	CARICOM	283,221	430	13,076	38
Belize	CARICOM	324,060	22,970	4,577	96
Dominica	CARICOM	71,684	750	6,691	72
Grenada	CARICOM	105,483	340	7,485	63
Guyana	CARICOM	795,369	214,970	3,584	118
Jamaica	CARICOM	2,712,100	10,990	5,472	85
St. Kitts and Nevis	CARICOM	53,584	260	13,969	72
St. Lucia	CARICOM	180,870	620	6,558	88
St. Vincent and the Grenadines	CARICOM	109,373	390	6,515	83
Trinidad and Tobago	CARICOM	1,337,439	5130	17,934	67

[13] This table was reproduced from David Berry's (2014: 11) book, *Caribbean Integration Law*. Professor Berry serves as Dean of the Faculty of Law at the University of the West Indies, Cave Hill, Barbados.



Figure 2: Map of Barbados[14]

[14] Image by U.S. Central Intelligence Agency. Online. Perry-Castaneda Library Map Collection at The University of Texas at Austin. 1980. Retrieved January 9, 2019 (http://legacy.lib.utexas.edu/maps/barbados.html).



Figure 3: Map of Jamaica[15]

As Henry and Miller (2008) highlight, despite their similar colonial experiences and the ongoing regional interest—primarily through CARICOM—in economic and legal harmonization,[16] the fortunes of Barbados and Jamaica have diverged since they became

[15] Image by U.S. Central Intelligence Agency. Online. Perry-Castaneda Library Map Collection at The University of Texas at Austin. 2002. Retrieved January 9, 2019 (https://legacy.lib.utexas.edu/maps/jamaica.html).

[16] It bears noting that for several years, beginning in 1988, an organization known as the Caribbean Law Institute ("CLI") headquartered at Florida State University attempted to help Commonwealth Caribbean states to reform their commercial laws. One of the main goals of the CLI was to work with Caribbean leaders (state and private sector officials) to facilitate the harmonization of commercial laws among Caribbean countries (Newton 1989: 1). There was also an effort by CARICOM to facilitate the harmonization of company laws throughout the region as part of the process of economic integration of member states (CARICOM 1979).

sovereign nations in the 1960s.[17] Barbados has consistently outperformed Jamaica along several development metrics (United Nations Development Program 2013, 2016), including gross domestic product per capita ("GDP") for decades now (Henry 2013) (notwithstanding its economic struggles since the 2007 Global Recession (Alleyne 2018; Wigglesworth 2018)). For example, Barbados currently has a higher gross domestic product (GDP) per capita of US $15,891 compared with Jamaica's GDP per capita of US $4,876. Barbados has also consistently ranked higher on the United Nation's Human Development Index ("HDI") and various rule of law indices. For example, in 2015, Barbados ranked 54 compared to Jamaica's 94 on the HDI (Human Development Report 2016, 198-99). In 2016, Barbados ranked higher than Jamaica on both the World Justice Project's ("WJP") Rule of Law index and the WB's World Governance Rule of Law index ("WGI")—scoring 0.65 to Jamaica's 0.58 on the WJP index, and 77 to Jamaica's 45 on the WGI (WJP 2017-2018; WB 2017d).

Further, there has been a noticeable difference in the development of their commercial laws. For example, according to the WB's Doing Business indicators, in the last fifteen years Jamaica has adopted more regulatory best practices[18] for its commercial laws than Barbados, even though they began political independence with very similar

[17] Orlando Patterson (2013) disputes this thesis and argues that countries like Barbados and Jamaica did not develop identical institutions during the colonial period. As such, it is unlikely they would experience identical social, political and economic development in the post-colonial period. In addition to Patterson's (2013) insightful perspective, it is also reasonable to assume that the same colonial forces that dominated these countries inspired nationalist movements, which ultimately led them to pursue different paths in the post-colonial period (Berry 2014; Garcia 2008).

[18] Details on the reforms adopted by each country can be found at: http://www.doingbusiness.org/Reforms/Overview/Economy/jamaica; and http://www.doingbusiness.org/Reforms/Overview/Economy/barbados.

commercial statutes and practices (Burgess 2013: 1-14).[19] To situate both countries among their neighbors and within the economic development efforts of the region, the next section provides a brief overview of some of the prior studies of Caribbean economic development.

Previous Studies on Caribbean Development

Of the relatively few academic studies of Commonwealth Caribbean economic development, none have examined social factors such as the roles of the legal community in promoting pro-growth commercial law reforms or CEI in shaping the types of commercial law reforms pursued. This section begins with the work of economist Winston Griffith, who, in a series of articles, outlined various theories of Caribbean economic development, including reasons for Barbados' post-colonial success.

The Matter of Size

Size is often seen as major constraint on small island economic development. But, according to Winston Griffith (2007), "economic smallness" and limited access to natural resources is not dispositive where it concerns economic growth. By "economic smallness," Griffith (2007) is referring to the commonly understood limits on how much a country can diversify its economy based on its resources. In a study of Barbados, Guyana, Jamaica, and Trinidad and Tobago for the time period 1970-1997, Griffith (2007) attributes Barbados' economic success to path dependence stemming from critical post-independence choices about the role of the state in markets and the adaptability of its

[19] For example, Andrew Burgess (2013) discusses the English origins of company law throughout the Commonwealth Caribbean.

institutions.[20] According to Griffith (2007), knowledge skills[21] are more influential to economic success for small countries,[22] including members of CARICOM, than access to natural resources (2007: 939-58). In making this argument, Griffith (2007: 941) assumes that a country can build up the knowledge skills of its population, if it has the appropriate "cultural and institutional framework." The challenge for policy makers is to discern how exactly this would happen or which institutions would require priority attention in this regard (2007: 941; but see Portes and Smith 2012). While Griffith (2007) references the role of institutions in explaining the unequal development of the Caribbean countries, he does not provide a theory of exactly how those institutions work or change.[23]

Regional integration and collaboration have also been popular recipes for economic growth in the Caribbean. For example, Griffith (1993: 38-49; 2010) suggests Caribbean states should engage in greater regional collaboration with neighbor states to, among other things, increase their competitiveness on the world market, as well as build

[20] Griffith (2002: 80) defines "institutions" as "prescribed patterns of correlated behavior." He also rebuffs the geography thesis (discussed in Chapter 2), which suggests that a country's physical location in the world plays an important role in its economic development (Diamond 1997).

[21] Griffith (2007: 939) argues that knowledge skills can be used to diversify "th[e] economic structure of production" in CARICOM countries.

[22] Griffith (2007: 942-44) appears to define "small" as a factor of both geography and economy. By geography he refers to those countries with a population of less than five million people. With respect to economic size, Griffith is unclear as to what the criteria for economic smallness entails, but concludes that, at a minimum, "all CARICOM countries are still considered less developed countries[.]"

[23] It is worth noting that a subsequent study by Magda Kandil (2009) of Caribbean and Latin American economies between 1960 and 2006 suggests that there are spillover effects on the Caribbean when the U.S. economy experiences shocks. Kandil (2009: 992) notes: "Geographical proximity, as well as trade and financial linkages, are likely to determine the spillover effects of shocks originating in the United States on economic activity in neighboring countries and trading partners."

on the knowledge skills of their citizens to invite greater foreign direct investment ("FDI"). One of the areas he highlights for potential state investment is "legal mechanisms to protect foreign capital," and therefore, by necessity, legal education (Griffith 2005: 974).[24] It is reasonable to assume that the education of capable lawyers who are astute with respect to the globalization of commercial law would fall under this category. While Griffith (2005) does not touch on this aspect, he does connect economic development with education and labor policy.

Education and Labor Policy

The way Caribbean states have approached their education and labor policies appear to have had an impact on their economic development. In the wake of independence and in response to their colonial history, heightened nationalist sentiments led the governments of Guyana, Jamaica, and Trinidad and Tobago to exert ownership over domestic industries and natural resources. These countries viewed FDI as a form of neo-colonialism (Kandil 2009: 84-85). And, since they had valuable resources like beaches, sugar estates, bauxite factories, and oil, they endeavored to control "'the commanding heights' of the economy" (2009: 85).[25] Barbados, on the contrary, not having access to a diverse set of resources and relying on sugar and tourism primarily,

[24] Griffith (1995) does not explain what state investment in legal mechanisms actually looks like in practice, but we can assume he means at least the basic concepts of protection of private property and enforcement of contracts.

[25] Guyana's main industries at independence were sugar and bauxite; Jamaica's main industries at independence were banana, tourism, sugar, cement and bauxite; Trinidad's main industries at independence were iron, steel, and oil. Barbados does not have traditional natural resources and depend primarily on agriculture and tourism. (Kandil 2009: 85-87).

used its stable political environment[26] and limited bureaucratic capabilities to enhance its tourism sector and invite FDI (2009: 87). Griffith (2005: 973) argues that it is not so much that Guyana, Jamaica, and Trinidad and Tobago pursued socialist policies and Barbados embraced neoliberalism, but that the other countries lacked the educational institutions capable of and interested in preparing their populations for work in the manufacturing sector. This was important because workers were needed to replace those in the industries that were expropriated from foreign investors (Griffith 2002).[27] Further, the lack of an industrially skilled labor force undermined these states' effort at import-substitution industrialization (2002: 90). Barbados, however, had a highly educated population and did not need to find a replacement labor force of skilled workers. It was therefore able to gain foreign exchange through tourism and excelled at job creation (2002: 96).

Griffith's (2002) thesis is that inflexible education and labor institutions in Guyana, Jamaica, and Trinidad and Tobago were responsible for their inferior economic performance when compared to Barbados. Apart from Barbados' decision to export tourism and the failure of the other countries to adapt their educational institutions toward training for manufacturing jobs, trade unions also proved inflexible in Guyana, Trinidad and Tobago, and Jamaica. While trade union activists in Barbados were willing to

[26] Barbados has maintained a stable government with no social and political upheaval, whereas Jamaica, Trinidad and Tobago, and Guyana experienced violence with respected to their struggles with democratic socialism, political turmoil and revolution, and political riots, respectively, during different periods.

[27] Griffith argues that a type of "ceremonialism" was inherited from colonialism that did not find manufacturing jobs appealing, or at least socially respectable. Hence, educational institutions did not invest in preparing the population for those opportunities and focused more on white-collar type professions (Griffith 2005: 973).

coordinate with the state in the 1980s and 1990s to help facilitate the implementation of austere measures imposed by the government to withstand a recession, their counterparts in neighboring islands engaged in strikes and lockouts. This naturally led to significant periods of unproductivity and, consequently, lower investor interest (2002: 97). In short, Barbados developed "a healthier industrial climate than other countries," which Griffith (2002: 97) thinks contributed to its economic performance.

With respect to Barbados' investment in knowledge skills, the high levels of literacy in the country cannot be ignored. Orlando Patterson (2013) argues that, historically, Barbadians saw the acquisition of education as one of the ways to escape the colonial plantations after the abolition of slavery. Additionally, education was the means to attain better paying work and even out-migration. The emphasis on education became a keen area of attention for Barbadians in the colonial and post-colonial period, and was incubated by a colonial experience that prioritized education. For example, Patterson (2013) highlights that "in 1834 there were already 213 schools in the island, which with a white population of 15,000 meant that there were more such institutions per capita (1 to 70 whites) than anywhere else in the Caribbean and perhaps the entire New World except New England" (2013:19). And, in the post-slavery era, around 1844, "there were 56 church-organized schools, mainly Anglican, and 149 private schools with a total enrolment of 7,452 students" (2013: 19).

Significantly, Barbados reflected both a higher level of literacy among its population than other islands, like Jamaica, and also had smaller difference in literacy between ethnic groups. According to Patterson (2013), in the early to mid-1940s, Barbados had "an 8 percentage point difference between blacks and whites[,]" whereas

Jamaica had a 25 percentage point difference (2013: 19). With such historically high levels of education in Barbados, labor participation rates were high for both genders, and Barbadians became attractive to other countries seeking skilled labor (2013: 20-21).

Despite the attention to knowledge skills, neither Griffith (2002) nor Patterson (2013) explicitly discuss the impact such skills had on the professional occupations, such as medicine, law or engineering, that developed in Barbados. Neither do they nor other scholars discuss what role these professions have played on the economic development of Caribbean economies. Potential insights into these arenas, especially law (for purposes of this dissertation), could reveal mechanisms for understanding new and interesting ways for the state to expand its development capabilities. Other scholars have examined the role institutional quality in the bureaucratic arena has played in the economic development of several countries in the Latin America and Caribbean region. The next section briefly discusses the work of Alejandro Portes and Lori Smith (2012).

Executive Branch Institutions

Taking aim at Argentina, Chile, Columbia, Mexico and the Dominican Republic,[28] Portes and Smith (2012) sought to understand if there were systematic differences between select institutions within each country that were consequential for development.[29] The study, therefore, endeavored to identify a configuration and ranking

[28] The Dominican Republic was the only country in the study squarely located in the Caribbean region—though not a Commonwealth Caribbean post-colony.

[29] The authors defined development as "a composite of economic growth, greater social equity, and democratic rights" (Portes and Smith 2012: 29).

of institutions that would constitute a profile for the ideal developmental state in the region.

The institutions examined were: stock exchanges; tax authorities; public health services; postal systems; and civilian aviation authorities.[30] Portes and Smith (2012) found that economic agencies, such as the stock exchange and tax authorities were usually of higher quality and importance, while service organizations like the post office and public health services were generally of lesser quality and importance. Chile was identified as the most developmentally successful of the countries studied and all their institutions were of adequate quality. Colombia, on the hand, had the weakest institutions overall, with their economic agencies performing below the standard of those in the other countries in the study. In short, those states that focused on and had better economic institutions—as "islands of excellence"—tended to do better developmentally. The Dominican Republic, representing the only Caribbean country in the study, had a strong tax authority and civil aviation authority that contribute to the country's development. It's public health system and postal service, however, play no role in national development (2012: 121-22).

Macro-economic Policy Choices

Despite Portes and Smith's (2012) findings, there is an argument that institutions do not matter as much as we think for economic development based on the development trajectories of Barbados and Jamaica. According to Henry (2013: 24), "the lion's share of the income gap between Barbados and Jamaica" can be traced back to how political

[30] Portes and Smith (2012: 28) categorize the stock exchange and tax authorities as economic agencies, public health and postal systems as social service agencies, and civilian aviation authorities as more technical agencies.

leaders addressed the oil crisis of the 1970s in Jamaica and the 1990s in Barbados. In this vein, he proposes that institutional determinism does not explain the difference in economic performance between Jamaica and Barbados. Referencing their similar colonial starting points and institutional inheritance, Henry (2013) makes the case that macro-economic policy choices are more important for economic growth than institutions. He posits that, given the similar institutional frameworks inherited by Jamaican and Barbados,[31] the key explanation for their polar outcomes is the macro-economic policy choices of their political leaders. For example, whereas, Jamaican leadership under Michael Manley chose socialist policies and spurned the IMF in the face of the 1970s global recession, Barbados's prime Minister Erskine Sandiford chose to pursue austere measures of his own choosing, while maintaining negotiations with the IMF during the oil crisis of the 1990s (2013: 23-42). Essentially, the two islands presented a contrast between populism and economic prudence—within similar post-colonial institutional frameworks. To this point, Henry's (2013) theory rides on the assumption that the inherited institutional frameworks in Barbados and Jamaica are sufficiently similar. As such, he does not entertain the likelihood that their institutions developed differently due to the distinct social and historical context in each island.

Colonial Institutions

Several scholars suggest this assumption of institutional similarity may have its limits and require a bit more nuance. For example, focused on the relationship between

[31] These include the "English language, Westminster parliamentary democracy, constitutional protection of private property, English common law, and the Anglican Church for good measure" (Henry 2013: 23).

"institutions, colonialism and economic development," Patterson (2013) details the socio-historical reasons for the difference in economic development between Barbados and Jamaica. He unequivocally argues that Barbados and Jamaica did not inherit identical institutions from Britain, common law notwithstanding. Patterson (2013) proposes that the unique nature of the colonial experience and the greater level of investment the British made in the Barbadian colony significantly influenced the country's post-colonial economic trajectory. Patterson (2013: 3) argues:

> [W]hile the institutions of both islands were formally similar, the claim that they began the post-colonial path to development on equal terms is seriously open to question. The more effective use of institutions by the Barbadian white elite, by means that were often ruthless, unfolding over a long period of time, and the reliance on blacks to perform all but the most elite-level institutional roles, to the exclusion of the white lower class, led to the emergence of a high-functioning socio-economic system during the colonial era, as well as the acquisition of the procedural knowledge and related cultural norms, values and beliefs that undergird such a system by black Barbadians of all classes.

Patterson proposes that Barbados inherited more than just institutions from the British, but the "procedural knowledge" associated with how to effectively make those institutions work in their best interest (2013: 34). Moreover, he avers that their similar institutional inheritance does not mean that those institutions were destined to function in the same way. In Jamaica, for example, the plantation undermined social relations among blacks, as well as between workers and managers. In Barbados, the plantation system proved beneficial from the perspective of enabling "the disciplining and enculturation of the Barbadian work force to capitalist norms" 2013: 36).

Additionally, Patterson (2013) incorporates the factor endowment thesis of Stanley Engerman and Kenneth Sokoloff (2002) (discussed in Chapter 1) to argue that Barbados' geography was friendlier to colonist than Jamaica's and, therefore, invited the

British to invest more of their time on the island and build higher quality institutions (Patterson 2013: 36). In short, Patterson (2013: 37) suggests that in Barbados "the procedural knowledge of the metropolitan institutional culture was assimilated to an unusual degree by the subaltern population." Indeed, Barbados is said to have developed so much in the mold of England institutionally that the country has been called "Little England" or "British Empire in Miniature" (Graham 2002: 52).

With respect to legal and political institutions, Patterson (2013) notes that both countries inherited a "two-party parliamentary system" based on the British Westminster model (2013: 25). Even their constitutions sought to replicate various British laws—an indication of how colonialism afforded the early globalization and isomorphism of laws. Importantly, in both countries, "most laws remained on the books exactly as they had been written by the colonial government and remained in place even after Britain had changed it own version" (2013: 25). While very detailed in analysis and keenly focused on historical events on each island, Patterson (2013) discusses economic development but does not engage in a substantial discussion on the role of law or acknowledge the influence of legal actors.

Two other prominent studies have examined the influence of colonial legacy on long-term development in the Caribbean. In comparing Barbados' economic success to Guyana's economic struggles, Michael DaCosta (2007), much like Patterson (2013), argues that the proverbial dye was cast during the colonial period where institutions are concerned. Pursuant to DaCosta (2007), Barbados' colonial history, as well as its geography, provided it with all the institutional advantages required to become a prosperous country at independence. With 300 years of practice with representative

government and parliamentary procedures, he argues that the state was expert in matters of politics and administration (2007: 18).[32]

DaCosta (2007) specifically notes that much of Barbados' economic advantages stem from "quality of institutions, including political stability and the rule of law" (2007: 19). Implicit in DaCosta's (2007) analysis is that Barbadian law was well developed and there was a professional group of lawyers and judges, and other legally trained individuals well capable of analyzing and utilizing it.

Given the disparity in the quality of legal institutions and economic outcomes among countries with similar British colonial histories, Ron Daniels, Michael Trebilcock and Lindsey Carson (2011: 126) pursued a natural experiment to determine "the processes, patterns, and possibilities of ambitious legal transition and reform efforts more generally." Contrary to Henry's (2013) assumption regarding the sameness of the islands' British colonial institutional legacies, Daniels et al. (2011) propose that the initial endowments of the country colonized by the British impacted the way the empire chose to govern and transplant its laws. Consequently, it was the dynamics of the colonial experience that produced the unique legal institutions of a colony—and subsequent post-colony, even if there is a *prima facie* case that the countries employ the same British common law.

According to Daniels et al. (2011) the dynamics of the colonial experience influenced how committed the post-colony would eventually be to the rule of law. Using case studies of eight British ex-colonies, including Barbados and Jamaica, the legal scholars explain: "the inheritance, from the colonial era, of one legal family or the other

[32] Chapters 3 and 5 suggest that perhaps this background made Barbados particularly well equipped to undertake the statute and treaty intensive arena of offshore banking.

seems to have little or nothing to do with subsequent commitments to legality, with many examples of both high-performing and low-performing countries within each legal system on current rule of law ratings" (2011: 174).

What seems to matter more was how the legal system was introduced and incorporated into the needs of the colonists and natives of the country. In the case of Barbados, which ranks higher than Jamaica on rule of law measures, a representative legislature was allowed to continue post abolition of slavery—thereby allowing recently emancipated slaves to serve as representatives of the people (2011: 131). Jamaica, on the other hand, replaced its legislative council with crown-colony rule, which only allowed for representation by white colonists—thereby excluding blacks from the lawmaking enterprise. Daniels et al. (2011: 141) claims that this disempowerment motivated the independent Jamaican state to pursue social and political rights for blacks—as opposed to a state focused on good governance, or even economic growth. The fact that native Blacks in Barbados could express their interests through representational politics enabled a subsequent post-independence legal system that was more familiar with and oriented toward rules (2011: 139). This study hints at a role for law in Barbados' economic development, but does not make the ultimate leap to robustly argue this thesis.

The next section provides a brief overview of recent policy briefs by the Inter-American Development Bank ("IDB") concerning the role of law in the economic development of countries in the Caribbean region.

Law and Legal Institutions

International Financial Institutions ("IFIs") have actively promoted a role for commercial law in matters of economic development (see, example, WB 2019; Besley 2015). For example, the IDB, which provides development assistance to countries in Latin America and the Caribbean, has produced several reports outlining how effective legal institutions are vital to the pursuit of business development in the Caribbean region (Holden and Howell 2009a; 2009b; IDB 2009).[33]

According to the IDB, the quality of commercial law varies across Caribbean countries, even among those that share the British common law as a consequence of colonialism (Holden and Howell 2009a). Commercial laws in the region are generally considered relics of the colonial era that do not complement more recent statutory additions in a way that makes transacting business seamless (Holden and Howell 2009a; 2009b). They are clunky and cumbersome, and not particularly user-friendly, as compared to the more streamlined and organized statutes and regulations present in more developed countries—such as the Uniform Commercial Code ("UCC")[34] in the United States.

The IDB's policy prescriptions draw attention to two areas deemed in need of reform throughout the region: commercial laws and bureaucratic process. With respect to commercial laws, one suggestion is the standardization, or at least harmonization, of laws across countries. Mindful of the immense resources required and the complications when

[33] This assistance typically takes the form of "financial and technical support" for specific development projects (https://www.iadb.org/en/about-us/overview). (Last visited January 13, 2019).

[34] See: https://www.law.cornell.edu/ucc. (Last visited January 14, 2019).

pairing model laws with judge-made rules, Paul Holden and Hunt Howell (2009a: 23), a pair of IDB consultants, specifically offer that:

> One option for legal reform in the Caribbean would be to draft model laws that could then be used as the basis for changing individual country laws….If all countries adopted similar privacy and consumer protection provisions regarding credit information, at one stroke, barriers to the provision of regional credit information would be greatly reduced. In this sense, commonality of legislation could provide substantial advantages.

The consultants recognize that there are also benefits to reform commercial laws country-by-country, and note that the "legal capacity of practitioners and judges also needs to be factored into reform" (2009a: 24).

With respect to government bureaucracies throughout the Caribbean, which often have a reputation for being slow and unproductive, Holden and Howell (2009a: 24) suggest rigorously justifying regulations utilized—to ensure that they are necessary and efficient. Specifically, instead of trying to update the current regulations utilized by government bureaucracies:

> An alternative approach would be to introduce a "sunset clause" into the application of a regulation. This would require all departments to justify all their regulations in writing by a particular date. In the event that convincing justification is not forthcoming, or if it is not provided at all, the regulations would lapse. Whatever method is chosen, analysis of regulations governing business is urgently needed. A first step that donors could initiate would be cataloguing business regulations, both at the central government level and the local level for the large countries in the region (Holden and Howell 2009a: 24).

The IDB has therefore been active in communicating the need to reform commercial laws in Caribbean and Latin American countries. While there has been sensitivity to local custom and practices, insufficient attention has been paid to coordination efforts between the states and commercial lawyers to discern the best rules for a jurisdiction. Further, there has been no consideration of community identity in relation to how reforms should

be prioritized. The next section discusses how this dissertation contributes to understanding the relationship between law and economic development in the Commonwealth Caribbean.

This Dissertation

The majority of the studies outlined above suggest institutions, including legal institutions, matter for economic development. Additionally, countries with similar colonial histories might have divergent outcomes based on the quality of their institutions and leaders. None of them, however, touch on how Caribbean states choose their legal reforms for the purposes of economic growth.

This dissertation examines how Barbados and Jamaica have responded to the secured transactions reforms promoted by the WB's Doing Business law reform initiatives, which are viewed as universally important for access to credit and economic growth. A secured transactions legal framework facilitates the use of assets (other than real property) to be used as collateral in loan transactions. An efficient secured transactions regime is theorized to facilitate easier access to credit and, therefore, generate more economic activity (IFC 2010).

Post-colonial developing countries are ideal venues to investigate how proposed best practices and model laws (including those governing secured transactions) resonate in foreign jurisdictions because these countries are often seeking to adopt high quality rules that promise economic growth (see, example, Halliday and Carruthers 2009; Halliday, Karpik and Feeley 2012; Comaroff and Comaroff 2006). Smaller developing post-colonies, like the island nations of the Commonwealth Caribbean, are particularly

appropriate in this regard because they are pursuing economic growth within the context of significant financial and bureaucratic resource limitations (see, example, Griffith 2007). These constraints force them to carefully prioritize their legal reforms and make strategic choices about commercial legislation.

Methodology

Methodologically, this dissertation seeks to understand why countries with similar colonial histories, state institutions, geographies and demographics[35] may approach legal reform, particularly business law reforms, in different ways. The institutional similarities of the two countries (for example, the common law legal tradition, Westminster parliamentary democracy and Whitehall administrative institutions) but differences in approach to commercial law reforms provides an opportunity to understand why legal institutions may not always facilitate economic growth or contribute the way we expect to the economic affairs of developing countries.

The data used for this dissertation comes primarily from the WB's Doing Business reports 2012-2019, archival materials uncovered in Barbados and Jamaica, rare Caribbean legal journals located at the University of California, Berkeley School of Law, the UCC, and a variety of business statutes in Barbados and Jamaica. The materials reviewed also include government policy papers addressing the post-colonial economic development goals and achievements of the Barbadian and Jamaican states, and articles

[35] Jamaica's population is 92% Black, with individuals of East Indian, European and mixed ancestry comprising the remaining 8% of the population. (https://www.cia.gov/library/publications/the-world-factbook/geos/jm.html) (Last visited January 10, 2019). Barbados' population is similarly 92% Black, with individuals from East Indian, European and mixed ancestry comprising the remaining 8% of the population. (https://www.cia.gov/-library/publications/the-world-factbook/geos/bb.html) (Last visited January 10, 2019).

and reports on the status of the legal profession in the early decades of political independence in both countries. The dissertation draws on the historical descriptions of the economies of Barbados and Jamaica found in the governments' development plans and economic profiles, as well as early scholarly writings by legal academics going back to 1970—the year a Faculty of Law was established in the Commonwealth Caribbean.

Over 30 informal expert interviews were conducted. I met with senior legal scholars, business leaders, social scientists, librarians, senior commercial lawyers, high court judges, and policymakers from across the Caribbean. The purpose of these interviews was to provide context for the materials gathered from the archives. Interviewees were selected by way of recommendation from legal scholars and practicing lawyers in the United States, Jamaica and Barbados. Subsequent interviews were chosen using the snowball interview method—whereby interviewees recommend other individuals for interviews. Recommendations were accompanied by an assessment of the proposed experts credentials, including experience practicing or studying law, as well as involvement in policymaking and academic studies in Barbados or Jamaica. In some cases, my interviewees had knowledge across multiple jurisdictions.

These expert interviews provided insights into the social and political conditions in each country during key periods of business law reform. The fact that the Commonwealth Caribbean is a region comprised of small countries (see Table 1) and academicians and legal professionals commonly spend time—at least during their schooling (but also in some instance at different points in their careers)—in multiple Commonwealth Caribbean islands (see Chapter 3), expert insights from jurisdictions such as the Cayman Islands and Trinidad and Tobago were beneficial. Notes were taken from

each interview, and a portion was recorded.[36] Where more information was needed, biographies and memoirs of political leaders were consulted.

Taken as a whole, the materials stitch together the relationship between law and the economy as viewed from the lens of local leaders in each country. In each country, the decades following political independence—the 1960s, 1970s, 1980s and early 1990s—were the primary focus, but recent reforms efforts were also studied. The goal was to understand the narrative transmitted by the state and community leaders, as well as the work of commercial lawyers in helping to craft a legal regime for business transactions.

[36] Most interviewees were uncomfortable with being recorded, given their professional status and the small size of the communities within which they work.

Research in Barbados

Research in Barbados began with a visit to the island in July 2016, where I served as a speaker at the Caribbean Commercial Law Workshop ("CCLW") in St. Michaels. The CCLW is an annual conference for commercial lawyers in the Caribbean and is hosted by the University of the West Indies ("UWI") Faculty of Law at Cave Hill. This workshop is a platform for rigorous scholarly and practical discussions regarding the status of commercial law in the Commonwealth Caribbean. In attendance were over 80 legal scholars, practitioners and business persons who presented papers or engaged in analyses of topics ranging from developments in contract law to international influences on commercial practices in the Caribbean.

As a participant at the CCLW, I benefited from multiple informal conversations, as well as group interviews, with a range of regional experts about the relationship between Caribbean economies and law reform goals. In these discussions, I sought to understand how legal professionals saw their role historically as contributors to economic development.

In Barbados, over 40 years of law review articles were reviewed at the Faculty of Law Library. These include articles from the West Indian Law Journal (1977-1990), University of the West Indies Student's Law Review (1976-1998), Caribbean Law and Business (1989-1997), and Caribbean Law Review (1997-2004). These journals provided a window into what legal scholars and practitioners thought of commercial law reform, particularly in the decades following political independence. Additionally, the Barbados Development Plans for the decades of the 1960s, 1970s and 1980s, and Economic Surveys of Jamaica for the same time period were reviewed at the Sir Arthur

Lewis Institute of Social and Economic Studies ("SALISES"). These surveys provided insight into what the state thought of the economy in the decades following political independence. The University of the West Indies at Cave Hill, Barbados and SALISES serve as repositories for historical and academic materials for a number of Commonwealth Caribbean countries. Additionally, files and reports related to the legal profession and economic development policies for Barbados and Jamaica were reviewed at the Barbados National Archives, located in Black Rock, St. James. Barbados proved to be a fruitful site for my research because materials from Jamaica were readily available.

Research in Jamaica

Research in Jamaica also began in 2016 and involved reviewing materials on legal history, including legal scholarship, of the Commonwealth Caribbean at the University of the West Indies, Mona Campus. Books and pamphlets that discussed reforms to the legal profession in Jamaica were reviewed in the West Indies Collection and Special Collections divisions of the UWI Library. Legal reports and professional publications were reviewed at the Law Branch Library, which serves the Faculty of Law and undergraduate students pursuing the Bachelor of Laws (L.L.B.) degree. Commonwealth Caribbean legal textbooks were reviewed at the Norman Manley Law School Library ("Norman Manley"). Norman Manley serves law graduates pursuing their Legal Education Certificate ("LEC") (see Chapter 3). In all three libraries, the materials reviewed were either unavailable online or in most libraries in the United States.[37]

[37] Some materials were also available at the University of California, Berkeley School of Law Library.

While at the libraries and archives in Barbados and Jamaica, informal interviews were conducted with librarians and staff members to better understand the content and context of the materials I found—as well as to seek their suggestion on additional materials that may be helpful.

Dissertation Outline

The remainder of this dissertation proceeds as follows. Chapter 1 outlines the theoretical background for the project. It highlights alternative factors and mechanisms prior scholars suggest explain economic development more broadly, and which may influence how developing countries pursue reforms to their commercial laws. It then suggests that the organization and strategies of private sector lawyers may contribute more to developmental goals that incorporate legal reforms than we currently realize. Further, it proposes that a jurisdiction's CEI matters for how leaders prioritize business reforms.

Chapter 2 presents the core practical puzzle driving my project: Unlike Jamaica, why has Barbados not pursued aggressive reforms to its mainstream business laws over the past decade—at least according to the WB? While the WB's Doing Business (discussed in Chapter 2) indicators reveal that Barbados has only pursued one set of reforms, of a potential eleven rules considered best practices for efficient business transactions, over the past decade. Secured transactions reform is one of those legal regimes seemingly ignored by the Barbadian state. This is especially curious given that independent experts have suggested that both Barbados and Jamaica are in need of reform to their colonial era secured lending laws and proffer that local firms would

greatly benefit from such reform in increasing their access to credit—which should lead to greater overall economic prosperity.

Chapter 3 invites scholars to consider a multi-dimensional approach to the understanding and deploying the concept of "state capacity." Instead of focusing primarily on features like bureaucratic capabilities (such as whether a jurisdiction follows a Weberian type bureaucracy), wealth, and the reach of the state throughout its territory, it suggests that law and economic development research (prevalent among economist and a small group of legal scholars) should be incorporated into the analysis. To this end, the role of private sector business lawyers—as a group of local leaders inextricably linked to legal reform—should be studied to understand the discrete ways in which regulatory capacity in resource scarce and bureaucratic challenged jurisdictions can be enhanced. Chapter 3 shows how post-colonial commercial lawyers in Barbados and Jamaica interacted with the state and potential implications for law making and economic development.

Chapter 4 introduces the concept of CEI into the legal academic discourse on law and economic development. Chapter 5 shows how CEI has impacted the choices made in Barbados and Jamaica regarding the types of commercial law reforms they have focused on in recent years. In short, it suggests that how leaders conceive of the country in terms of its CEI has led them to focus on a narrower or broader set of commercial laws, including best practices.

Chapter 6 outlines some of the questions and theoretical implications of this project for further research.

CHAPTER 1: THEORETICAL BACKGROUND

This chapter outlines prior scholarly perspectives on economic development, including those that touch on a role for law and legal institutions. It situates this dissertation within larger economic development scholarship and shows how insufficient consideration has been paid to the legal profession (commercial lawyers) and CEI. Not only have economists and development practitioners overlooked these areas, but also have sociologists and legal scholars. In recent decades, sociologists have considered the role of institutions and bureaucracy in economic development (for example, Portes and Smith 2012; Evans & Rauch 1996), but their overall influence in development theory and practice has diminished since the 1980s (Viterna and Robertson 2015: 244; Portes and Kincaid 1989). Legal scholars, on the other hand, have been concerned with the way law can influence the economic development (for example, Dam 2006; Davis and Trebilcock 2008), but have ceded ground to economists (Trubek 2014).

Both sociologists and legal scholars stand to benefit from a keen assessment of how commercial lawyers and CEI can impact the process of legal reform, particularly in developing countries. For sociologists, such an approach is timely, given the growing interest in the relationship between state capacity and development (see, for example, Enriquez and Centeno 2012; Enriquez, Sybblis and Centeno 2017). This is an area already colonized by political scientists and economists and their respective tools (see, example, Acemoglu et al. 2015; Cardenas, Eslava, and Ramirez 2011; Harbers 2015; Sellers and Listrom 2007; Soifer 2008; Soifer and vom Hau 2008), but which could benefit from a diversity of disciplinary perspectives.

For legal scholars, this analytical framework provides an opportunity for clarification and precision in an area where they should demonstrate strength. While economists have proffered that law—as a subset of institutions—is important to industry development and economic growth (La Porta et al. 1997), it is still unclear which sets of laws should be adopted to spur growth (Trubek 2014; Trubek and Galanter 1972; Davis and Trebilcock 2008; Davis 2010). Given that existing explanations for legal change tend to focus on political economy considerations (see, example, Gilson 1999), a socio-legal approach is sorely needed to provide a more comprehensive understanding of how communities approach commercial law reform.

Take, for example, the literatures on the evolution of Delaware as the state for incorporation of firms when they decide to go public and the standardization of business law in developing countries. Both have developed without the benefit of understanding how communities envision themselves in relation to particular commercial enterprises. More specifically, scholars have not considered how the local bar has coalesced around legal reforms geared at promoting a desired economic outcome, or how leaders form public economic identities for the community. This dissertation attempts to make headway in both of these arenas.

The remainder of this chapter proceeds as follows. First, it outlines some of the more prominent theories that seek to explain economic development. Second, it describes how various actors have sought to use law to promote specific commercial enterprises and explain why legal change may not be forthcoming in some instances, even when reform promises wealth to a society. Third, it explains how an appreciation of

the capabilities of commercial lawyers in a community and CEI can contribute to our understanding of how legal change occurs.

Theories of Economic Development

A variety of theories seek to explain the determinants of economic growth and cross- sectional variations in development (see, example, Portes 1997; Evans and James 1999). Four of the more popular ones see a role for ethnicity, geography, factor endowment, and institutions. The next section briefly discusses each of these and argues that none has paid attention to the legal profession or CEI—as influencers of economic development.

Ethnicity and Homogeneity

As it relates to ethnicity and homogeneity, scholars have proffered that more homogenous societies—ethnically, linguistically and religiously—tend to do better economically due to their shared histories and community goals, as well as greater social trust. Overall, ethnic heterogeneity (diversity) distracts from prudent development policy by nudging greater focus on issues of redistribution to select groups within the society—which promotes conflict (see, example, Horowitz 1985; Wimmer 2013, 1997). Bill Easterly and Ross Levine (1997) argue that ethnic diversity actually works contrary to the development goals of the state by undermining the production of effective public policies, including political stability.

Ethnically fragmented societies are believed more likely to disagree with respect to the provision of public goods due to the inevitable conflict and polarization of groups.

Specifically, they claim that "rent-seeking behavior and reduce[d] consensus for public goods, creat[e] long-run growth tragedies" (Easterly and Levine 1997: 1241). Other scholars, such as Jose Montalvo and Marta Reynal-Querol (2005), suggest that, ethnic diversity leads to low rates of investment, increased public consumption and conflict that diminish economic growth. More recently, Bilin Neyapti and Yavuz Arasil (2015) have argued that ethnic homogeneity is not only important with respect to formal state institutions, but can have positive results with respect to informal ones—providing for easier and faster reforms and more robust economic growth (Neyapti and Arasil 2015).

Geography

Geography is also considered a factor that explains development and underdevelopment. According to this perspective, a country's physical location in the world matters for economic growth. This is particularly pertinent where it concerns issues of climate, disease and even the likelihood of diffusion of technology (see, example, Diamond 1997; Gallup et al. 1999). Jared Diamond (1997) proposes that the prevalence of disease, and the presence of certain kinds of animals impact its changes of economic success. John Gallup, Jeffrey Sachs and Andrew Mellinger (1999) contribute to this argument by noting that a combination of geographic, economic and political institutional conditions work together to influence development outcomes. Gallup et al. (1999: 204) posit that sophisticated public policies are important, but are not necessarily sufficient for economic growth because some parts of the world are not receptive to growth, such as the tropics where disease like malaria is prevalent. On the other hand, geography may benefit those countries endowed with access to coastal regions—where

they can capitalize on lower transportation costs and more easily, and cost effectively, trade in a range of goods.

Some scholars discount the geography thesis. For example, Dani Rodrik, Arvind Subramanian, and Francesco Trebbi (2004) have found that the quality of institutions, including the rule of law and property rights, in a country can overcome whatever geographical deficit it has. Along these lines, Todd Mitton's (2016) study of geography and institutions at the subnational level finds variation in economic development within a country. According to Mitton's (2016: 103) research, geography has a significant effect on economic development, "[b]ut regional institutions do seem to play a significant role when 'given a chance'; that is, when they are not dominated by national institutions"—which typically occurs, unless regions have some degree of autonomy.

Factor Endowment

A group of scholars have given credit to factor endowment as an explanation for economic development. The factor endowment theory captures both an institutional analysis of development and sociology of development approach to economic growth. According to Engerman and Sokoloff (2002), the wealth difference among New World economies is directly related to factors such as climate and soil conditions, which facilitated economic activity, as well as the density of the native population in the place. Those countries where the climate and soil were conducive to growing cash crops for the world market invited the development of slave institutions, and "quickly generated vastly unequal distributions of wealth, human capital and political power" (2002: 3).

In other words, institutions are designed in response to the initial conditions found in that country. The interaction between institutions and geography explains why some countries and regions are more successful than others today. Institutions, including laws and political systems, that protected the wealthy were developed to help perpetuate inequalities in societies where such unequal conditions were originally found. On the contrary, those societies that were more equal at the onset of colonization, and were endowed "with greater wealth and human capital or homogeneity among the population, the elites were less able or less inclined to institutionalize rules, laws, and other government policies that grossly advantaged them" (2002: 18).

Extending the factor endowment theory, some scholars have sought to explain why some ex-colonies tend to have better institutions for economic growth than others. They argue that the feasibility of settlement in a colony was of utmost importance to the quality of the institutions that develop. Pursuant to Daren Acemoglu, Simon Johnson and James Robinson (2001), where colonists found favorable environmental conditions (and were, therefore, likely to survive) they invested in the cultivation of higher quality institutions. These included practices that encouraged investment and promoted the rule of law (see, example, Daniels et al. 2011; Patterson 2013). On the other hand, where initial conditions were unfavorable, they invested less in those kinds of institutions and sought only to extract resources—which led to long-term underdevelopment (Acemoglu and Robinson 2012).

The factor endowment thesis has even been utilized in the law and finance arena. For example, Daniel Oto-Peralias and Diego Romero-Avila (2014) found that the common law facilitates the development of a robust financial system in colonies where

initial endowments were less, such as where the native population density was low, allowing colonists to wholly transplant and implement strong property rights and contract enforcement. For the British, for example, where initial endowments were greater, indirect-rule was the means by which control was exercised—which left native rule intact and a legal system tending more toward local tradition (Oto-Peralias and Romero-Avila 2014: 44).

Institutions and Development

Modernization Theory

Turning to a role for law in the economy, the early law and development movement in the 1960s (of which there have subsequently been several versions) (Trubek and Santos 2006: 11) drew on Max Weber's thesis on the relationship between law and capitalism. It theorized that Western law would facilitate rapid development in underdeveloped countries (Trubek 1972; Thomas 2006). David Trubek (1972: 720), one of the early law and development scholars, outlines Weber's thesis on law and capitalism in the following manner:

> Unique conditions in European history, Weber argued, led to the emergence of legalism. Religious, political, economic, and legal factors contributed to this development. In the West, religious and secular law were separated, thus allowing a divorce of legal and ethical norms. At the same time, the bureaucratization of the Catholic Church, and its Roman law heritage, led canon law to become significantly more rational than most theocratic legal orders. And European kings, in their struggles for power with other groups in the polity, found it necessary to create bureaucratic staffs and to enter into alliances with rising bourgeois interests. To further their own self-interest, both the administrative staff and the merchant groups demanded more rational and calculable systems, demands which patrimonial rulers found difficult to refuse, even though the result was in some way a limitation of their powers.

An integral part of the first wave of law and development scholarship and practice, was the reliance on transplantation of Western laws to developing countries (Trubek 2014: 5; Davis 2010: 537-553). "In his economic sociology, Weber stressed the importance for capitalist development of two aspects of law: (1) its relative degree of calculability, and (2) its capacity to develop substantive provisions—principally those relating to freedom of contract—necessary for the functioning of the market system" (Trubek 1972: 740).[38] According to law and development scholars, law is therefore a tool to be used for providing better and more vibrant economies—with other attributes of development following naturally.

This perspective is tied to modernization theory, which was incorporated into the core of the early law and development movement. According to modernization theory: "a society's underdevelopment was both caused by, and reflected in, its tradition (as opposed to modern) economic, political, social, and cultural characteristics or structures" (Davis and Trebilcock 2008: 900). Trubek (2014) notes, however, that there was gross oversight and ethnocentrism on the part of law and development academicians and public policy practitioners in the 1960s regarding the idea that there was a set of laws that would have the same effect regardless of location and existing legal system (also termed "legal universalism") (Trubek 2014: 5; Davis 2010).

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[38] According to Trubek (1972: 720), Weber's analysis suggests:

> Legalism is the only way to provide the degree of certainty necessary for the operation of the capitalist system. Weber stated that capitalism 'could not continue if its control of resources were not upheld by the legal compulsion of the state; if its formally 'legal' rights were not upheld by the threat of force.' He further specified that: '[T]he rationalization and systematization of the law in general and…the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of capitalistic enterprise, which cannot do without legal security.

While this sentiment is generally thought to be accurate, Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard (2003: 167) have suggested that the success of legal transplantation geared at facilitating economic development is premised on the mode of reception of transplanted laws. This, they argue, is more important than the specific nature of the law that is transplanted. Berkowitz et al. (2003: 167) suggest that: "in order for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law."

A key component of a successful adaptation process is the role of legal intermediaries. Berkowitz et al. (2003: 167) explains that "judges, lawyers, politicians, and other legal intermediaries" (effectively the legal complex) must have latitude to modify the transplanted law as necessary to satisfy the needs of the population to be served. Pistor (2002: 98) proposed that, for a transplanted legal arrangement to work, there has to be attentiveness to "the constant change, innovation, and adaptation of institutions and organizations in a competitive environment." Of the scholarship on legal transplantation, Pistor (2002) appears to come closest to exploring the agency of local communities—not to mention the concerns and complexities they face—when contemplating commercial law reforms. Few other scholars seek to investigate the role of communities and legal actors, as it relates to legal change for the purposes of economic development.

Donald Horowitz (1994: 250), in his work on legal change in Malaysia, recognizes that legal transplantation, or borrowing, is an important source of legal ideas, and that "legal innovations depend on, among other things the range of potential

innovations that are known to lawyers and seem natural or fitting to them, whether or not the innovations are well adapted to the society at large" (1994: 251). More specifically, the legal elite in a society influence what legal change will ultimately look like—an outcome that depends greatly on "the knowledge, the traditions, and the interests of the lawyers" (1994: 251). With respect to commercial law, Joseph McCahery, Erik Vermeulen, Hisatake Masato and Saito Jun (2006) assess that a key reform strategy involves legal elites (judges, legal scholars, legislators and the like) competing for hegemony in the way they interpret and market new rules that are in their interests, and which are often transplanted from other jurisdictions. Indeed, McCahery et al. (2006) aver that society depends on these groups of actors to make new laws applicable to business needs.

The New Institutional Economics

There is a general consensus that, in recent decades, there has been an "institutional turn" in development economics (Portes and Smith 2012: 24; Thomas 2011; Davis and Trebilcock 2008; Dam 2006). According to Douglas North (1990; 1986), institutions are the formal and informal constraints that shape or guide the way people interact (see also Thomas 2011; Portes and Smith 2012). Central to the "institutional" approach to economic development is the idea that the nature and quality of a country's institutions matter for development (Portes and Smith 2012). According to the NIE school, "the design and functioning of public sector institutions and private sector organizations that interact with these institutions [are] critical determinants of a country's development prospects through the incentives they create to engage in either socially

productive or socially unproductive activities" (Davis and Trebilcock 2008: 902). In other words, institutions govern the way both individuals and organizations operate.

Based on North's (1990) definition of institutions, law is pertinent to economic development. Legal scholars Kevin Davis and Michael Trebilcock (2008: 902), estimate that NIE has several implications for substantive laws and legal systems that promote economic development. For example:

> In terms of substantive law, from this perspective, core priorities should attach to well-defined and alienable property rights; a formal system of contract law that facilitates impersonal contracting; a corporate law regime that facilitates the capital investment function through ease of incorporation and limited liability of small and medium sized enterprises and minimizes agency costs faced by shareholders in general in the case of non-owner managed firms or by minority shareholders in firms with controlling shareholders; a system of secured lending that makes it easy for creditors to take a broad range of assets as collateral, identify competing claims to those assets, and seize and sell assets in the event of default; a bankruptcy regime that induces the exit of inefficient firms and redeployment of their assets to higher-valued uses; and a non-punitive, non-distortionary tax regime.

Scholars have credited economist Ronald Coase (1960) with the rise of NIE and the subsequent resurgence of the academic and policy interest in law and economic development (see, example, Thomas 2011; Rittich 2002). Coase's (1960) work on transaction costs provided the insights for subsequent economists who determined that "transaction costs and institutional constraints prevented some economies from reaching the most efficient system of property rights, which included exclusiveness and enforcement" (Thomas 2011: 982).

A group of economists have taken North's (1986, 1990) institutions thesis and its relationship to law to be inextricably intertwined with the type of legal system a country adopted centuries ago. Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny (1997) are the prime proponents of this argument. These scholars

suggest that countries inheriting the English common law perform better economically over time than those inheriting French civil law. Specifically, their research suggests that common law countries were better for financial development and, consequently, overall economic growth (La Porta et al. 2008: 285-87).

The underpinning of this scholarly perspective is that the common law, which relies heavily on judicial rulings, evolved due to key historical events (like the Glorious Revolution) to be more sensitive to private property rights than the French civil law.[39] Moreover, the fact that the common law depends on judges to make decisions on a case-by-case basis (even in the face of precedent) allows for a lawmaking process that is "more adaptable to the changing circumstances" (La Porta 2008: 305). The basic idea here is that the likelihood of legal change is grounded in path-dependency or historical chance—simply by virtue of the choice of legal tradition ("the common law [], German, French or Scandinavian civil law") (Davis and Trebilcock 2008: 920).

A number of scholars have tested the legal origins hypothesis and have provided more cautious perspectives on La Porta et al.'s (1997, 2007) theory.[40] As it relates to this dissertation's focus on commercial law reform, one main criticism of La Porta and his colleagues' work comes from Kenneth Dam (2006: 33), who notes:

> [B]oth corporate law and bankruptcy law are legal areas where most countries—common law and civil law countries alike—rely on statutory

[39] La Porta et al. (2008: 303) argue that English judges gained more independence post Glorious Revolution, "including lifetime appointments in the 1701 Act of Settlement" and were aligned with property owners in the fight against the Crown. French judges, on the other hand, were more statist in their orientation, and were aligned with the monarch during the French revolution.

[40] For example, according to Simon Deakin (2008: 60), where it concerns specific substantive laws—such as labor law and company law—the civil law/common law divide does not speak to the complex components associated with their development. And, Daniel Oto-Peralias and Diego Romero-Avila (2014: 70), "the effect of the common law on finance is conditioned by the level of endowments."

> law, much of it quite recent, rather than judge-made common law or nineteenth civil law codes. This circumstance raises serious questions about the leading interpretations of their results to the effect that the common law method of judge-made laws is superior to legislative enactments in building stronger financial sectors and hence in enhancing economic growth.

In light of this point, Dam (2006) queries what the legal origins thesis means. Specifically, what should policymakers in the Global North, IFIs, and governments in developing countries do in the face of legal origin (2006: 36)? Certainly, no one (especially Dam (2006)) thinks that civil law countries should adopt the common law as a way of boosting economic growth. Instead, Dam (2006) suggests we learn from history. That is, we should examine where developing countries (including those transitioning from communism) have struggled to make modifications to their laws to quickly and more effectively integrate themselves into global markets. Dam (2006) recommends a close examination of "areas where law affects the economy in a powerful way—land law, corporate law, bankruptcy law, and the like. And, especially, one can look at the role of law and legal institutions in financial markets, where the legal origins research focuses" (2006: 36).

Notwithstanding Dam's (2006) insights, legal scholar Chantal Thomas (2011) has called for an "institutionalist analysis of institutionalism" where it concerns "law and neoclassical economic development." After all, examples of law's failure in achieving economic development are plentiful (see, example, Trubek 2014). According to Thomas (2011), the areas of the NIE agenda that require more assessment include: (1) further information about the kind of context required for specific rules to thrive in targeted developing countries; (2) better understanding of powerful interests both inside and outside of these countries, and how they shape the choice of reforms pursued; and (3) the

role of "ideas and ideologies" in "shap[ing] the subjective mental constructs that individuals use to interpret the world around them and make choices" (1020-23).[41] This type of analysis has yet to be aggressively pursued by scholars and practitioners of development, and commercial law best practices are still being promoted to developing countries as a way to expedite their economic growth process.[42]

The next section discusses this in the context of what has been referred to as "global law making" (see, example, Block-Lieb and Halliday 2017) and its relationship to economic development.

Modeling Success

Global Law Making

The integration of economic markets has prompted reforms to business regulations across the globe (Halliday and Carruthers 2009: 5-9; Cohen 2008; Pistor 2002). Commentators have long argued that these efforts, especially those by IOs and wealthier countries, reflect an affinity for "a one size fits all" approach to business law reform across countries, which does not work (Trubek 2014: 1-33; Davis and Kruse 2007; Davis 2010; Pistor 2002). While there is a growing sensitivity to the idea that country context should be considered with respect to reforms (as discussed below), the momentum behind the early work of prominent economists and development agencies

[41] Similar concerns have been posited by Davis and Trebilcock (2008) in their overview of the law and development field—aptly sub-titled "Optimists versus Skeptics."

[42] This dissertation attempts to tackle some of Thomas' (2011) concerns.

continues to carry sway.[43] Importantly, there has been a consolidation of pseudo-lawmaking power—by way of norm setting—in the hands of IOs determined to achieve this goal across substantive commercial areas, including finance, intellectual property, and insolvency laws, to name a few (Cohen 2008: 773; Halliday 2011; Block-Lieb and Halliday 2017).

At least two goals inspire the promotion of a functionally standard set of private law reforms in these areas (Pistor 2002). First, there is an interest in sharing best practices that support high quality laws and legal institutions (Cohen 2008; Davis 2010; Besley 2015; Acemoglu et al. 2013). For example, the IMF has sought to promote standards for "corporate finance and corporate governance" in many countries that it believes to be structurally sound in an effort to avert or diminish the impact of potential financial crises (Pistor 2002: 97).[44] Second, there is an interest in removing significant differences in legal regimes across countries to facilitate seamless cross-border business transactions. For example, having a similar well-established legal framework for secured transactions provides security and predictability for a firm seeking to invest or establish business across multiple international jurisdictions (Block-Lieb and Halliday 2017: 4-5).

Transnational actors, including foreign lawyers, economists, and accountants, who are trained in countries with modern and efficient business laws are an invaluable

[43] There is an extensive literature in this area. A few key examples include De Soto (1989, 2000); La Porta et al. (1997, 2008). For a critique of this literature, consider: Dam (2006); Davis and Trebilcock (2008); Thomas (2011); Kevin Davis, Benedict Kingsbury and Sally Engle Merry (2012).

[44] This may take the form of coercive isomorphism, according to the work of Paul DiMaggio and Walter Powell (1983).

part of this ambitious agenda (Ewald 1995: 499).[45] For example, local actors who are trained abroad often return home brimming with excitement about new and prominent legal regimes observed abroad.[46] But, despite the participation of local actors in the development of efficient business regulations adopted from other countries, there has been little explicit consideration of how a state's pre-existing industries shape the likelihood that some countries will adopt modern practices for commercial law.[47] As Chapter 4 will show, not all developing countries are inclined to adopt laws packaged as global best practices—notwithstanding how easy they claim to make local business transactions. In some instances, a country may simply view the reform as inapplicable to its circumstances (Goldson 2013; Davis 2006). This may be due to the size of its economy (Davis 2006), the structure of its business organizations (Goldson 2013), or the history of its legal system (Rose 1998). This dissertation suggests it may also be due to the state's ability to coordinate with local commercial lawyers and the jurisdiction's CEI.

From this viewpoint, it is likely that legal reform requires specific complementarities with pre-existing institutions (Davis 2010: 540). According to Davis (2010: 540):

> [t]he most interesting universalistic claims about law and development assert that particular laws are either necessary or sufficient, or both, to cause particular development outcomes. However, if the law in question has substitutes, and those substitutes are present in some societies but not

[45] These professionals promote what DiMaggio and Powell (1983) would refer to as normative isomorphism.

[46] These scripts are typically found in international treaties, global indicators, model commercial laws, and World Trade Organization rulings in trade disputes, among other means (Halliday and Carruthers 2009: 19-28; Dezalay and Garth 2002; Davis et al. 2012).

[47] But, see the edited volume by Feest and Nelken (2001), as well as Watson (1980), Ewald (1995), and Teubner (1998).

> in others, then the law will be necessary to promote development in some societies but not in others. Similarly, if the law in question has complements that are not universally distributed, adopting the law will be sufficient in some places but not in others.

This call for complementarity, however, requires a fine grain understanding of when and where particular commercial law reforms are appropriate. More recently, economist Timothy Besley (2015: 102) conceded that the WB's research into how business is regulated in foreign countries does not take into consideration the interrelationship between important sectors of the economy and the society. For example, according to Besley (2015: 102), "the [WB's] findings would not apply automatically to the agriculture sector, which is a large part of the economy in many low-income countries." Recognizing this oversight, the WB recently began a project focused on efficient regulations for the agriculture sector—the Enabling the Business of Agriculture (EBA) project.[48] In other words, the WB's more general assessment of the best legal reforms for developing economies previously disregarded developing economies that specialize in agriculture.

Importantly, an economic analysis of law reform and legal transplantation overlooks how the social nature of states and institutional limitations impact the law-making enterprise. It therefore fails to account for how the social aspects of states impact their responsiveness to legal transplantation from other jurisdictions—large or small. Scholars have argued that "states are organizational entities embedded in a wider social environment" and are constantly seek to either fit in or stand out, depending on their long- and short-term goals (Goodman and Jinks 2003: 1752). The next section suggests

[48] See: http"//eba.worldbank.org/ ("presenting data that measures legal barriers for business operation in agriculture in 62 countries and across 12 topic areas"). (Last visited January 10, 2019).

that one way to understand how states will approach commercial law reform is to consider their social goals, particularly their pursuit of identity.

States (Jurisdictions) as Social Creatures with an Identity

In reality, states do not operate in a vacuum. Even the "nation-state" can be viewed as "culturally constructed and embedded rather than the unanalyzed rational actor depicted by realists" (Meyer, Boli, Thomas, and Ramirez 1997). State choices are constrained by both external forces (other more powerful nation states and organizations) and their internal capacity (bureaucratic, financial, organization, etc.). Indeed, it is within this context that state action, including problem solving, occurs (Goodman and Jinks (2003: 1754; Centeno and Portes 2008: 28; Boix 2015: 10). Moreover, states, like other types of organizations, are heavily influenced by an abiding interest in legitimacy (Goodman and Jinks 2003:1755; see also Orru, Biggart, and Hamilton 1991). This concern with acceptability is one reason for the immense similarity among states (Meyer et al. 1997). Theorists propose that world culture[49] imposes certain institutional structures on states by providing them with an identity and goals and reinforcing and legitimizing them. As an example, Meyer et al. (1997: 145-46) suggest:

> [I]f an unknown society were 'discovered' on a previously unknown island, it is clear that many changes would occur. A government would soon form, looking something like a modern state with many of the usual ministries and agencies. Official recognition by other states and admission to the United Nations would ensue. The society would be analyzed as an economy, with standard types of data, organizations, and policies for domestic and international transactions.….All this would happen rapidly, and with greater penetration to the level of daily life, in

[49] Meyer et al. (1997: 149) consider "world culture" to be "the cognitive and ontological models of reality that specify the nature, purposes, technology, sovereignty, control, and resources of nation-states and other actors."

> the present day than at any earlier time because world models applicable to the island society are more highly codified and publicized than ever before. Moreover, world-society organizations devoted to educating and advising the islanders about the models' importance and utility are more numerous and active than ever…. Thus, without knowing anything about the history, culture, practices or traditions that obtained in this previously unknown society, we could forecast many changes that, upon 'discovery,' would descend on the island under the general rubric of 'development.'

Stated otherwise, there is little room for variation in institutional structure, if states (jurisdictions) want to appear legitimate in the eyes of their peers.

Institutional Isomorphism

Consistent with the foregoing thesis, Paul DiMaggio and Walter Powell (1983) argue that organizations in a field will tend to become more like each other through institutional isomorphism—"a constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions" (1983: 149). Consequently, developing countries like Barbados and Jamaica—with similar colonial histories and specialized economies—should, understandably, resemble each other in important ways. This would include the types of laws they pursue for economic development. According to institutional isomorphism, states (as organizations) will seek to look like each other in structure and presentation in an effort to gain legitimacy and, ultimately, access to resources (1983: 150).[50] Significantly, efficiency is not always the reason they converge in structure.

DiMaggio and Powell (1983) propose that three types of isomorphism typically drive this type of convergence: coercive, mimetic, and normative isomorphism. With

[50] According to Goodman and Jinks (2003: 1757), the new institutional theory has inspired a reconceptualization of the "sovereign nation state as a unique organizational form."

respect to coercive isomorphism, organizations are forced to adopt similar structures due to "both formal and informal pressures exerted on [them] by other organizations upon which they are dependent and by cultural expectations in the society within which organizations function" (1983: 150). An example of this kind of coercion is the type of influence wielded over developing countries by the U.S. Treasury Department, IMF, and World Bank during the era of the Washington Consensus.[51]

Mimetic isomorphism, however, flows from organizational uncertainty. When organizations are charting new territory or adopting new practices and outcomes are unclear, they tend to "model themselves after other organizations in their field that they perceive to be more legitimate or successful" (DiMaggio and Powell 1983: 151-52). For example, DiMaggio and Powell (1983) note how Japanese modernizers modeled western government initiatives toward the end of the nineteenth century and American corporations modeled Japanese production models in the 1980s to deal with future uncertainty.

Normative isomorphism "stems primarily from professionalization" (DiMaggio and Powell 1983: 151-52). In this regard, formal education and related networks tend to influence which policies, practices, and models get successfully diffused. For example, as similarly trained professionals within the same industry leave from one organization to another, they take knowledge and practices with them to the new environment. The case of lawyers trained at similar schools and traveling from one large firm to another is indicative of how homogenous practices and structures can arise. The takeaway is that

[51] The Washington Consensus was the framework within which the U.S. Treasury Department, IMF, and World Bank operated during the 1990s and based their interactions with developing countries. It was founded on neoclassical economic theory, which promoted, among other things, deregulation, trade liberalization, and privatization of major industries (Thomas 2011).

states, as organizations, "are enactors of institutional models derived from cultural processes" that are not always tied to an interest in efficiency (Goodman and Jinks 2003: 1756).

Communities Do Not Always Act As Predicted

Based on DiMaggio and Powell's (1983) institutional isomorphism thesis, it is reasonable to expect that jurisdictions may not always act according to principles of economic rationality. But, it also appears that jurisdictions do not necessarily follow others based on coercive, mimetic or normative isomorphism mechanisms. Indeed, more recently, an argument has emerged that the mechanisms of isomorphism proposed by DiMaggio and Powell (1983) can also lead to divergence. For example, Jens Beckert (2010: 153-159) suggests coercive isomorphism (or "power") can result in divergence where an external actor or power broker is practically unable to enforce institutional change. This may occur, for example, where a colonial empire lacks resources (such as bureaucratic or military depth) in a colony to implement replicas of rules from the metropole. Normative isomorphism (or "attraction") can lead to institutional divergence where experts choose to follow specific institutional models they deem appropriate to their cultural context—rather than the dominant model in the global community. This can occur, for example, where experts in a country model local institutions from a variety of external sources, rather than just one, to address a specific domestic problem. Similarly, mimetic isomorphism (or "mimesis") can lead to institutional difference. This may occur when actors do not see a given institutional model as legitimate enough to

replicate. In short, the model does not adequately alleviate uncertainty—perhaps because it follows a different cultural frame (see Dobbin 1994).

A domestic example of where the isomorphism thesis does not lead to homogenization is the case of Delaware in the United States. Delaware continues to be dominant in the incorporation market and corporate lawmaking (even though there have been attempts from states like California, New York, Nevada and Ohio to gain market share in this area) (Roe 2003: 592). If Delaware's success and legitimacy were a consequence of its corporate law and specialized courts, it would stand to reason that many states would attempt to replicate it by adopting these legal features (Kahan and Kamar 2002; Kahan 2006; Romano 1985; Bebchuk and Cohen 2003). The isomorphism thesis (at least by way of mimetic and normative mechanisms) would support such an effort. This has not been the case.

A political economy analysis of this puzzle suggests the replication of Delaware's corporate law regime is not easy to achieve. Consider the longstanding view that Delaware thrives because of the presence of vital networks (Klausner 1995; Saxenian 1996). This view is an outgrowth of network effects theory, which argues "the utility a user derives from consumption of a good increases with the number of other agents consuming the good" (Katz and Shapiro 1985: 424). For example, corporate law scholar Michael Klausner (1995: 844) makes the case that: "Once Delaware became the state of choice for a large number of publicly held firms, network externalities may have increased the value of the Delaware charter and created a self-reinforcing dynamic that extended Delaware's lead." In other words, Delaware's social and legal network is the

reason for the jurisdiction's success and, in order to copy the success, one would need to replicate that network—which is no easy task.[52]

Importantly, despite the assumption that states are interested in the monetary benefits associated with the incorporation of public companies, two legal scholars have shown that there may be little desire on the part of states to actually compete with Delaware because of specific hurdles to law reform (Kahan and Kamar 2002). According to Marcel Kahan and Ehud Kamar (2002), even with Delaware's sizeable profits from franchise taxes each year, other states may not be quick to copy Delaware's legal infrastructure due to a combination of its competitive advantage and their own internal political dynamics—particularly interest group politics and political promises to constituents. For example, New Jersey's attractiveness to corporations diminished significantly post 1913 because president-elect Woodrow Wilson "made the destruction of business monopolies a keystone of his platform" (Kahan and Kamar 2002: 721, 731).

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[52] Corporate law scholar Mark Roe (2003) provides a complementary explanation for Delaware's advantage and ultimate success. Roe (2003: 594) argues Delaware's rise is due to: its small size; the strong influence of franchise tax revenues; the indifference of citizens to the substance of corporate rules; and its specialized judiciary. These factors cumulatively make citizens desirous of retaining the financial benefits that flow from corporate taxes and, therefore, less concerned about the specific rules for corporate entities.

According to Roe (2003: 594), however, "[t]his public indifference to the actual corporate law rules allows for something akin to organized private lawmaking among the corporate players." In this case, as corporate and legal actors work together to shape the content of Delaware's corporate law, the larger public enjoys the economic benefits of the industry (for example, franchise tax revenue).

Roe (2003: 594) notes that local leaders, like judges, "take pride" in being known for their expertise, and "[t]he corporate bar can influence the legislature (and perhaps the judiciary), while other states' corporate bars would be ignored if they do the same."[52] Roe (2003: 594) also notes that "[l]ocal interest group pressures on corporate law from labor unions and local companies are weaker than they are in other states. It's not that such pressures are absent in Delaware, but that the revenues from the franchise tax loom larger in Delaware than they do in larger states."

In essence, scholars tend to return to political economy explanations for the outcome of law reform—such as how costly it would be to establish a specialized court and adopt (and maintain) a corporation code that track Delaware's—and the political will of local politicians to embark on such an endeavor (Kahan and Kamar 2002). More specifically, they argue: "Were Delaware not protected by competitive advantages, political constraints might not be enough to retard entry by other states. Similarly, if the political calculus in a state were to change, economic entry barriers might not suffice to deter entry" (Kahan and Kamar 2002: 733).

The assumption, therefore, is that states would copy Delaware, by adopting the relevant legal framework, were it not for cost and politics (Anderson and Manns 2015).[53] But, while Kahan and Kamar (2002: 727-28) do not consider monetary cost as a crucial limiting factor (or disincentive) by itself, and recognize that political leaders often have ideological and non-monetary reasons for their choice of legislation, more can be said about the source of these political reasons. Indeed, it is not apparent that all states would seek to copy Delaware's legal regime if its competitive advantage were easily surmountable and local politicians were not opposed to the idea. Sociological analysis may reveal that a state may be disinclined to pursue through legal change, even a lucrative industry like this one, if it has already come to culturally identify with another type of commercial activity.

[53] It is worth noting that some scholars argue it is not so much Delaware's current substantive legal advantage over other states that drive corporations to the jurisdiction, but the state's "past preeminence" (Anderson and Manns 2015: 153). According to this thesis, "lawyers appear to turn to Delaware because it is the law they know best and because it is a safe default to recommend since most companies are based there" (153).

A Role for Identity

While the institutional isomorphism thesis can be helpful in explaining why states appear similar to each other, and even have similar laws and legal institutions, some scholars argue it inadequately explains how organizations change or diverge over time (see, example, Westenholz, Pedersen, and Dobbin 2006). For example, it does not explain why two seemingly similar countries (like Barbados and Jamaica) would diverge in their choice of legal regimes. Organizational culture theorists argue that the pursuit of identity is at least one source of divergence in organizational structure (Pedersen and Dobbin 2006; Westenholz 2006: 890). Organizations value gaining recognition for being a member of a well-established community and brandishing recognized institutional models, but they actively seek to highlight their differences in order to stand out (DiMaggio 1988).

To appreciate the identity aspect of organizations, however, it is the micro as opposed to macro processes that must be observed over time (Westenholz 2006: 893). While scholars and policy makers tend to focus on the macro and "exaggerate commonalities" (for example, colonial histories, institutional heritage, legal traditions) to explain similarities between states (Pedersen and Dobbin 2006: 901), a look at economic structure may indicate that two otherwise similar countries are different. Consequently, the daily actions undertaken to maintain the economy could reveal differences that are otherwise not readily observable and are attributable to a state's search for uniqueness in the world environment.

The need for identity may therefore exist alongside the pursuit of legitimacy as a nation-state. In developing countries, aspects of their national identity may be based on

their product for domestic and international markets (Briguglio 1995: 1616). For example, during the British colonial era, many small island colonies like Barbados and Jamaica were known primarily for their ability to produce specific raw materials or agricultural goods—most often sugar—for the colonial empire. In the post-independence era, these nation-states are still known for their "narrow resource base" and ability to produce a limited range of goods for the world market from key economic sectors (Griffith 2007). These identities are valuable in helping these countries stand out on the world stage and as a means of organizing priorities domestically. To the extent that law-making in these jurisdictions aims to promote commerce and economic growth, the process should contemplate the nature of the country's economic identity to craft commercial laws that allow the country's valued economic sectors to flourish. Consequently, if the economic identities of countries are different, their approach to law reform may also be different.

The pursuit of identity may be one way to explain divergence in legal regimes, but it is not inconsistent with the isomorphism thesis proffered by DiMaggio and Powell—it actually complements it and provides a nuanced explanation for institutional change within the context of convergence. More specifically, institutional isomorphism emphasizes that organizations in the same field will tend to encounter various social forces (embodied in coercive, mimetic, and normative interests) that will necessitate that they become more similar to each other. The prevailing assumption may be that organizations (in this case, states) do not have sufficient agency in the isomorphism process. "World culture" essentially dictates the types of rules and norms they must

adopt. Missing from this assessment is the possibility that isomorphism can take place at different levels and with respect to specific aspects of the state.[54]

To be sure, developing states are strongly influenced by more developed countries and organizations like the IMF, World Bank, and UN to establish "legitimate" institutions, like robust democratically elected legislative bodies, government ministries, courts, and market economies. In an attempt to rationally manage the unknown, they will very likely tend toward existing structures and institutions to minimize uncertainty (DiMaggio and Powell 1983: 147). Notwithstanding, states have multiple roles that require interaction with different actors with whom they must adjust their practices (Merton 1938).[55] Indeed, DiMaggio and Powell (1983) suggest that we must empirically examine "the totality of relevant actors" in a field before we can begin to fully appreciate how organizations will structure themselves.[56] For example, states are constantly interacting with IOs, regional bodies, citizens, domestic non-governmental institutions, as well as other states at various levels of development and influence. In each of these roles, the role-partner will have a unique set of expectations for the state—which may very well conflict with other roles.

In the case of developing countries, their interaction with IFIs may require they play the role of borrower of funds, which means they have little bargaining power and

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[54] But, see discussion of Beckert (2010) above for a somewhat similar argument about how isomorphism can lead to divergence.

[55] Robert Merton (1938) discusses the theory of role-set, which outlines how individuals occupy a given status in society and that status is comprised of various roles—based on who they are interacting with.

[56] DiMaggio and Powell (1983: 148) suggests that: "once disparate organizations in the same line of business are structured into an actual field…, powerful forces emerge that lead them to become more similar to one another").

must fulfill specific conditions to get loans—usually in the form of domestic policy prescriptions, including how it structures its commercial laws (Pistor 2002; Davis and Trebilcock 2008). This role often conflicts with the policies expected of them by citizens as domestic legislator. But, since states also compete with each other for "economic fitness," we should examine the breadth of other states that could be considered influential to how a country adopts its commercial laws.[57] In the pursuit of economic identity, a state may actively choose to mimic the path of other states more directly tied to its main industry—even if it is contrary to the will of prominent world bodies and more developed countries.

In other words, coercive, mimetic, and normative isomorphism may be in conflict with each other and emanate from different sources (for example, multinational institutions, more developed states, and neighboring countries in the same industry), and the state must decide which actors to follow at a given moment in time.

As a brief preview to Chapter 4, if economic identity is a top priority for a state, it may choose to model its laws and institutions on those of countries with similar CEIs, despite coercive and normative pressures from powerful countries and organizations. Countries that appear similar (such as Barbados and Jamaica) and are subject to institutional isomorphism because of prominent global forces that come to bear on them could reveal significant divergences due to the nature of their identity industries—and,

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[57] Michael Porter (1990) notes:

> Competitive advantage is created and sustained through a highly localized process. Differences in national values, culture, economic structure, institutions, and histories all contribute to competitive success….Ultimately, nations succeed in particular industries because their home environment is the most forward-looking, dynamic and challenging.

consequently, the nature of the world actors they have chosen to follow. This type of multilevel, selective institutional isomorphism may also be borne out of the need to balance the capabilities of the state with the most pressing needs of the economy when considering legal and policy reforms. The next section briefly outlines four common explanations for how legal change occurs.

Theories of Legal Change

The predominant theories of legal change tend to fall into five broad categories, with some overlapping: (1) economic factors; (2) political factors; (3) external factors (4) cultural factor; and (5) informal arrangements (Davis and Trebilcock 2008: 922-938). Economic theories generally suggest that there is a direct relationship between the quality of a country's legal system and the wealth it possess (Kaufman and Kraay 2002). After all, it requires resources to adopt, implement and adequately enforce laws (Davis and Kingsbury 2017). This approach is questionable, however, as scholars have suggested that "development and state building can occur at many points on the GDP/taxation curves" (Enriquez and Centeno 2012: 138). Davis and Trebilcock (2008: 923) go further to suggest that lack of wealth may not be as big a hurdle as we think—"because it is possible that good legal institutions pay for themselves." In other words, they may increase economic activity that generates tax revenues for the country.

Political theories of legal change speak broadly to the role of interest groups in law making (Tollison 1988; Ross 2013). From this perspective, reform is governed less by what is best for society in a particular arena (economic or social welfare) and more to do with serving the interests of influential segments of the community (Davis and

Trebilcock 2008: 923-24). In short, "in divided societies each group will strive to encourage the state to act in ways that support its own special interests at the expense of broader and more encompassing interests" (2008: 926). Of course, political theories extend to external actors—such as wealthier countries, international organizations or colonial empires—and the power they wield over the domestic affairs of developing countries (Daniels et al. 2011; Beckert 2010).

External actors can influence policies and legal reform efforts in developing countries through what has been termed "global governance." Global governance speaks to the ability to influence the activities and policy choices of states and populations around the world through means other than purely indigenous processes and direct local law making.[58] Indeed, "[g]overnance can be effected through a wide variety of mechanisms, including military action, transfers of funds, promulgations of legal instruments, publication of scientific reports, advertising campaigns, and educational programs" (Davis, Kingsbury and Merry 2012: 78-80).

To this list, legal scholars have added the concept of indicators. Indicators are a key technology of global governance (Merry, Davis and Kingsbury 2015; Davis et al. 2012; Davis, Fisher, Kingsbury and Merry 2012). Indicators are commonplace among organizations IOs, such as the WB, UN and numerous non-governmental organizations. They are often used to compare countries along some measure, or more often to encourage certain standards or best practices, such as in the area of business regulations or the control of corruption. In its simplest form, an indicator is usually presented as a number that reflects or summarizes a larger issue or occurrence (2012: 73-78).

[58] See also Martin Sybblis' (2016) discussion of Global Governance.

Cultural theories of legal change argue that the values that a society holds dear influence the types of institutions they build. This approach would include Max Weber's well-known thesis that the cultural values emanating from the Protestant faith facilitated to growth of capitalism (Weber 1920; Davis and Trebilcock 2008; Thomas 2011). According to Davis and Trebilcock (2008), perhaps the most significant aspect of the cultural approach to reform is how it provides a counterweight to theories that elevate interest group politics as the main determinant of legal reform. For example, Robert Putnam (1994) based on his study of Italy, argues that the key to successful governance is a particular kind of culture. Specifically, when comparing successful governance with unsuccessful ones, Putnam (1994: 32) suggests the former is:

> [c]haracterized by a dense network of civic associations and an active culture of civic engagement, whereas others were characterized by vertical patron-client relations of exploitation and dependence, not horizontal collaboration among equals. Some regions of Italy have a rich network of community associations. Their citizens are engaged by public issues and take an active role in politics. They trust one another to act fairly and obey the law. Social and political networks here are organized horizontally, not hierarchically.

In this manner, citizens are not as concerned about groups in their midst who are acting strategically to achieve legal reforms that are not in the interest of the larger community (Davis and Trebilcock 2008: 929).

Another cultural approach to legal reform, however, points explicitly to the role of special interests. For example, Alan Watson (1983) suggests that the culture and practices of lawyers within a society directly impact how laws change. Indeed the rules that govern society emanate from how lawyers approach their interpretation and

application, and not necessarily as a result of the social and political needs of the society (Watson 1983; Davis and Trebilcock 2008: 930).[59]

Finally, there is the informal approach to legal reform. Simply put, there may be no need to pursue formal legal change because informal arrangement between individuals and groups suffice (Ellickson 1991; Ginsburg 2000). Indeed, in some instances, communities may avoid the use of existing laws due to their costs and the need to maintain goodwill among neighbors (Ellickson 1991).[60] Even the norms literature in legal scholarship is receptive to the idea that legal reform may not be as vital as we assumed (see, example, Bernstein 1992; Macaulay 1963).

The next section introduces a novel way of understanding legal change. It briefly discusses the role of legal professionals (commercial lawyers) in facilitating commercial law reforms. In subsequent chapters, this dissertation suggests how this role can be constrained by CEI.

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[59] Watson (1983: 1478) points to what he terms a "Transplant Bias." Pursuant to Watson (1983: 1478):

> Transplant Bias is a system's receptivity to a particular outside system of law—a receptivity distinguishable from an acceptance based on a thorough examination of possible alternatives. Law, I believe, develops mainly by borrowing rules and structures from elsewhere. Since the rules and structures must be known in order to be borrowed, and since it is lawyers who predominantly know foreign law, the Transplant Bias is very much involved with the legal tradition.

[60] Robert Ellickson (1991) study of the ranchers in Shasta County, California is particularly insightful about this approach.

Expanding Theoretical Boundaries

The Legal Complex and Business Law Reform

In parts of the world, the ability of states to implement formal regulations throughout their jurisdiction is well known to be weak (Pritchett et al. 2012). These states often lack proper governance, sufficient qualified agents, and support from a talented legal community. In these states, the government's "regulatory load" is often more than it can bear, and it is consistently "frustrated" because of the gap between ever-expanding rules and the capacity to enforce them (Centeno and Portes 2008: 26).

Collective action by private sector lawyers can enhance the state's capacity for legal reform (see, example, Block-Lieb and Halliday 2016; Halliday and Carruthers 2009; Kettering 2010). Commercial lawyers in a jurisdiction help to construct the architecture for commercial transactions—both privately on a transaction-by-transaction basis and through the shaping of commercial legislation. One means of understanding this subset of the legal profession is by way of the "Legal Complex," a concept developed by socio-legal scholars Terrence Halliday, Lucien Karpik and Malcolm Feeley (2012c) ("HKF"). HKF (2012c) have used the legal complex to explain how legal professionals in British post-colonies impact the development (or underdevelopment) of political liberalism and "access to justice" (HKF 2012c: 7; Scheppele 2015: 1). In this context, HKF (2012c) are interested in the role lawyers play as agents of socio-political change. Lawyers are generally perceived as change agents, but not necessarily where economic growth and development are concerned (but, see, Wilkins, Khanna and Trubek 2017). They are generally considered guardians of existing rights and proponents of new ones in a society (see, example, Sarat and Scheingold 1998, 2008; McCann 1994). Indeed, they

can be integral components of "social movements [that] [push] the boundaries of law and politics" (Sarat and Scheingold 1998: 4). These "cause lawyers," typically engaged in litigation, are interested in ensuring that law serves a moral purpose—the facilitation of a specific kind of society—and, in some instance blur the lines between the legal process and politics (Sarat and Scheingold 2008: 2).

In other words, these lawyers are more than well-trained advocates. They are committed to a moral cause. Through pro bono services for the poor, or professional activities that serve human rights or civil rights causes, among other ends, lawyers have been at the forefront of important social questions—particularly in common law traditions. According to Sarat and Scheingold (1998: 6):

> In common law countries, the boundaries between law and politics tend to be readily permeable. There are many lawyers; they are trained to think of themselves as generalists; and they regularly move back and forth between private practice and public service as judges, prosecutors, bureaucrats, and politicians. Moreover, the relative autonomy of courts allows cause lawyers, like lawyers in general, to fashion litigation into an assertive political weapon.

As a professional community, legally trained individuals are especially equipped at understanding and deploying legal rules. After all, "[l]ike the rules of chess, or of any game, the rules of the law are based on an *internal logic,*" which law schools impart to students (Scheingold 2004: 156). These rules and the logic of their application become particularly crucial outside of the classroom as they directly impact how individuals and communities interact and express themselves (2004 157). But, the training lawyers receive and the expertise they hone make them well equipped "to focus complex problems, to defend solutions in a rational and tough-minded fashion, and also evoke important symbols of legitimacy" (2004: 168; Kennedy 2016).

This dissertation seeks to remove the Legal Complex from the realm of social justice advocacy and political liberalism (see, e.g. Sarat and Scheingold 1998; 2008) and investigate how, as a group, commercial lawyers who are interested in pro-growth business legislation inform reforms in developing countries (and communities). This group of commercial lawyers is referred to herein as the Business Legal Complex ("BLC"). From the perspective of BLC, cause lawyering is not necessarily focused on civil liberties and equality, but is located within the realm of commercial activity.

The effort by IOs to standardize commercial law across countries provides an opportunity to observe how the BLC responds to and promotes reforms in post-colonial developing countries. Bracketing the possibility of professional self-interest (see, example, Abel 1985), this dissertation suggests the BLC in post-colonies may oppose or stay silent in the face of proposed reforms when they are aware of the limited bureaucratic capabilities of the state and the inapplicability of the law to local economic circumstances.

At this juncture, it is important to recognize that the BLC, as a subset of the legal profession, are well equipped to serve alongside the state in a developmental capacity precisely because of their professional backgrounds. Sociologists have long attributed specific characteristics to professionals. For example, according to Paul Starr (1982: 15): "A profession, sociologists have suggested, is an occupation that regulates itself through systematic, required training and collegial discipline; that has a base in technical, specialized knowledge; and that has a service rather profit orientation, enshrined in its code of ethics."

The expertise that is often attributed to professions, like medicine and law, stems from the certification process individuals must pass through to gain their title (lawyer, doctor, professor, etc.) and constant self-regulation. And, the high barriers to entry into the profession—whether because of monetary cost or years of schooling—provides professionals with a level of prestige and even authority (Starr 1982: 15; Evetts 2006: 135). Indeed, the power of professionals is directly linked to their ability to wield knowledge and expertise over others (Kennedy 2016: 18). While other professionals are well suited to advice the state on reform measures, the BLC is uniquely equipped because of their expertise in commercial law matters.

Chapter 2 turns to secured transactions law, as an example of a commercial law regime that has been the target of global reform efforts. It provides a general overview of the structure and purpose of secured transaction law and demonstrates the motivation for reform in developing countries, including Barbados and Jamaica.

CHAPTER 2:

SECURED TRANSACTIONS REFORM

Introduction

This chapter provides a synopsis of secured transactions law and explains why it is an important piece of commercial law to examine in the Commonwealth Caribbean context. It begins with an overview of how laws developed in British colonies like Barbados and Jamaica, including a history of early secured transactions laws on the books. Next, it provides a summary of the role secured transactions legal regimes play in managing how collateral is used in lending arrangements. Finally, it discusses the ongoing efforts to reform secured transactions laws in the Commonwealth Caribbean.

Law in the Colonies and Post-Colonies

An important reason Barbados and Jamaica were chosen for this study is the similarity in their colonial history and, consequently, their legal and political institutions. But, their similarity should not be overstated (see, example, Patterson 2013). Certainly, they are small island states in the Commonwealth Caribbean and share a similar colonial experience under the British Empire (Williams 1970; Sherlock and Bennett 1998; Beckles 1990). Indeed, Jamaica and Barbados even began their colonial periods with very similar laws. According to Howard (1827 [1970]: 96), Barbados effectively had the same constitution "as that of Jamaica, with the exception, that the governor and council in matters of legislation do not constitute two distinct bodies independent of each other, as in Jamaica, but one constituent branch only, sitting and deliberating together." Commercial laws were also similar—but not identical (see, example, Burgess 2013: 1-

14). While it is generally accepted that the imperial law transplanted to colonies were influential in the development of local legal institutions during and after the colonial period, some scholars have noted early divergences from those in the Empire (Benton 2002; Greene 1994).

It comes without much surprise then that British ex-colonies inheriting the common law and a Westminster style parliamentary democracy were not institutional duplicates at independence (Daniels et al. 2011; Patterson 2013). Lauren Benton (2002) and Jack Greene (1994), for example, have highlighted that legal authority and traditions in each colony were different from each other because they were individually negotiated and contested—not necessarily ordained or imposed (see also Morrison 1979). According to Benton (2002: 261), legal policies were certainly transported from the Empire to the colonies, "[b]ut in general, colonial governors and settlers, and even political leaders in the metropole treated European legal traditions as a useful collection from which they might draw selectively in crafting colonial legal systems." Greene (1994: 11) proffers that state building in the colonies relied on a situation where "authority had not flowed from the center outward to the periphery but had been constructed out of an ongoing series of negotiations, of reciprocal bargaining, among the center and the peripheries." As a result, settlers in the colony retained significant influence over their laws and legal institutions.[61]

[61] Greene (1994: 350-393), for example, describes a controversy in the mid 1700s (1764-66) over the privilege of members of the Jamaica legislature from arrest and seizure of their personal goods during legislative sessions, notwithstanding Crown rules to the contrary. The legislators on the colony argued that they had a right to their own rules based on their own constitution, which they created as "native Britons." Indeed, decrees from the metropole were not accepted by default—especially given that Britain did not have endless resources to enforce its rules in every colony. According to Greene (1994: 392), "local consent was crucial to the implementation of metropolitan initiatives. Regardless of theory, in practice, metropolitan power extended into the

Some of these differences can be detected in the early business laws in the colonies. For example, company law—corporate governance rules—in both Barbados and Jamaica grew out of English law. Five English statutes are considered to have formed the basis of early Commonwealth Caribbean company law: "the Joint Stock Companies Act, the Joint Stock Companies Act 1856, the Companies Act 1862, the Companies (Consolidation) Act 1908, and the Companies Act 1948" (Burgess 2013: 1-8). According to Caribbean legal scholar and appeal court judge Andrew Burgess (2013: 1):

> Commonwealth Caribbean company legislation was introduced by the local legislatures adopting and repeating the provisions of one English Companies Act or another. In the meantime, English company case law was introduced with the adoption of the legislation on the general principles governing the authority of English precedents on adopted English legislation.

Jamaica was first to adopt a company statute during the colonial period, which took place in 1864. This law was modeled on the English Companies Act of 1862.[62] Barbados would adopt company legislation several decades later in 1910, based on

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periphery only so far as powerful local establishments like the Jamaica legislature found acceptable."

[62] Burgess (2013: 7) notes that:

> The Companies Act 1864, enacted for the incorporation and regulation of trading Companies and other associations in Jamaica, was the first piece of company legislation to be introduced in Jamaica. The 1864 Act was based on the English 1862 Act and, despite amendments in 1886, 1906, 1908, 1909 and 1923, [the law] remained substantially unchanged until 1965. In that year, the Companies (Amendment Act) 1965 made sweeping changes to the 1864 Act to incorporate many of the innovations introduced by the English 1948 Act. The 1864 Act as amended was eventually repealed and replaced in 2004 by the Companies Act 2004.

England's Companies Act of 1908.[63] Notwithstanding this apparent difference in starting point, it is important to note that the English Companies Act of 1908 was the replacement for "the Companies Acts 1862 to 1908" (Burgess 2013: 4)—and was the progeny of the previous law. The two countries would reverse places by the early 1980s, at which time Barbados took the lead in significantly overhauling its company law (in 1982), leaving Jamaica behind to undertake major reforms later in 2004 (Carmichael 1990; Carnegie 1989; Holden and Howell 2009a; Goldson 2013).

In recent decades, the Inter-American Development Bank ("IDB") (building on the NIE theory of law and neoclassical economic development) has highlighted the potential role law and legal systems can play in supporting vibrant Caribbean economies. In so doing, it has recognized Barbados as ranking higher than Jamaica in the efficiency of its legal framework, and considers its rankings equivalent to that of high-income countries of the Organization of Economic Corporation and Development ("OECD") (Holden and Howell 2009a: 10).[64] Indeed, in 2017-2018, the World Justice Project ("WJP") [65] ranked Barbados higher at a score of 0.65 than Jamaica, which had a score of

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[63] Burgess (2013: 6) highlights that title of this piece of legislation was: '"an Act to provide for the incorporation, management and winding up of companies,' and provided for both private and public companies."

[64] While the authors of the IDB report praise Barbados for its high quality legal institutions, they point out some of the flaws that exist. For example, they note: "the court system is notoriously slow, albeit fair in rendering verdicts" (Holden and Howell 2009a: 10). This story of backlog is familiar and one also told by Sir David Simmons, former Chief Justice of Barbados, during a lecture delivered recently (Simmons 2016).

Holden and Howell (2009a: 15) also note that: "In Barbados, the public sector is characterized by overcentralization of decision making and dependence on rigid regulations because management and functioning of the public sector have failed to keep pace with the growing size and complexity of the economy."

[65] The WJP measures the rule of law across eight factors according to how it "is experienced in practical, everyday situations by the general public worldwide." These factors are: "Constraints

0.58 (see table 2). It is unclear how Barbados developed this superior legal framework, but theories[66] exist (see, example, Daniels et al. 2011; Patterson 2013; Blackmun 1998).[67] Economists and IFIs, such as the WB, IMF and IDB, have long pondered the secret to energizing the economies of the Caribbean. To that end, scholars have proffered a variety of theories as to why some islands in this region of the world have done better than others, despite their similar colonial histories. Poor quality state institutions is often one of the reasons suggested—because they influence how well the private sector can function.

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on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, and Criminal Justice." Retrieved January 16, 2019 (http://data.worldjusticeproject.org).

[66] Several theories explicitly relate the quality of modern day institutions in Barbados (and Jamaica) to their colonial experience under British rule (for example, Daniels et al. 2011; Patterson 2013). These approaches are consistent with those of political scientist Atul Kohli (2004)—who argues that colonial experience matters for economic development.

[67] While the legal profession is not addressed directly by the IDB, it is worth noting that of Barbados' seven prime ministers since independence, five have been lawyers. Jamaica does not have this record of "lawyers-in-chief" (Scheppele 2015: 6). Jamaica has had only two lawyer prime minister of nine. This begs the question of whether stronger legal and political institutions produce more lawyers-in-chief, or more lawyers-in-chief produce better legal and political institutions.

Kim Lane Scheppele (2015) uses this term, noting that "effective executives very often start their careers as lawyers across a wide range of countries, both liberal and illiberal." Scheppele (2015) highlights the fact that world leaders like U.S. Presidents Barack Obama and Bill Clinton, Prime Minsters of the UK, like Tony Blair and Margret Thatcher, not to mention several Canadian Prime Ministers were lawyers.

The question is whether the degree of representation of lawyers as chief executives post-colonialism is any indication of the influence of the legal complex on government and the varying degrees to which they coalesce to affect changes in the legal system in each country—and consequently their economies. As an empirical matter, it would also be interesting to uncover where these lawyers-in-chief were trained—i.e., in the colony at the University of the West Indies Faculty of Law versus in Britain at one of the Inns of Court, for example.

Table 2: WJP Rule of Law Rankings 2017-2018[68]

Country	Global Rank	Government Powers	Absence of Corruption	Open Government	Fundamental Rights	Order and Security	Regulatory Enforcement	Civil Justice	Criminal Justice	Overall Score
Barbados	30/113	0.66	0.68	0.49	0.77	0.75	0.6	0.65	0.59	0.65
Jamaica	47/113	0.62	0.55	0.59	0.63	0.62	0.56	0.54	0.5	0.58

Given the critical role the private sector plays in economies of these countries, independent experts have considered the lack of credit to small and medium enterprises ("SMEs") to be crucial to economic growth and consider secured transactions law reform to be one solution. Researchers conclude that inadequate access to finance across the Commonwealth Caribbean, including Barbados and Jamaica, has been due to: (1) the lack of sufficient financial institutions willing to service SMEs, (2) the unavailability of appropriate collateral and borrower credit data, and (3) "legal systems that favor large business and those with [real] property" (Holden and Howell 2009a: 5). Major creditors, including commercial banks, simply consider small entrepreneurs who lack specific kinds of collateral—primarily real estate—to be risky bets. By formally expanding the range of property that can be considered collateral through law to include things like livestock and accounts, and by building reliable collateral registries, the International Financial Corporation ("IFC") argues "the end result [will be] higher productivity and more

[68] The data for this table is taken from the WJP rankings. Retrieved January 10, 2019 (http://data.worldjusticeproject.org/#table).

growth" (IFC 2010: 6; see also United Nations Commission on International Trade Law ("UNCITRAL") 2010; Holden and Howell 2009a: 25-28). In the next section, I provide a brief overview of secured transactions law.

Secured Transactions: A Primer

Secured transactions laws govern lending arrangements where personal property—as opposed to real property—of the borrower is used as collateral for the loan. The lender receives "a security interest" in the borrower's asset, which she is allowed to claim if the debtor fails to meet his obligations under the terms of their agreement (Nowka 2013). This legal structure allows the lender to get a second shot at repayment by way of the borrower's pledged assets. While conceptually uncomplicated, many issues arise in secured transactions systems that make the process convoluted and ripe with pitfalls for the parties involved, particularly creditors who may find themselves unsecured or at a lower priority with respect to a particular collateral, not to mention ambiguity about how best to legally gain security interests in certain property, such as accounts and inventory procured or created for sale.

The bulk of the problems dealt with under secured transactions law relate to three areas: "attachment," "perfection," "priority" and enforcement of security interests (Nowka 2013). Attachment is concerned with whether the appropriate procedures were followed when the borrower pledged her property to the lender. Failure in this regard could mean that the security interest is not enforceable (2013: 4). Perfection speaks to the post attachment steps required to ensure that a creditor's security interests survives challenges from other borrowers who have similar claims to the borrower's property.

Priority speaks to the importance or superiority of some creditor's claims to the borrower's property over others—based in large part on matters of attachment and perfection. Finally, enforcement speaks to the procedures required for the lender to recover the pledged property of the borrower if she is in default.

Modern secured transactions regimes in the developed world have a unitary statutory framework, which systematically contemplates these and other problems that can arise in a secured lending arrangement. This structure provides predictability to parties contemplating a financing agreement, and arguably lowers the cost of credit to some category of borrowers (Akseli 2013: 3). For example, WB encourages "debtors to grant security interests in a broad range of collateral, to make it as fast and as cheap as possible for a secured creditor to foreclose in the event of default without going to court, and to give secured claims priority over all other claims" (Davis 2010: 538).

Theoretically, there are tremendous benefits to be gained from secured transactions reforms along the lines discussed. Any individual or business entity involved in financing stands to gain from the efficiencies associated with clear attachment, perfection and priority rules. Further, adopting a unitary and uniform secured transactions regime across countries presents an opportunity for more seamless cross-border financing transactions, which could be a potential boon to business. IOs and various interest groups have sought to bring developing countries—as well as some developed countries, like England—into this type of legal regime in the interest of efficiency. [69]

[69] With respect to England, there is a very active organization known as the Secured Transaction Law Reform Project (STLRP), which has been advocating for modernization. (https://securedtransactionslawreformproject.org) (Last visited January 15, 2019).

A modern and integrated secured transactions legal regime is believed to lead to "higher productivity and more growth" in developing countries (IFC 2010: 8). The gist of the argument is: by providing an efficient set of rules that allow creditors to easily access the moveable assets of borrowers, credit markets will become more easily accessible to small businesses—as lenders will be more confident that there is meaningful recourse if this group of borrowers fail to repay their loans. Importantly, these principles are deemed universally applicable across countries and types of economies (2010: 7).

The IFC proffers that the essential features of a modern and effective secured transactions regime are: working credit bureaus to report consumer credit; collateral registries to notify the public about the borrower's already pledged assets; and a unified statutory framework that covers all varieties of secured transactions (IFC 2010: 16).

A Brief History of Secured Lending in the Caribbean

While a modern integrated secured transactions system was generally lacking throughout the Commonwealth Caribbean prior to 2013 (which is when Jamaica implemented a new regime), the concept of secured lending (albeit not in moveable property) is not new. In the 1600s, Britain's colonies in the Caribbean were not far behind the Empire's American colonies where it concerns the adoption of chattel mortgage statutes—which afforded the granting of an interest or title in personal property as collateral to secure a debt (Flint and Alfaro 2003). For example, not long after the Virginia colony adopted the "first chattel mortgage in the Anglo-American world" in 1643, the Caribbean colonies began to require that interests in land be recorded in order to put other would-be creditors on notice (2003). And, like the calls for modern day

reform in developing countries, the motivation behind early secured transactions legislation was straightforward. They represented a practical way to increase access to finance. Britain needed to raise money to build and support its production of various raw materials in the colonies and needed lenders to be secure in their loans (Howard 1827 [1970]: 8).[70]

In one of the first English statutes dealing specifically with mortgages (and not moveable property), the preamble made it quite clear that this was indeed the case. It stated:

> Whereas the cultivation and improvement of estates in His Majesty's colonies in the West Indies, and the erecting of sugar works and other necessary buildings thereon, are attended with great expense, and the proprietors of such estates are often obliged to borrow large sums of money for these purposes upon the credit of such estates: and whereas it has been found difficult to procure sufficient loans from the subjects of this kingdom, and it would tend greatly to the improvement of such estates and to the public benefit, if money could be borrowed at a reasonable rate of interests from the subjects of foreign states for the purposes aforesaid; but doubts have arisen, whether, as the law now stands, any security in the nature of a mortgage, granted to a foreigner or alien, or to any person in trust for him can be made effectual against such estates for recovering the money lent thereon: and whereas no foreigner or alien, as the law now stands, can bring or prosecute any suit for the recovery of money in any court of law or equity within His Majesty's dominions, at a time when the state of which such alien is a natural-born subject is at war with this kingdom; in order to remove such doubts, and to encourage foreigners or aliens to lend money upon the security of such estates, be it enacted, that from after the passing of this act it shall and may be lawful to and for all and every person and persons, being foreigners or aliens, to lend money at a rate of interest not exceeding five *per cent per annum* upon the security of any freehold or leasehold estate in any of His Majesty's colonies in the West Indies, and to hold the same as an effectual security for the money lent, and to prosecute any suit or

[70] One of the statutes was titled: "An act to encourage the Subject of Foreign States to lend Money, upon the Security of Freehold or Leasehold Estates, in any of His Majesty's Colonies in the West Indies, and to render the Securities granted to such Aliens effectual for recovering Payment of the Money so to be lent by Sale of such Freehold or Leasehold Estates" (Howard 1827 [1970]: 8).

> suits for recovering the same as hereinafter mentioned whether the foreign state of which such alien is a natural-born subject be at war with this kingdom or not (Howard 1827 [1970]: 8).

In the colonies, much of the early statutes struggled over how to extinguish mortgages and the use of slaves as collateral. The first colonial era chattel mortgage statutes in the British Caribbean "generally covered slaves and a few sugar production utensils rather than all chattels and goods"; and the earliest domestic chattel mortgage type statutes were in places like St. Kitts (1727), Jamaica (prior to 1731), and Antigua (1746). Tobago and Barbados adopted recording statutes in 1768 and 1798, respectively (Flint, Jr. and Alfaro 2004: 1403-31).

With respect to colonial Barbados and Jamaica, a few legislative facts can be discerned. In Barbados (colonized by the British in 1605), the recording of interests in land was required beginning in 1661 (Flint and Alvaro 2004: 1429-1430). The statute stated:

> Be it further enacted, that all and every person or persons that now hat, have, or claim to have, any estate above the term of three years of any lands, tenements or hereditaments, shall bring into the secretary's office, there to be recorded at length, the deed or deeds, in case they are not already enrolled, by which he or they immediately claim or hold the same, within one year next ensuing publication therefor, or else such deed or deeds to be utterly void.[71]

Some confusion over the law, where it concerns the status of slaves, seems to have arisen shortly thereafter, because a subsequent statute declared explicitly that slaves were considered real estate, except interest in slaves did not require explicit registration with

[71] Howard (1827 [1970]: 108) (setting out 2 Car. II (1661)) (Barbados): "An Act concerning the Conveyance of Estates").

the secretary's office.[72] Still, further clarification was required because a statute in 1672 emphasized the utility of slaves in the satisfaction of debts. Specifically:

> That negroes shall be deemed real estate, and not chattels; be it declared, that, by the true meaning of that act, negroes may be sued for and recovered by action personal, as they usually were before the making of the said act; and also that by the true meaning of the act aforesaid, negroes continue [to be] chattels for the payment of debts.[73]

Later, in 1799, "An Act declaring the Negro Slaves of this Island to be real Estate"[74] was repealed and a new statute replaced it requiring the recording of interests in slaves. The new law stated that:

> [A]ll deeds of sale, and deed of conveyance and alienation of slaves whatsoever, after being duly executed, shall, in order to render them valid and of effect, be duly proved, or acknowledged, and recorded at length in the secretary's office of this island, as in case of lands, according to the manner and custom, and in the same manner as by the said hereinbefore-recited acts is required and directed to be done with respect to deeds of conveyance of lands of inheritance or other real estate.[75]

In Jamaica, the first recording statutes were, expectedly, very basic and dealt with the simple registration of deeds, aimed at foreclosing potential multiple conveyances of the same property to bonafide purchasers.[76] For example, the Jamaica statute explained the process for extinguishing a mortgage after the loan has been satisfied:

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[72] Howard (1827 [1970]: 112) (setting out 8 Car. II (1668) (Barbados): "An Act declaring the Negro Slaves of this Island to be real Estate").

[73] Howard (1827 [1970]: 117) (setting out 12 Car. II (1672 (Barbados): "A declarative Act upon the Act (a) making Negroes real Estate).

[74] Howard (1827 [1970]: 112) (setting out 8 Car. II (1668) (Barbados): "An Act declaring the Negro Slaves of this Island to be real Estate").

[75] Howard (1827 [1970]: 139) (setting out 39 Geo. III (1799) (Barbados): "An Act concerning the Conveyance of Slaves").

[76] Howard (1827 [1970]: 36) (setting out 13 Car. II Cap. 12 (1732) (Eng.): "An act for registering Deeds and Patents").

> [A]ny mortgage of any lands, tenements, real or personal estates whatsoever within this His Majesty's island, having received full satisfaction and payment of all such sum and sums of money as are really due to him by such mortgagor, shall at the request of the mortgagor, enter satisfaction upon the margin of such mortgage, recorded or to be recorded in the office of enrolments, which shall for ever hereafter discharge, defeat and release the same, and shall likewise perpetually bar all actions brought or to be brought thereupon in any court of record within this island.[77]

Importantly, prior to mortgage satisfaction, there was a concern about double pledging of real estate or personal property, including slaves (negroes), as collateral to bonafide purchaser. Specifically, in another statute, this was explicitly stated:

> And be it enacted, that all deeds which shall be made or executed within this island, after the May 1st 1732, for any lands, tenements, negroes or hereditaments whatsoever, shall be duly proved or acknowledged and recorded, within ninety days after the dates of such deeds, otherwise to stand void and of no effect against all other purchasers or mortgagees bona fide for valuable consideration of the said lands, tenements, negroes or hereditaments, who shall duly prove and record their deeds within the time prescribed by this act, from the dates of their respective deeds.[78]

If there was ever any doubt, by the early 1800s, it was explicit that slaves were a form of collateral for loans in Jamaica. According to an 1809 statute:

> And whereas, in and by certain of the acts and clauses of acts herein and hereby repealed, provision was made for making slaves assets for payment of debts and legacies, and in what manner they should descend and be held as property, and be conveyed in certain cases, and it is expedient to continue and amend such wholesome regulations: Be it further enacted, That no slave shall be free by becoming a Christian: and for payment of debts and legacies, all slaves shall be deemed and taken as all other good and chattels are in the hands of executors, and where other goods and chattels are not sufficient to satisfy the said debts and legacies,

[77] Howard (1827 [1970]: 36).

[78] Howard (1827 [1970]: 49) (setting out 4 Geo. II Cap. 5 (1732) (Eng.): "An act for the better preserving of the Records in the several Public Offices of this Island, supplying and remedying Defects").

> then so many slaves are necessary for the payment of debts and legacies, shall be sold…[79]

Suffice it to say, for the next several hundred years, legal institutions looked very similar among the three countries (though not identical), and secured transactions laws were comparable, at least until more recently when legal institutions became recognized and touted as a means of facilitating economic development and countries were encouraged to make decisions as to the type of secured transactions system was most suitable to their needs.

Promoting Secured Transactions Reform

As mentioned above, North's (1990) definition of institutions as rules governing the way actors operate indicates that laws are forms of institutions. There has consequently been a push to use legal reform as a means of promoting economic growth in developing countries (Davis and Kruse 2007). Notwithstanding the celebrated efficiency of business regulations stemming from the NIE framework, not all developing countries endeavor to adopt reforms that promise increased wealth. For example, a quick review of the NIE inspired WB Doing Business indicators, which measures the ease of doing business across most countries (190 in the 2019 publication), reveals that many poor countries that stand to gain from the regulatory reforms recommended as global best practices have not pursued them.

Economists and IFIs have argued that access to finance has contributed to the stifling of economies in developing countries because SMEs (the backbone of

[79] Howard (1827 [1970]: 79-80) (setting out 50 Geo. III Cap. 21 § (1809) (Eng.): "An Act (a) to repeal several Acts therein mentioned respecting slaves, to declare Slaves Assets for Payment of Debts and Legacies, and in what Manner they shall descend and be held as Property, and be sold and conveyed in certain Cases").

economies) are unable to get capital to launch and support their businesses (Holden and Howell 2009b; IFC 2010). This sentiment has undoubtedly contributed to the wave of innovations in microfinance in the past decades. We need look no further than Muhammad Yunus' Grameen Bank in Bangladesh, which serves as the prime example of the financing constraints of small entrepreneurs (Yunus 1999). Indeed, the gravamen of the concern over access to finance is focused on poor secure lending infrastructures in developing countries. The assumption by many economists and public policy practitioners is that once the right formal rules and systems are in place, lending will flow and the economy will grow (see, example, DeSoto 2000). This argument sounds much like the original law and development thesis, which anticipated that the transplantation of a certain set of Western laws to developing countries would both replace their inadequate traditional laws and usher in prosperity (Trubek 2014: Davis 2010).

In recent years, there has been an international effort to get certain countries around the world to update their secured transactions laws. The WB and UN have been two of the more prominent leaders in this regard, but intergovernmental and non-governmental organizations like the International Institute for the Unification of Private Law ("UNIDROIT") and the Secured Transactions Law Reform Project ("STLRP"), based in England and comprised of prominent lawyers, judges and legal scholars, have also been active in pursuit of this goal.

According to the IFC (2010: 6), "[w]hile access to credit varies from one jurisdiction to another, constrained access to finance remains among the top three limitations on private sector growth in the developing world." By allowing legal institutions to expand the range of property that can be considered collateral (such as

livestock—for example, cows and sheep and accounts—like cash flow from business transactions) and building reliable collateral registries, WB proposes that credit will be more easily available and the cost (high interest rates) associated with accessing it will decrease (2010: 8). The IFC (2010: 8), suggests: "[t]he end result is higher productivity and more growth." In service of this goal, the IFC has prepared and made available a comprehensive handbook or toolkit for what a "well-functioning" secured transaction system should look like, including all the necessary rationales and justifications for their model.[80]

Similarly, the United Nations Commission on International Trade Law ("UNCITRAL") has developed a detailed guide to modern secured transactions law, "UNCITRAL Legislative Guide on Secured Transactions" ("Guide"), which includes specific language for legislation. The Guide is so complete it includes sections on a range of sophisticated finance mechanisms and issues, such as "acquisition financing," "conflict of laws," and the "impact of insolvency on a security right."[81] UNCITRAL delicately balances the ideals of the proposed law with the practicalities of implementation in states, primarily with regard to the quality of legal system and Legal Complex required for success. Specifically, UNCITRAL (2010: 1) notes:

> The Guide is based on the premise that sound secured transactions laws can have significant economic benefits for States that adopt them, including attracting credit from domestic and foreign lenders and other credit providers, promoting development and growth of domestic

[80] See: *Secured Transactions Systems and Collateral Registries*. Retrieved January 9, 2019 (https://www.ifc.org/wps/wcm/connect/c5be2a0049586021a20ab719583b6d16/SecuredTransactionsSystems.pdf?MOD=AJPERES).

[81] See: UNCITRAL Legislative Guide to Secured Transactions. Retrieved January 9, 2019 (https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf).

> businesses (in particular small and medium-sized enterprises) and generally increase trade. Such laws also benefit consumers by lowering prices for goods and services and making consumer credit more readily available. In order to fully achieve their objectives, these laws must be supported by efficient and effective judicial systems and other enforcement mechanisms. They must also be supported by insolvency laws that respect rights derived from secured transactions laws (such as the insolvency law recommended in the UNCITRAL Legislative Guide on Insolvency Law…).

The implicit message is "buyer beware." The law is robust and has many potential economic benefits, but it must be supported by a host of complements for it to work as proposed. Needless to say, these complements may vary from country. In some places, a sophisticated network of commercial lawyers may be sufficient. In others, it may require an adept and creative judiciary, as well as academics, willing to spend time analyzing and articulating useful solutions to complex legal problems associated with particular provisions.

Another organization marketing change to secured transactions laws is UNIDROIT.[82] Based in Rome, Italy, with a membership of 63 states, the organization considers it its mission to assist in "modernizing, harmonizing," and coordinating private and commercial laws among states.[83] Since the late 1980s, it has undertaken a variety of studies on secured transactions laws. Of the entities pushing for revised secured transaction systems around the world, the STLRP is perhaps most interesting—because of its geographic emphasis. Surprisingly, the group is focused on reforming secured transaction laws in England, which is the fount of common law and where London is considered a capital of finance (see, example, Bird 2014).

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[82] See: http://www.unidroit.org/about-unidroit/membership. (Last visited January 9, 2019).

[83] See: http://www.unidroit.org/about-unidroit/overviewv. (Last visited January 9, 2019).

The primary complaint by reformers is that some of the secured transactions laws of England and Wales are outdated. Other complaints are related to the complexity[84] and inaccessibility of these laws to many, particularly because it lacks a unified set of laws controlling security interests. STLRP urges England and Wales to model their laws after Article 9 in the United States.[85] A few key features of Article 9 appear to be most attractive to the STLRP reformers. First, UCC-type secured transactions laws provide for a one-stop statutory location for the treatment of all transactions deal with the granting of security interests.[86] Second, the various ways UCC-type security interests can be perfected provides for flexibility and notice to third parties. For example, the ability to perfect by registering one's interest—notice filing—allows creditors a fairly easy way to ensure priority. Third, the priority rules outlined in the statute provide for predictability.

[84] For example, according to the STLRP, "the law is a mixture of case law and a series of statutes, making it hard to access or understand." Moreover, [i]mportant aspects of the law relating to financial collateral lack clarity, such as the meaning of 'possession or control' and the position regarding priority between competing interests over financial collateral." STLRP, Secured Transactions Law: The Case for Reform, Retrieved January 9, 2019 (http://securedtransactionslawreformproject.org/the-case-for-reform/).

[85] The STLRP notes that variations of Article 9 are presently law in countries like Canada, New Zealand and Australia. Retrieved January 8, 2019 (http://securedtransactionslawreformproject.org/the-case-for-reform/).

[86] The STLRP highlight that such a statutory framework incorporates a range of devices, "from mortgages, charges and pledges to (where fulfilling the economic equivalent to security) hire-purchase agreements and equipment leases, are subject to the same rules of registration, priority, and in most cases, enforcement, whereas under English law each device is subject to different rules." Retrieved January 8, 2019 (http://securedtransactionslawreformproject.org/the-case-for-reform/).

Promoting Reform in the Caribbean

While there have been calls from IFIs for secured transactions laws reform in the Commonwealth Caribbean for decades but, until recently, there has hardly been any movement among the countries. Arcane and disjointed legal regimes for secured credit are blamed, at least in part, for this inadequate access to finance (Holden and Howell 2009a; 2009b). In 2013, Jamaica undertook reforms—replacing its rudimentary system of laws with a more modern regime, akin to those in the United States and Canada, and promoted by WB and UN.[87] Barbados, however, has refrained from pursuing similar reforms.[88]

Barbados and Jamaica have historically lacked an integrated set of laws dealing with secured credit—a single statutory framework governing the lending by way of moveable assets. They also lacked a direct way of determining a debtor's creditworthiness—key features of more modern regimes like Article 9. There was no adequate collateral registry for determining whether a debtor already had other security interests attached to her pledged collateral. The WB Doing Business indicators promote reforms to developing countries that would create a more efficient regime like Article 9. But some countries like Barbados have chosen not to pursue legal reform in this area—despite the promised benefits to SMEs and the promise of increased economic activity. In Barbados, studies by the WB and IMF have shown that "[a]bout 45% of small

[87] http://www.doingbusiness.org/Reforms/Overview/Economy/jamaica. (Last visited January 8, 2019).

[88] http://www.doingbusiness.org/Reforms/Overview/Economy/barbados. (Last visited January 8, 2019).

enterprises"[89] consider limited access to credit to be a major concern (WB and IMF 2014: 25).[90] The absence of these features made it objectively difficult to understand and make effective use of asset-based credit on the island.

The IDB (2013: 16) in a separate report explained that:

> At the end of 2009 bank deposits stood at over 90% of GDP and rose to 105% in 2012, one of the highest ratios among the group of comparator countries. However, bank credit as a proportion of bank deposits stood just under 50% in 2009 and 70% in 2013, among the lowest ratios in the Caribbean. This suggests that businesses in Barbados—and particularly small businesses, which lack the access to international credit markets that some larger firms enjoy—find it difficult to access credit, despite the funds in the financial system.

A major problem in Barbados is the lack of functioning credit bureaus (WB and IMF 2014). Without the ability to assess the credit of borrowers, lenders—including commercial banks and credit unions—consider many SMEs particularly risky clients, who may abscond with their funds. According to Holden and Howell (2009b: 22):

> Credit bureaus are a permanent feature of all developed country financial markets and play an invaluable role in mitigating the adverse selection and moral hazard issues mentioned above. Nonetheless, credit bureaus exist in only two countries in the Caribbean. In Barbados (established in 1994), the credit bureau's information is incomplete in that records are collected for hire-purchase, automobile dealerships, and finance companies, but not from banks, although the latter are able to use the information.

In the case of Jamaica, the problems with access to credit were essentially the same for SMEs. Prior 2013, Holden and Howell (2009b: 22) noted "the right to privacy

[89] According to other accounts, the number is closer to 33% of firms—that consider access to credit a major or sever obstacle. Another 19% considers it a moderate obstacle (The Economist 2015: 20).

[90] In 2014, the WB and IMF (2014: 27) noted that "[t]he existing credit bureau (Caribbean Credit Bureau Ltd., also known as Credi-Check) [did] not provide adequate information about a creditor's exposure and standing. Data is [sic] incomplete, as only a few lending institutions (credit unions, banks and/or retailers) provide information periodically."

contained in the Banking Act [was] an obstacle to mandatory reporting of credit history data to public credit bureau."[91] At this stage, a maze of disparate laws also governed secured lending and a multitude of forms were required to undertake the most basic of loan transactions. Small firms had to consider the cost associated with hiring legal professionals for almost every type of lending arrangement—simple or complex.[92]

There were also justifiable concerns with the overall efficiency of the Jamaican legal system, which is notoriously slow. A secured lender was always uncertain about when he would be able to access the borrower's pledged collateral in the event of a default (Holden 2009: 6-9). This was problematic because, in many cases, the courts would have to intervene to address uncooperative debtors, and potentially two statutes—the Companies Act and Bill of Sale Act—would apply to the seizure and subsequent disposal of the property for cash (2009: 9). This, of course, complicated the resolution process. In some cases, it could take years from the time of the debtor's default before the creditor obtained the collateral, which would have most likely lost its value (2009: 9).

Next, this dissertation examines the relationship between the WB Doing Business indicators and the choice of secured transactions regime in Barbados and Jamaica. Given the influence of the indicators, it would be not be unreasonable to expect that similarly situated countries, like the island states of the Commonwealth Caribbean, would respond similarly to reform recommendations. Indeed, one of the theories of legal change suggests that external actors like the WB, IMF, UN and wealthy countries are capable of

[91] Jamaica subsequently adopted the Credit Reporting Act of 2010, which became effective as of October 1, 2010 and governs the operation of credit bureaus on the island. See http://boj.org.jm/financial_sys/supervised_cb_overview.php. (Last visited January 2, 2019).

[92] There were "[a]t least five separate legal forms": (1) hire-purchase agreement, (2) finance lease, (3) bill of sale, (4) fixed charge, and (5) floating charge (Holden 2009: 9).

influencing reforms in countries like these (see Chapter 1: 61-63). This has not been so where it concerns the cases of Barbados and Jamaica. Before 2013, both Barbados and Jamaica were considered places where getting credit was difficult. Indeed, they scored almost identically on the available Getting Credit sub-indicator of the WB Doing Business (Table 3). Post 2013, Jamaica undertook a series of reforms to its secured transactions laws and has soared up the ranking on this measure. Barbados has refrained from such reforms. This section below discusses the purpose and methodology behind the Doing Business rankings.

The World Bank Doing Business Indicators

The WB Doing Business indicator is a proxy for how easy it is to transact business in a country. It is easily one of the tools of global governance (Davis et al. 2012; Fisher et al. 2012; Merry et al. 2015). Similar indicators about the nature and quality of state institutions include the World Governance Indicators and the Corruption Perception Index.[93] The indicator ranks the business law framework of the majority of countries around the world (190 countries in the 2019 publication) in an effort to assess how conducive they are to economic development (WB 2019). To "measure" the quality of commercial law regimes, researchers associated with the Doing Business project identify formal laws (laws on the books) and legal reforms in eleven areas: (1) getting electricity; (2) dealing with construction permits; (3) trading across borders; (4) paying taxes; (5) protecting minority investors; (6) registering property; (7) getting credit; (8)

[93] See: WB. "World Governance Indicators." (http://info.worldbank.org/governance/wgi/#home). (Last visited December 29, 2018); Transparency International. "Corruption Perception Index." (http://www.transparency.org/research/cpi/overview). (Last visited December 29, 2018).

resolving insolvency; (9) enforcing contracts; (10) regulating labor market; and (11) starting a business (WB 2019).

The WB (2017)[94] states:

> The indicators presented and analyzed in Doing Business measure business regulation and the protection of property rights—and their effect on business, especially small and medium-size domestic firms. First, the indicators document the complexity of regulation, such as the number of procedures to start a business or to register a transfer of commercial property. Second, they gauge the time and cost to achieve a regulatory goal or comply with regulations, such as the time and cost to enforce a contract, go through bankruptcy or trade across borders. Third, they measure the extent of legal protections of property, for example, the protections of minority investors against looting by company directors or the range of assets that can be used as collateral according to secured transactions laws. Fourth, a set of indicators documents the tax burden of businesses. Finally, a set of data covers different aspects of employment regulation.

A significant component of the Doing Business data collection methodology includes recruiting a number of local experts, including lawyers, accountants, and government officials, who are asked to respond to surveys and hypotheticals regarding the activities of a "simple business case" in their country (Davis and Kruse 2007: 1099; WB 2017b, 2017c). Two key numbers are eventually assigned to countries based on the findings from these surveys: (1) the "ease of doing business score"; and (2) the "distance to frontier score" ("DTF"), which ranges from 0 to 100.[95] The ease of doing business score compares countries in terms of regulatory efficiency, and the DTF score situates countries with respect to global best practices—typically by leading economies. A DTF

[94] See: Besley (2015: 99-100); Acemoglu et al. (2013); see also http://www.doingbusiness.org/Methodology/Common-Misconceptions. (Common Misconceptions About Doing Business). (Last visited January 8, 2019).

[95] See: WB. "Distance to Frontier and Ease of Doing Business Ranking." Retrieved January 8, 2019 (http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Chapters/DB17-DTF-and-DBRankings.pdf).

score of 100 indicates that a country is on the frontier of best practices, whereas a score of zero "represents the lowest performance."[96] The IFC recommends using the distance to frontier DTF score to compare changes in regulatory regimes across countries over time (WB 2017c).

The Doing Business "Getting Credit" sub-indicator ranks countries according to how much they incorporate "modern" features of secured transactions law (WB 2019, 2017b, 2017c). Overall, it focuses on: (1) the degree to which lenders are legally protected and have easy recourse to the collateral pledged by borrowers; and (2) the extent to which borrowers' credit information is made available.[97] The WB points to little but anecdotal evidence that secured transactions reforms actually leads to increased access to finance but, in several of the cases highlighted by the IFC, implementation problems have proved to be consequential. For example, after countries like Slovakia and Romania introduced modern secured transactions law in the 1990s capacity constraints limited the extent to which the law could achieve its goals.

More specifically, despite being named one of "the top reformer in the [WB] Doing Business 2005," lack of human resources in Slovakia proved to be a hindrance to the effectiveness of the country's collateral registry (IFC 2010: 10). Similarly, in Romania, many private sector registries were unable to meet the requisite legal standards and "creditors [found] it difficult to recover and dispose of collateral (2010: 13). Further,

[96] See: WB. "Doing Business: Distance to Frontier." Retrieved January 8, 2019 (http://www.doingbusiness.org/data/distance-to-frontier).

[97] According to the Doing Business project, "[t]he first set of indicators measures whether certain features that facilitate lending exist with the applicable collateral and bankruptcy laws. The second set measures the coverage, scope and accessibility of credit information available through credit reporting service providers such as credit bureaus or credit registries." (WB 2017b)

there has been no robust discussion in the development or academic literatures about the availability, role and insights of the local legal community in these and other countries seeking to undertake secured transactions reform.[98]

Table 3[99]: Barbados and Jamaica Secured Transactions Scores 2012-2018 (DTF)

	Barbados	Jamaica
2018	30.00	80.00
2017	30.00	80.00
2016	30.00	80.00
2015	30.00	80.00
2014	30.00	30.00
2013 (2005-2014 methodology)	50.00	50.00
2012 (2005-2014 methodology)	50.00	50.00

According to the DTF scores of Barbados and Jamaica (displayed in Table 3), it is apparent that Jamaica has made significant strides in secured transactions reforms. The Doing Business included Jamaica in its very first publication in 2004 (WB 2004a). Barbados debuted several years later in 2012 (WB 2012b). Since 2012, Jamaica has slowly moved up in the overall rankings and has surpassed Barbados—moving from 88 that year to 75 overall in 2019 (WB 2019) (see Appendix 2).[100] Barbados did not receive a rank in 2012, but was ranked 88 overall in 2013 (WB 2012b, 2013). It subsequently

[98] The WB encourages consultation with "a local lawyer" who is an expert in secured transactions and the training of lawyers and judges before the implementation of reforms, but does not seek the broad insights of the legal community, particularly commercial lawyers, about whether it is a good idea to engage with a certain line of reforms (see, generally, IFC 2010).

[99] The data for this table was taken from the WB Doing Business indicators. Retrieved January 2, 2019 (http://www.doingbusiness.org/en/custom-query).

[100] See Appendix 2 for how Barbados and Jamaica stacked up in 2019 against the larger Latin America and Caribbean region.

fell to 129 in 2019 (WB 2019) (see Appendix 2). With respect to Getting Credit, Barbados ranked 144 and Jamaica ranked 12 in 2019.

The change in scores over a relatively short period is directly related to how amenable the two countries were to adopting the secured transactions framework implicit in the DB ranking system and explicit in the IFC's pronouncements (IFC 2017). Jamaica's rise, for example, is due to its implementation of a "modern" secured transactions system in the mold of UNCITRAL's model secured transactions law and Article 9 of the UCC (Commercial Law Sub-Committee of the Jamaican Bar ("CLSC") 2013). The principles of Article 9 are embedded in the DB Getting Credit sub-indictor. Barbados, on the other hand, has not adopted legislation creating a modern secured transactions system (WB 2014, 15). Jamaica's scores are consistent with an aggressive approach to business law reforms going back to at least the early years of the DB (2004 to be exact) (WB 2004a; Appendix 3),[101] while Barbados' scores are consistent with a slow and steady—more strategic—approach to reforms, which this dissertation suggests has been tied to its offshore banking sector (Appendix 4).

A curious observation about the Doing Business is that, not only are the lowest ranked countries on the Doing Business rankings typically some of the poorest and smallest in the world but, even middle-income countries like Fiji (ranked 101/190), Belize (ranked 125/190) and Guyana (ranked 134/190), have found themselves lower in the rankings as well in the 2019 report (WB 2019). This is ironic, since the reforms proposed are supposed to help shape regulations that are good for economic growth—suggesting that these countries should be aggressive reformers. Further, the publicity and

[101] In its earliest publications, the WB highlighted Jamaica's aggressive efforts to create a business friendly regulatory environment that was with global best practices (DB 2004: xiv).

legitimacy associated with reforms promoted by the WB, IMF, UN and other well-known IOs should coincide with eagerness toward adoption (Acemoglu et al. 2013: 2).

Most would agree that "Doing Business has attracted attention at the highest level of policy-making across the world" and serves as a roadmap to many countries for how to undertake business-relevant regulatory reforms (Acemoglu et al. 2013: 3). Indeed, a variety of governments refer to the indicator for guidance. And, of course, the level of attention given to the indicator makes it a domestic and international political tool. For example, world leaders, including India's Prime Minister, Narenda Modi and Russia's President, Vladimir Putin, have aspired to move their countries up the rankings (Besley 2015: 100). Interestingly, in the 2015 Doing Business report, Rwanda with its struggling economy and high rates of poverty ranked higher than the wealthier country of Italy (2015: 99-100). The implication of this level of attention and potential for movement in the rankings is that many (though clearly not all) countries see the Doing Business indicators as a way to signal[102] to the world that they are open and friendly to business interest, even if the reforms are note effectively implemented. Yet, some countries do not reform their commercial laws to be consistent with the Doing Business indicators.

It is important to recognize that the Doing Business has its fair share of critics (Davis and Kruse 2007; Arrunada 2007; Santos 2009). Whereas supporters (Besley 2015: 99-100; Acemoglu, Johnson, Klein, and Wheeler 2013; see also WB 2018b)[103] argue that it presents an opportunity for countries to assess their commercial regulatory regime and

[102] An increase in rankings is supposed to theoretically correlate with a more vibrant business climate and better economic performance (Acemoglu et al. 2013: 4).

[103] See: WB, Common Misconceptions About Doing Business. Retrieved January 4, 2019 (http://www.doingbusiness.org/Methodology/Common-Misconceptions).

develop more efficient practices and rules, critics contend that the indicator is too glib an assessment of complex legal institutions and, consequently, limited in its usefulness (Arrunada 2007; Santos 2009).

A key strength of the Doing Business indicators and other similar indicators rests in the ability to label—even brand—countries. According to Halliday (2012a: 211), they have the ability to "[grab] the attention of authorities and provide practical guidance for programmatic adaptations; yet they also potentially embarrass nations before their peers and discredit elites responsible for the institutions under evaluation." In the case of the Doing Business indicator, a country's assigned ranking can have significant influence on its perceived attractiveness for foreign direct investment and, in some instances, its ability to receive foreign aid (see Appendix 5). [104]

Pursuant to Davis et al. (2012: 92):

> The Doing Business indicators are tremendously influential and exemplify the range of mechanisms through which power can be exercised beyond the state. To begin with, the Doing Business indicators are used, in combination with other indicators, to guide the allocation of foreign aid by multilateral development banks, as well as the [Millennium Challenge Corporation ("MCC")] and [the United States Agency for International Development ("USAID")] in the United States. For example, at the World Bank, five of the ten Doing Business indicators are used as "guideposts" (together with other sources) to assist country teams in determining country scores on "Business Regulatory Environment," one of the 16 criteria of the Country Policy and Institutional Assessment, the primary determinant of World Bank aid allocations. At the MCC, Doing Business indicators are used in two of the six indicators of whether countries are "Encouraging Economic Freedom"; countries must score above the median on at least three of the six indicators in this category to be eligible for MCC funding. Finally, USAID officials have informally expressed commitments to support countries that are willing to reform in areas measured by the Doing Business reports.

[104] Appendix 4 shows the types of questions asked of countries in relation to their secured transactions laws.

However, even if a country were to accept the reforms promoted by the Doing Business indicators and its ranking were to improve, the WB does not guarantee that more efficient commercial transactions would emerge as a result (Davis and Kruse 2007: 1117).[105] This outcome, of course, is tied to a host of factors (including the actual process of legal transplantation) that are not considered by the Doing Business indicators (Davis 2010; 537-541; Pistor 2002: 106-107; Besley 2015: 111).

Conclusion

This chapter provided a brief history of lawmaking in the colonies and post-colonies, a primer and secured transactions law, and an overview of the movement to reform these laws around the globe. In recent decades, it appears that modernization theory remains at the heart of development policy. Wealthy countries and IFIs promote modernizing commercial law regimes in developing countries, so that they look and behave more like theirs—theorizing that this will lead to economic growth. One way of understanding this sluggishness toward reform on the part of some countries may be to explore the relationship between the proposed global best practices and the availability of local legal leadership from within the country to spearhead legal change. Further, we may consider the nature of the legal institutions underlying the country's CEI and whether the proposed reforms directly benefits, complements or detract from the CEI.

Chapter 3 begins the exploration of these relationships. It examines the connection between commercial lawyers in Barbados and Jamaica and commercial law reform—specifically secured transactions reform.

[105] Davis and Kruse (2007: 1104-1117) argue that the various practical limitations to the Doing Business project make the indicators untrustworthy as benchmarks.

CHAPTER 3:

STATE CAPACITY, LAWYERS AND LEGAL REFORM

Introduction: The Business Legal Complex

This chapter shows how the BLC can complement the state's capacity to adopt and implement legal reform in the commercial law area. This theory of state capacity departs from previous research, which emphasized the role of civil servants in building state capacity (see, example, Evans and Rauch 1999; Portes and Smith 2012). The following sections provide both a historical context for the role of the legal community in Barbados and Jamaica and a critical assessment of the choices made by each country regarding secured transactions reform. Chapter 3 is organized into four parts. Part I outlines existing theories of state capacity and suggests a role for BLC in better understanding variations in state capacity. Part II provides a brief history of legal training in the Commonwealth Caribbean. Part III presents the case of Barbados. Part IV presents the case of Jamaica.

PART I

State Capacity

There is no consensus among theorists as to a definition of state capacity. Depending on discipline and substantive area of focus, commentators have referred to state capacity as: wealth; power, the ability to make effective policy choices; the ability to implement those policies; as well as bureaucratic capacity (Enriquez and Centeno 2012: 134-138). The complexity and often overlapping interpretations of the concept is directly related to the varied methodological and theoretical approaches to state and

economic development among sociologists, economists, and political scientists (Levi 1988; Mann 1984; Soifer and vom Hau 2008). Regardless of how the concept is understood, it is abundantly clear that it is highly contextual, and ultimately refers to the state's ability to function effectively with respect to a particular activity (Enriquez and Centeno 2012: 133; Kleinfeld 2012: 185-221).

Among sociologists, state capacity is generally associated with the bureaucratic capabilities of government institutions in a country (see, example, Enriquez and Centeno 2012: 136; Portes and Smith 2012). This type of capacity has been described as a function of the state's ability to intervene in the economy based on a well-organized, talented, and experienced group of experts from within, rather than reliance on external sources for advice and guidance (Skocpol and Finegold 1982: 260-261). For example, political scientists Theda Skocpol and Kenneth Finegold (1982) examined the success of the Agricultural Adjustment Act (AAA) and failure of the National Industrial Recovery Act during the New Deal era and proffer that a combination of expertise nurtured over time, a set of well-crafted and tested ideas by seasoned professionals, and the ability to coordinate and implement those ideas effectively was invaluable to the positive outcome achieved by the AAA—and amounted to high state capacity.

Some scholars have even argued that states with specific bureaucratic characteristics have better prospects for economic growth (Evans and Rauch 1999: 751-753). These traits are often associated with Max Weber's work on bureaucracy and typically include "meritocratic recruitment" and "a predictable career ladder" (the Weberian Bureaucracy) (Portes and Smith 2012). Sociologists Peter Evans and James

Rauch (1999: 748) have even shown that countries with Weberian Bureaucracies tend to have better economic performance, even when accounting for initial wealth.

Bringing in The BLC

In addition to talented civil servants, states often require legal experts—including from the private sector—to help draft, interpret and apply complex commercial laws (see, example, Pistor 2002, 98; Dezalay and Garth 2011; Rattray 1994, 49). Consequently, any meaningful analysis of the state capacity concept in relation to law's role in economic development must incorporate an assessment of the local BLC. Indeed, while the BLC has received limited attention in current scholarly discussions of state capacity, NIE necessarily implicates lawyers in this arena (by proposing that institutions—including laws and legal institutions—are important for economic development) (see, example, Davis and Trebilcock 2008; Thomas 2011). Importantly, legal professionals represent a subset of community leaders that play a vital role to the construction of a CEI—particularly where that CEI is intricately tied to a set of legal rules.

As outlined in Chapter 1, according to NIE theory, law and legal institutions are important for growth because "the legal environment could impose effects and costs on market actors that would become variables determining economic output (Thomas 2011: 979). One set of key actors that comprise the legal environment is the legal profession. For example, Carol Rose (1998), through her analyses of legal reforms aimed at changing legal culture in post-communist Vietnam, highlighted how lawyers can be perceived as central to legal reforms in developing countries—since they play a vital role in building and maintaining legal institutions (Rose 1998).

Indeed, a state that is capable of working with the BLC can more readily achieve its policy goals, including where it concerns commercial law reform. Hence, one view suggests, for a state to have high capacity to undertake a given law reform project, that state must have both the bureaucratic wherewithal and a legal community that is technically equipped and supportive of the new reforms (see, example, Berkowitz et al. 2003; see also Santos 2012)—since the BLC is a vital intermediary between laws on the books and law in action. Yves Dezalay and Bryant Garth's (2002, 2011) work on globalization and the legal profession supports this theory of state capacity. For example, they proffer that lawyers are "brokers—converting social, political and economic resources in legal processes and, vice versa, thus accumulating these various forms of legal capital that they can mobilize in social and economic interactions" (Dezalay and Garth 2011: 3).

Yet, other scholars have recognized the inextricable link between the globalization of business law and the legal profession (see, example, Shaffer et al. 2017; Varottil 2017). For example, "legal scholars studying globalization, lawyers and emerging economies" ("GLEE") are concerned with how globalization is impacting the practice of law in places like Brazil, India and China (see. example, Wilkins, et al. 2017). The opening of markets in emerging economies has been accompanied by increased cross border activities, including, but not limited to, more foreign investment and financing transactions—which ultimately require well-trained local commercial lawyers.[106]

The primary concern for scholars studying the globalization-legal profession connection is how globalization is changing the legal profession in emerging economies

[106] See: Globalization, Lawyers and Emerging Economies. Retrieved January 9, 2019 (https://clp.law.harvard.edu/clp-research/globalization/).

and what impact these changes are, in turn, having on the political economy of each of these countries, as well as the international community. The implication of this work is that corporate lawyers are having an influence on economic matters—though this is not directly studied (see, example, Cunha, Gabbay, Ghirardi, Trubek, and Wilkins 2018). This dissertation complements the approach of the GLEE scholars. It focuses directly on the impact commercial lawyers can have on the political economy of developing countries.

While lawyers were considered important to the development of legal institutions in poor countries during the initial law and development movement (see, example, Rose 1998), development policy and strategy has been primarily left to economists (see, example, Davis and Trebilcock 2008; Trubek 2014). Lawyers have been relegated to mere facilitators or implementers of policies they had little part in producing (Rose 1998).[107] This need not be the case though. Lawyers may have a bigger role to play as a collective in the economic growth undertaking, especially where it concerns supplementing or complementing the capabilities of the state. Immense opportunities exist at this juncture to connect up the work of legal scholars studying the role of commercial lawyers with the work of sociologists studying lawyers in traditionally political context. The goal would be to see how this particular profession[108] is able to assist with the economic development goals of developing countries.

[107] For example, Carol Rose (1998) describes in detail efforts to change legal culture in post-cold war Vietnam through various legal assistance programs from international organizations and more developed countries. The goal was to make the local lawyers more like Western lawyers, which would allow the community greater access to global markets (Rose 1998: 133-135).

[108] Certainly, other professional groups are capable of aiding the state in this regard. Since we are discussing "law" and economic development, however, the focus of this dissertation is on the legal profession.

Socio-legal scholars, HKF (2012c), have used the Legal Complex as a "universal phenomenon" to explain "[t]ransitions to or from political liberalism" in British-post colonies. By way of a series of case studies (India, Singapore, Sudan, Malaysia, Malawi, Namibia, Pakistan, and Zambia) these scholars reveal how the politics of the Legal Complex had a distinct influence on the degree of political liberalism present in post-colonial states. The Legal Complex is a conceptual tool used to explore the various ways that the carriers of legal knowledge—"the fraternity of legal professionals"—in a particular jurisdiction choose to exploit their training to achieve certain outcomes (HKF 2012c: 7). Consequently, the Legal Complex can be used to better understand the influence of the legally-trained on explaining and implementing the legal products (statutes, judicial opinions, forms, and informal practices) that have come to embody modern day legal systems.

Building on HKF's (2012c) work, Kim Scheppele (2015: 6) uses case studies of Hungary and Russia to argue that lawyers can choose to be either liberal or illiberal, depending on circumstances and their interests. Given the training lawyers receive and their importance to the legal infrastructure of the modern state, it is reasonable to accept that the Legal Complex can influence much more than just political liberalism or constitutional reforms (HKF 2012c: 9). Indeed, if capitalism requires the rationality of law to thrive (as Max Weber proffered) the character of capitalism and commerce must be dependent on the social ordering of the Legal Complex employing this rational law—a point that Weber never thoroughly explored (see, example, Trubek 1972).

Legal scholar Alvaro Santos (2013: 21) has indirectly used insights regarding the Legal Complex (although he does not use this term) to understand country success and

failures under the World Trade Organization's ("WTO") dispute-settlement system.[109] He uses the term "legal capacity" to refer to a country's ability to cultivate and organize its legal talents to achieve specific development goals—essentially engage in strategic lawyering. In comparing Brazil and Mexico's approaches to WTO disputes, Santos (2013: 169) explains that developing countries have often lacked the necessary legal capacity to navigate the intricacies of WTO laws, but notes that Brazil has been able to use trade law "as a sword to open markets and a shield for heterodox policies." He theorizes that Brazil has used a "network of lawyers, policymakers, and representatives of civil society that constitute 'developmental legal capacity' [to] protect key aspects of its export policy," whereas Mexico, on the other hand, has not (2013: 22).

While both countries have skilled lawyers, Santos (2013: 221) suggests that there are "important institutional and strategic differences [between them] that reflect divergent policies about how to create, foster, and deploy legal capacity." For example, Brazil's legal capacity is less concerned with a specific case or rule, but is focused on how its legal strategies are consistent with the larger policy goals of the state—now and in the future (2013: 223). Mexico, however, suffers from a lack of institutional knowledge among government lawyers representing the state in international trade matters. As lawyers depart employment with the state, human capital leaves with them and is not easily replaced (2013: 223). In addition to this lack of professional continuity, which undermines long-term legal strategy, the ministry responsible for trade (Ministry of the Economy) "has largely relied on outside counsel—primarily from the United States and Canada—for the preparation of its cases and lawyering strategies" (2013: 224).

[109] Santos and his colleagues have co-authored an insightful volume, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Trubek, Garcia, Coutinho and Santos 2013).

International trade lawyering is therefore pursued in an "ad hoc" fashion with little intentional investment in talent or cohesion among legal professionals.

Similar to work by Marc Galanter (1975), the thrust of Santos' theory is that Brazil has developed a cohesive legal team that is integrated in the overall operations of the state and focused on not just "playing by the rules" but also changing them to the country's advantage—a form of expert repeat player. Mexico essentially, reflects the approach of Galanter's legal "one-shotters"—aimed at achieving "immediate relief" on a case-by-case basis, and thereby not organizing or honing the skills and strategies of government lawyers toward an agreed upon development agenda (Galanter 1975). Without explicitly using HKF's (2012c) concept of Legal Complex, Santos (2012), fundamentally makes the argument that the role of legal actors and how they engage laws on the books, as well as each other, matters for issues of commerce. Santos (2012) focuses his research on Latin America, but his insight is useful in other parts of the world, which may provide compelling case studies with respect to whether the Legal Complex is pertinent to the success of commercial law for purposes of economic development. It is here that this dissertation proposes a close look at countries that neighbor Latin America—those in the Caribbean.

The GLEE project aside, which focuses on larger multi-sector emerging economies (Brazil, India and China) and the impact of globalization on the legal profession primarily (see Wilkins et al. 2017), missing from the current scholarship is an investigation into how poor countries that lack bureaucratic depth can effectively coordinate with commercial lawyers to build capacity for legal reform that is squarely focused on economic growth. The lack of scholarly interest is perhaps due to the

underlying assumption that this group is primarily focused on pursuing and defending its own pecuniary self-interest (Abel 1985). Closer scrutiny, however, may reveal that this is not always the case and that commercial lawyers—in some contexts (not all)—also pursue larger development goals.

The following sections examine the roles played by commercial lawyers in Barbados and Jamaica in the creation of a developmental commercial law regime. First, the similar training and background of the lawyers in both countries are highlighted to show their common starting points.

PART II

Commonwealth Caribbean Legal Training: A Brief History

Legal education in the Commonwealth Caribbean is governed by a single entity—the Council of Legal Education ("CLE"). According to the Agreement Establishing the Council of Legal Education, the following 16 countries and territories send students to UWI and its three law schools to be trained as Caribbean Lawyers: Antigua; Bahamas; Barbados; Belize; The British Virgin Islands; Cayman Islands; Dominica; Grenada; Guyana; Jamaica; Montserrat; St. Kitts-Nevis-Anguilla; St. Lucia; St. Vincent; Trinidad and Tobago; and the Turks and Caicos Islands ("Commonwealth Caribbean Jurisdictions").[110] The first Faculty of Law in the Commonwealth Caribbean was established in Barbados at the University of the West Indies at Cave Hill in 1970. Subsequently, three law schools were established. In 1973, The Hugh Wooding Law School in Trinidad and Tobago was opened. In that same year, The Norman Manley Law

[110] See: Agreement Establishing the Council of Legal Education (1971). Retrieved January 8, 2019 (http://www.clecaribbean.com/treaty.php).

School was established in Jamaica. In 1998, the Eugene Dupuch Law School began operations in The Bahamas.

Before these developments, there was no department or school in the Commonwealth Caribbean providing formal legal education to aspiring students in the region (Lazarus-Black 2008: 42). The best that could be achieved by these individuals was "some part-time extra mural coaching in Barbados, Jamaica, and Trinidad and Tobago with the support of the [UWI][111] for those persons wishing to obtain an external L.L.B. degree" (Nunez-Tesheira 2001: 6). Otherwise, the only source of legal training was Great Britain (Lazarus-Black 2008: 42; Council of Legal Education 1972).

In a comprehensive report on the state of legal education in the Caribbean, revered Jamaican lawyer and legal scholar Lloyd Barnett (1996: 12) describes the pre-1970 state affairs:

> Prior to the establishment of the Faculty of Law of the University of the West Indies, there was no West Indian system of legal education. The primary means of legal training were by articleships with local solicitors culminating in the taking of the examinations of the English Law Society and by reading for the English Bar, with or without the taking of a law degree course as an internal or external student.

Generally speaking, students needed to earn a Bachelor of Law (L.L.B.) degree from the Faculty of Law (which typically took three years) and then complete two additional years of study at one of the aforementioned law schools (Hugh Wooding, Norman Manley or Eugene Dupuch law schools)—where they could earn a LEC. The LEC qualifies them to

[111] UWI as an institution was still in its relatively nascent development. It was chartered in 1948 and started with a single campus in Jamaica. Subsequent campuses were developed in Trinidad in 1960 and Barbados in 1963. More recently, in 2008, a new campus was opened in Antigua and Barbuda. UWI is the most prominent and oldest university serving the Commonwealth Caribbean. https://www.uwi.edu/history.asp. (Last visited January 2, 2019).

practice law throughout the Commonwealth Caribbean Jurisdictions.[112] To this end, students are required to travel to at least one (but potentially two, depending on their home country) other Caribbean country to complete their legal training. According to a report by consultants who reviewed legal education in the Caribbean in the 1980s:

> An obvious advantage of the present system is that it ensures that the new Caribbean lawyer does not get all his training in any one country. The Jamaican, Trinidadian and Guyanese have to go to Barbados for part of their training; the Barbadian and Guyanese have to go to Trinidad for their professional training; and citizens of the other territories have to do their entire training away from home. The students and graduates with who we spoke considered that this system helped to make them more fully aware of the Caribbean as a region and more conscious of the form the system of legal education should take to enable them to play a full part in the region.[113]

Consequently, legal training across Commonwealth Caribbean Jurisdictions has been fairly standard—from the academic curriculum (Barnett 1996) to the even the students' social experience (Marshall 1981).[114] Indeed, in 1979 the Faculty of Law made available an LL.M. program that focused on legislative drafting—the aim being to enable locally trained lawyers to be skilled in drafting legislation for the now independent nations of the Caribbean (Fraser 1980: 107). The important point here is that the lawyers in Barbados

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[112] Currently, there are mechanisms for foreign trained lawyers to become licensed to practice law in the Caribbean region. There is no clear sense of what percentage of the legal profession this group represents. It is fair to say, however, that the vast majority of lawyers are Caribbean trained.

[113] Marshall, R. (Sir). (June 1981) (Chairman). "Report of the Consultants Appointed to Assist the Joint Committee on Legal Education in a Review of Legal Education in the Commonwealth Caribbean" (Marshall Report).

[114] It is important to note that there is a "zoning arrangement" for attendance to the law schools. (http://nmls.edu.jm/programmes/2-year-programmes/; http://nmls.edu.jm/wp-content/uploads/2017/08/Student-Information-Guidelines-2017-2018.pdf). (Last visited January 3, 2019). See also Barnett (1996: 38).

and Jamaica are equally talented and informed about the legal rules and its potential for Caribbean society.

In the next sections, I discuss how this legal training maps on to the political and economic dynamics in each country in the post-colonial period.

PART III

Political Economy of Barbados

When Barbados gained political independence from the United Kingdom in 1966, the primary goal of the country's leaders was to transition "from an agrarian based economy to a more diversified one characterized by light to semi-heavy manufacturing and services" (Government of Barbados 2005: 11). Barbados' primary industry during the colonial period was sugar cane, which continued to contribute as much as 60 per cent of GDP to the country's economy at the time it became a sovereign nation (Business Barbados 2013, 136; Invest Barbados 2013, 7). Given this precarious foundation and the waning influence of the sugar industry (Drummond and Marsden 1995), upon gaining independence the state had an interest in quickly finding other sources of revenue.

While Barbados is known internationally as a tourist destination (one of its CEIs) (Berry 2014, 12-13; Invest Barbados 2009, 7; World Travel and Tourism Council 2015, 1),[115] its offshore banking (or offshore financial services (OFS)) sector has become prominent in recent decades and has made significant contributions to the island's

[115] As of 2014, Barbados' tourism sector contributed "10.8 [per cent] of total GDP" to the economy and "directly supported 14,000 jobs (11.1 [per cent] of total employment)" (World Travel and Tourism Council 2015: 1).

economy (Shipke 2011).[116] An OFS (or offshore) jurisdiction is "a country or territory that provides special legislative incentives to attract and retain firms conducting financial business with non-residents" (Butkiewicz and Gordon 2013: 165). This type of arrangement may lead to "a financial sector substantially larger than that needed for domestic economic activity" (2002: 165). The Barbadian people have gone to great lengths to develop a sophisticated legal framework to court companies and high net worth individuals interested in investing their money in Barbados (Carmichael 1996: 3-28, 268-272; Interview #12).

The OFS became an attractive area for exploration and development (Government of Barbados 2014) due to Barbados' stable political climate and strong legal institutions (Holden and Howell 2009a; Daniel's et al. 2011: 126). The island had a well-established Westminster-style parliamentary government, a highly respected judiciary, and some of the basic institutional trappings considered essential for foreign investment and economic growth—well-defined property rights and a good system of contract law (Graham 2002: 52; Antoine 2002: 12).

Bureaucratic/Legal Expertise in Barbados

To develop the OFS sector, the state legislated and implemented a variety of rules necessary for a competitive low-tax jurisdiction, including "banking confidentiality, company laws, trusts, tax policy and insurance legislation" (Antoine 2002, 12). The state also crafted or became party to key tax treaties crucial to the operations of offshore companies (and individuals). This undertaking was particularly impressive, given that

[116] As of 2008, 11 per cent of state revenues came from the offshore sector, as well as 4 per cent of GDP. In a country of 280,000 people, 3,500 were directly employed as a result of the sector (Shipke 2011; Patterson 2013: 28-31).

scholars have noted the island's meager bureaucratic arrangements. For example, with respect to the drafting of a local competition law, Michal Gal and Eleanor Fox (2014: 15) explained that the Barbadian Commission tasked with this agenda "face[d] major challenges due to insufficiency of technical staffing to manage broad and varied technical agendas. These limitations [were] often intertwined: civil service salary structures often restrict[ed] agencies from recruiting and maintaining highly skilled members."

Yet, the state managed to excel in the highly statute intensive arena of offshore banking. Patterson (2013: 28) asks whether the OFS sector explains Barbados' economic success, as compared to Jamaica. His answer is no—although he acknowledges the OFS' contribution to the economy, which was some 7.8% of GDP in [2011] (2013: 30).[117] I think an equally good question is: How did Barbados become an OFS center, and why have several other small islands not taken on the challenge—or have not been as successful?[118]

For a tiny country with few local experts (legal and business), the establishment of an OFS industry required significant effort from both the state and private sector, including competent legal counsel. Indeed, in the 1980s-1990s, Barbados relied heavily on a small cadre of local lawyers—with private and public sector expertise—to ensure the selection and implementation of the appropriate legislature infrastructure (Holder-

[117] It is important to recognize here that several professionals I interacted with in Barbados tended to think that the offshore banking sector contributed much more than 7.8% to the country's GDP. Some even estimated it is responsible for 50% or more of GDP, although they could not point to a specific source for this number.

[118] Several Caribbean countries have offshore banking statutes on their books, but only a handful are well know as "successful" offshore banking jurisdictions (see, example, Butkiewicz and Gordon 2013). For example, it is noteworthy that Jamaica has an International Financial Services Act, adopted in 2011, but is not known to be a successful offshore banking jurisdiction (2013: 166).

Olutayo 2016). This was also remarkable given that, in the years preceding the rise of the sector, Barbados had only a few hundred lawyers admitted to practice on the island. For example, in the mid-1980s, the island had only 217 attorneys listed as members of the bar (Newton 1988, 144-145). Of this number, only 28 served in government agencies and ministries (Table 4) (1988: 145-153).

Fortunately, the legislative framework for the OFS sector was well within the wheelhouse of Barbadian lawyers. Given that the United Kingdom was a leading financial center and the place where many Barbadian lawyers were trained prior to 1970, there were early opportunities for learning (Saxson 2011; Lazarus-Black 2008). Furthermore, neighboring countries like the Bahamas and the Cayman Islands with competitive OFS sectors presented ready policy and legislative models for legislators and local professionals (lawyers and accountants) to emulate. Caribbean legal scholar and expert on offshore financial services law Rose-Marie Antoine (2002: 6) proffers that "[offshore banking centers] tend to borrow heavily from each other such matters as legislative content, legal policy, style, institutions, norms and philosophy."

Table 4. Legal Profession in 1980s: Barbados and Jamaica [119]

	Judges & Magistrates	Legal Officers	Private Practitioners	Legal Academicians	Total Lawyers	Per Capita (approx.)
Barbados	12	28	159	18	217	88: 100,000
Jamaica	57	200	(Approx.) 455	8	675	31: 100,000

(Newton 1988, 144-145)

Coordination Between the State and the BLC

A senior lawyer and key figure in the development of Barbados' offshore banking sector describes the effort to bring international business to Barbados as a form of movement among the professional class—with law firms and accounting firms (KPMG, Coopers and Lybrand (now Price, Waterhouse, Coopers (PWC), and Ernst and Young, among others) leading the way (Interview #12).[120] At least, five interrelated factors seem to have influenced or provided the support for the establishment of the OFS sector in Barbados.

First, Barbadian commercial lawyers became keenly aware of the offshore banking sector in neighboring islands like Bermuda, The Bahamas, Cayman islands and the Bailiwick of Jersey (British dependencies), and were interested in gaining the benefits that those jurisdictions enjoyed (Interview #8). Some Barbadian lawyers travelled to

[119] This table was taken from Newton (1988). The number of lawyers noted as being in private practice in Jamaica is an approximation, and assumes that some lawyers serve in multiple overlapping roles, hence the fact that the amount in each category does not add up to 675 (Newton 1988, 144-145). According to the Barbados Statistical Service, Barbados' population in 1980 to be 247,129 (Barbados Statistical Service). The Caribbean Community (CARICOM) notes that Jamaica's population in 1982 was approximately 2,190,357 (CARICOM 2000: 4).

[120] The lawyers and accountants were simultaneously cooperative and competitive, as each group vied for clients and influence in the sector (Interview #12).

these destinations, as well as the United States and Canada, and gained direct insight into how tax legislation could be used to incentivize foreign investment (Interview #6; Interview #12; Interview #16).

Canada was particularly influential where it concerns tax incentives for overseas business investments. A trade relationship had blossomed between the two countries in the 1800s and, when Canadian tax policies in the 1970s encouraged Canadian businesses to invest overseas in countries like Barbados and have their profits returned to Canada without a heavy tax burden ("Exempt Surplus"), Barbadian lawyers and policymakers sought to learn as much as possible regarding how investment incentive legislation could work (Sears 2016: 8; Carmichael 2001, 56-57; Beckles 2006). Specifically, the BLC and local policymakers used their knowledge of Canada's flexible tax treatment of its companies when drafting their own tax legislation, and benefitted tremendously when Canada became the source of one of Barbados' early double taxation treaties in 1980 (Carmichael 2001: 113).[121] Indeed, some of the "initial growth [in OFS] came from highly respected and very sophisticated 'Blue Chip' Canadian companies," that were investors in Barbados (Sears 2016: 9).

A second factor that influenced the development of OFS in Barbados was a fairly receptive body of policymakers—often led by lawyer-Prime Ministers stretching back to the early post-colonial years.[122] While the International Business Companies (hereinafter

[121] During the 1970s through early 1990s, commercial law was not a popular area of practice or academic study, however. The University of the West Indies, where West Indian lawyers were trained after 1970, taught company law. It was only after OFS gained traction on the island that courses began to focus on offshore business law (Interview #12).

[122] It was not feasible to get an exact accounting of the percentage of lawyer-parliamentarians in the post-colonial period. According to a senior commercial lawyer in Barbados, however, the island always had a very heavy predominance of lawyers in parliament. The thought was that, in

"IBC Act"), which provides tax incentives to foreign business operating in Barbados was formally adopted in 1992, the framework for OFS was already being put in place as early as the 1960s. Barbados' first Prime Minister (then Premier) and lawyer, Errol Barrow, "was the driving catalyst for developing and passing" the original IBC Act in 1965 to attract business to the island (Sears 2016, 8; Interview #6).

This legislative foundation was expanded on in the 1970s by yet another lawyer-Prime Minister, Jon "Tom" Adams. As efforts to diversify Barbados' economy continued, Adams "would further the work of Errol Barrow by introducing legislative changes and new pieces of legislation to make Barbados even more compelling for international investors" (Sears 2016: 9). Several prominent commercial lawyers on the island suggest it mattered for the development of the OFS sector to have such a receptive and cooperative body of legislators.[123] The private sector (commercial) lawyers were able to effectively engage with the state and share insights on effective policies and legislation. For example, a number of important OFS supportive legislation were adopted under the auspices of Prime Minister Adams. They include: amendments to the original (1965) IBC Act, a new "Offshore Banking Act (1980), Companies Act (Amended) (1980), the Exempt Insurance Act (1983), Barbados Foreign Sales Corporation Act (1984), Shipping Incentive Act (1982), the Securities Exchange Act (1982)," among others (Sears 2016: 9).

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order to have the necessary training and oratorical skill, you needed to have legal training. The estimate is that almost 2/3 of parliament in the early days of independence had a legal background. Today, she estimates it is perhaps less than 50 percent (Interview #6).

[123] It bears noting that Barbados' recently elected Prime Minister, and first woman to hold the office, Mia Mottley is also a lawyer and was previously Attorney General (Economic Times 2018).

Importantly, Prime Minister Adams had several lawyers in his cabinet who were familiar with the technical regulations associated with offshore banking as a direct result of their professional practice and training (which, recall, took place primarily in England prior to 1970) (Interview #6). And, Barbados' third Prime Minister, lawyer Harold Bernard St. John, is credited as being very engaged and knowledgeable where it concerns the intricate details of international business—suggesting he was an able and willing partner with commercial lawyers (Interview #12). A senior commercial lawyer on the island estimates that about two-thirds of the members of parliament had legal training in the early years following political independence and this was helpful to the OFS sector (Interview #12). These parliamentarians were not necessarily involved in the OFS sector themselves.

A third factor, directly interrelated with the second, was that Barbados curiously had many lawyers at the helm of the country in its nascent years as a sovereign nation. Barbados spent the first twenty-one years of political independence under the leadership of lawyer-Prime Ministers—three to be specific.[124] While lawyers are well-known to be associated with politics, why is it that Barbadian society tended more toward lawyers than any other professional group for political leadership (see Appendix 7)? Perhaps this is due to the society's perspective on the meaning and importance of law.

Some legal scholars argue that compared to other British post-colonies, Barbados had a higher degree of commitment to legality due to the early exposure of indigenous Barbadians to formal political activity and lawmaking under British colonial rule (Daniels et al. 2011). Specifically, during the colonial period, freed blacks were allowed

[124] Errol Barrow (1966-1976); J.M.G. Adams (1976-1985); Bernard St. John (1985-1986); Errol Barrow (1986-1987).

involvement with legislative affairs—which was unique among British colonies (2011: 131). When the country gained its sovereignty over a century later, indigenous Barbadians already had sufficient experience with lawmaking that they were well prepared for political leadership (2011: 131). Patterson (2013) proposes that Barbadians learned how to effectively run—not just follow—institutions during the colonial period. As mentioned above (Introduction: 18), the colonial experience further allowed for a high level of education of Black Barbadians, which meant that at independence the society had valuable social and intellectual capital with which to also pursue economic development (Patterson 2013; Beckles 2006; Interview #31).

A fourth factor that contributed to the viability of the OFS sector on the island was the new system of legal education that developed in the Commonwealth Caribbean in 1970. The Faculty of Law at UWI was established, including professional law schools (see Part II). From this point onward UWI would serve as ground zero for legal education in the Caribbean. This development meant that more West Indians were able to join the profession than before, since the high cost and inconvenience associated with travel to England was no longer a barrier to entry (Interview #8; Interview #11). As a result, law practice on the island became less exclusive and more competitive than before and new lawyers sought to distinguish themselves by pursuing new areas of practice, such as commercial (or business law more broadly) (Interview #11). This increased the availability of expertise on the island that would be supportive of a technical sector like OFS.

Fifth, and related to the development of the Faculty of Law, in the early 1970s, the legal profession in Barbados went through a metamorphosis. The Legal Profession

Act of 1973 merged the two pre-existing branches of the bar. Prior to that, lawyers were divided into "barristers" and "solicitors" (Baker 1990: 185-187) and were assigned to work either in court (barristers) or with clients in transactional settings (solicitors). Harry Cohen (1987: 7) once explained the difference between solicitors and barristers in the following way: "Theoretically barristers are advocates and specialists in various field of law, and solicitors are lawyers who deal with clients directly employing barristers for advice and advocacy in higher courts."

Solicitors generally helped clients with a variety of transactional legal matters. Their training prior to 1973 included successfully completing an examination prepared by the Incorporated Law Society of England. Additionally, these aspiring legal professionals were required to learn at the feet of already established solicitors for approximately five years (Nunez-Tesheira 2001: 7). Those individuals who aspired to be a barrister, however, were required to travel to England and spend time at one of the Inns of Courts—where they would study English law—and ultimately take a qualifying exam. The barrister had the additional benefit of representing clients in court. With the fusion of the legal profession in the Caribbean, both barrister and solicitor became known as "attorney-at-law." This also meant they were now actively involved in a single bar association (Interview #8), which led to a more unified professional infrastructure for technical advice, advocacy and collective action.

A confluence of the aforementioned five factors created a social climate that enabled the legal profession to be more developmental in vision. To be clear, it is feasible that the BLC in Barbados did not necessarily see itself as developmental during the 1960s, 70s and 80s, although specific individuals certainly did see it in that light

(Holder-Olutayo 2016; Interview #12). Indeed, the presence of lawyers in leadership positions in the state may have allowed for more synergy with private sector lawyers and a greater willingness to work on commercial law projects that could prove beneficial to the country's economic development. To this end, it is not the intent of this dissertation to glorify Barbadian commercial lawyers as particularly farsighted. Instead, the main point is to begin to understand whether coordination between the BLC and the state may have served a worthwhile development purpose.

Several senior lawyers on the island, including some with experience in government, suggest that the OFS sector was more than just a profit-making enterprise for lawyers. It was part of an overall social agenda for the society.

For example, according to one former lawyer and cabinet official:

> I think that there came a point in time when social justice issues were being adequately dealt with…As politicians, we often say even now, that our major social issues have been dealt with. We have one or two areas that we still need to tweak. But we have equality of men and women, we have statutes dealing with conditions of work. We've covered all those issues. So, our big issues now, are centered around how to pay for those gain that we made back then. Now in the 1980s I think we really started to work on commercial law (Interview #11).

The understanding that social issues were dealt with was quite reasonable. It is certainly not lost on Barbadians that the country entered political independence with the most literate population of its Caribbean neighbors (Patterson 2013: 19). Reflecting on the Barbadian census of 1946, Patterson (2013: 19), highlights that: "91 percent of the population over 10 years of age was able to both read and write, with a total illiteracy rate of only 7% (the difference was accounted for by the semi-literate, those who could read by not write)." Indeed, the census highlighted that men were more illiterate than women, suggesting opportunities for women to gain an education at the time (2013: 19-20).

Indeed, based on Patterson (2013) and Daniels et al.'s (2011) theories of Barbados' colonial experience, it is fair to assume that Barbadians both had greater opportunities for institutional learning and an appreciation for the role law could play in social ordering. According to Patterson (2013: 35):

> Having learned to play the institutional games of British colonial culture so well (as disciplined, productive workers, lower and mid-level colonial administrators, soldiers, policemen, artisans and other skilled workers, Anglicans, diligent pupils, schoolmasters, missioners, lawyers and other professionals, and not least of all, cricketers) it was natural for Barbadians to carry over these procedural skills to running the institutions they finally inherited with independence, as well as effectively implementing policy. Once account is taken of the declarative-procedural distinction, several otherwise puzzling cases of institutional similarity and sharply different economic outcomes between pairs of countries are easily explained.

Patterson's (2013) historical sociology of Barbados (and Jamaica) is compelling. It would be helpful, however, to further unearth how Barbados' institutional learning specifically manifested itself in the way law was used for purposes of economic development. In this case, the legislatively intensive OFS sector may have been particularly attractive because it fell within the bureaucratic and lawmaking skills of Barbadian leaders.

An example of the confidence Barbadians have in their governance skills is how leaders defied the IMF in the early 1990s. During this period, the government and the private sector collaborated and ignored the IMF's currency devaluation advice. They accepted wage cuts in both sectors to rescue their faltering economy (Henry 2013: 22-26). Not many small countries would have been so bold. Indeed, Barbados displayed an immense degree of state capacity in this context—if one includes the ability to coordinate with the private sector to achieve national goals as an aspect of state capacity.

A common theme among professional Barbadians and throughout the written materials is that the early lawyer-prime ministers had a clear social vision for the society, which was connected to the development of commerce (Interview #6; Interview #11; Interview #12). They were intent on coordinating the public and private spheres of the community. For example, Barbadians saw lawyer-in-chief Errol Barrow as a pragmatist who was committed to the social development of the island, but in a non-socialist way (Interview #6). One interesting perspective is that early leaders, like Barrow and Adams, saw political leadership as akin to legal advocacy. While they understood the basic framework of international business, they may not have been fluent in the technicalities of the field. Notwithstanding, they were advocates for a better way of life for average Barbadians and could easily transition the advocacy they employed in legal representation to the realm of politics and economic development (Interview #11; Interview #6). While it cannot be said that there was a common philosophy[125] among Barbadian lawyers about the role of commercial law and economic development, there seemed to have been a willingness to work with the state to develop a legal structure for enhanced economic activity—at least where the OFS sector was concerned.

Legal Reform in Light of State Capacity

More recently, the Barbadian government and professionals from the OFS sector have focused their attention on protecting the industry they built steadily from the ground up. There is an abiding concern that various international initiatives geared at regulating

[125] Some would argue that, despite the rise of the law and development movement in the United States in the 1960s and 1970s (Trubek 2014; Davis and Trebilcock 2008), Caribbean lawyers of that era were just using the common law they inherited and not aggressively seeking advances (for example, Interview #10).

offshore banking—particularly the degree to which the transactions of foreign clients are held confidential—could undermine the sector (Carmichael 2011; Interview #4). Fallout from the 2008 financial crisis, which affected the OFS sector, and pressure from the international community concerned with tax avoidance of citizens from wealthy countries has caused Barbadian leaders to carefully prioritize reforms. For example, the United States by way of laws like the United States Foreign Account Tax Compliance Act ("FATCA")[126] and the OECD by way of various Tax Information Exchange Agreements (OECD 2018) have facilitated sustained efforts to gain access to personal information of account holders in Barbados who are citizens of the United States and other OECD countries (Antoine 2002; Interview #29). The goal of these measures is to ensure tax compliance and prevent money laundering (Antoine 2002; Bell 2002). Some of these international concerns stem from recent events like the well-publicized revelations concerning the Panama Papers and Paradise Papers (Bernstein 2017).

With respect to confidentiality, onshore jurisdictions, such as the United States, have an interest in being able to investigate criminal activities effectively where access to financial records can be quite helpful, but are hindered by protective legislation in OFS jurisdictions (Antoine 2002: 20). But, given that "[b]ank confidentiality is the cornerstone of offshore confidentiality and its most controversial component," any significant reduction in protection in this area could severely damage the sector and have far-reaching ripple effects throughout the local economy (Antoine 2002: 20).

[126] FATCA was a component of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501 (2010). The law "generally requires that foreign financial institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments" (Internal Revenue Service 2018).

To adequately address the international scrutiny of the OFS sector, however, requires state resources, including the availability of resident technocrats to manage the regulatory requirements of tax information sharing agreements with countries like the United States, much less undertake legal reforms to maintain the sectors viability. For example, Barbados' agreement with the United States to implement FATCA requires the performance of many detailed tasks, including sufficient due diligence to determine if accounts held at local financial institutions belong to U.S. citizens or permanent residents and provide specific information about their financial transactions (Mottley 2002).[127]

In short, the crisis facing the OFS sectors globally requires states to utilize valuable financial and human resources[128] that could be otherwise allocated. In 2002, Attorney General (now Prime Minister) of Barbados, Mia Mottley (2002), noted that the state had a small group of government lawyers and other civil servants that manage issues and legislation related to international business, as well as a range of domestic regulation including tax collection. This team was particularly small and unable to undertake multiple complex tasks simultaneously (Mottley 2002: 419-20). For example, Mottley (2002: 413) explained at the time that Barbados had two persons in government who managed the "administrative aspects of international business." Further, there is a single

[127] Information about the FATCA requirements for Barbados can be found at https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (Last visited December 28, 2018). The agreement is titled "Agreement between the Government of the United States of America and the Government of Barbados to Improve International Tax Compliance and to Implement FATCA."

[128] More specifically, there is need for legal and bureaucratic expertise to pass legislation and effectively implement it, given the interdependence of commercial laws. As Pistor notes (2002: 107-108), it is rare to change one rule or area of law without ripple effects to other areas. In a tiny country with a small bar association and limited bureaucratic capacity, it would require extensive work and expertise to overhaul the entire secured transactions system.

department—that of the Chief Parliamentary Counsel—that prepares legislation for parliament, and "a director of public prosecutions department that is responsible for prosecutions, and a solicitor general's department that is responsible for advising government on all of its civil liability plus international law obligations."

Limited state capacity could therefore be one reason little attention has been paid secured transactions reform, despite the need for greater access to credit by SMEs on the island, calls for reform from independent experts, and even Barbados' low performance in the Doing Business rankings. Expectedly, a small island with a current bar membership of just under 1000 attorneys—approximately 340 lawyers per 100,000 people—a tiny subset of which are involved in government practice, would be hesitant to undertake such a task.[129] Moreover, the state and BLC on the island have found ways to work together to address the difficulties associated with access to credit that are not readily apparent through the Doing Business rankings. For example, evidence suggests that at least some corporations (though likely not SMEs) tend to get loans from international institutions and use foreign laws to govern the financing transaction.[130] According to a senior commercial lawyer on the island, Mary Mahabir (2009, 18-19), some Barbadian firms involved in international business use the secured transactions "laws of a province in Canada or of the state of New York."

Furthermore, Barbadian commercial lawyers concerned with economic development make a clear distinction between business incentive legislation and business

[129] Barbados Bar Association. Retrieved December 2, 2018). (http://www.barbadosbarassociation.com/about_us.cfm).

[130] Cohen (2008: 780) notes that "through the use of choice of law, forum selection and arbitration clauses, contractual parties have great latitude in shaping the legal orders that will govern specific transactions and particular industries."

facilitation legislation (Interview #16). Business incentive laws, on the one hand, are aimed at attracting investment to a jurisdiction and include those pieces of legislation that provide tax incentives to investors—the quintessential offshore banking statute (Interview #16). Business facilitation laws, on the other hand, allow for easier and more efficient economic activity but do not necessarily incentivize business—although they could. Secured transactions laws fall into the latter category. According to this distinction, secured transactions reform would be nice, but attracting business would be nicer. The Barbadian state and BLC have been primarily focused on incentivizing investments. And, with a small BLC and limited bureaucratic resources, it is reasonable to see why secured transactions reform has taken a back seat at this time.

Notably, the BLC in Barbados has not mounted a collective effort to engage in secured transactions reform, even though it could benefit a range of their clients (small business and hotels in particular). Indeed, while attending the 15th Annual CCLW in Barbados, there was not one item by a local lawyer or law firm on the agenda addressing secured transactions reform (CCLW 2015). And when questions of secured transactions reform were posed, lawyers appeared unconcerned. While several lawyers addressed the inefficiencies of the legal system, including the perception that legal matters move at a glacial pace (Interview #18; Interview #21), there was little sense of urgency toward secured lending reforms.

Importantly, the Minister of Commerce and Small Business visited the workshop to implore the legal community to help foster "a more vibrant and friendly business climate in the region" (Lavine 2016). The Minister, however, was not interested in secured transactions or any other commercial law reform. Instead, he implored the BLC

to support the establishment and operation of a Caribbean Court for Arbitration and Mediation as a low cost way of resolving business disputes in the Caribbean region. In recent years, Barbados has endeavored to build on its international business expertise to create an international business arbitration court. The state has sought to use its existing stock of legal experts to extend and complement its OFS sector—rather than immediately pursue multiple models and standards for secured transactions reform and other commercial laws proposed by IOs.[131]

One potential reason for the lack of enthusiasm for this type of commercial law reform may have been a deterioration in the state's capabilities for coordinating the public and private sectors (Henry 2013: 22-26). The recent government (the Democratic Labour Party ("DLP"), which was in power from 2008-2018) may not have effectively engaged or worked with the BLC in a manner that inspired their enthusiasm and expertise to address reforms in other areas of commercial law. Recently, economist Pranab Bardhan (2016: 864) asserted that:

> Beyond being a "nightwatchman" of property rights and markets, the state often needs to be a guide, coordinator, stimulator and a catalytic agent for economic activities in situations where, for historical and structural reasons, the development process has been atrophied and the path forward darkened by all kinds of missing information and incomplete markets.

Indeed, in the 2018 national elections, the incumbent DLP—was resoundingly defeated. The Barbados Labour Party ("BLP") won every seat in the 30-member-parliament—the first time this has happened for any party since the country gained its

[131] The prominent exception to this is the case of bankruptcy laws. Barbados adopted new bankruptcy laws in 2001—Bankruptcy and Insolvency Act "based largely on the more modern Canadian principles of bankruptcy and insolvency practice" (Dear 2013). The argument here is that bankruptcy reform benefited companies, not just individuals. According to legal commentator Amiri Dear (2013: 1-2), one of the main aims was to attract foreign businesses to the island.

sovereignty. While there was a general disenchantment with the DLP over the handling of the economy over the last ten years, some commentators specifically suggest that more could have been done to provide public goods and facilitate private sector activities—particularly in the tourism sector.[132]

PART IV

Political Economy of Jamaica

Jamaica's model for economic development differed greatly from that of Barbados' (Henry 2013: 22-26). First, unlike Barbados, Jamaica had a natural resource—bauxite—that produced handsomely for the country. Ironically, bauxite's success may have undermined the type of economic development vision required by early leaders. Second, while Jamaica was a larger territory than Barbados, with more lawyers—approximately 675 by the 1980s[133]—and access to FDI (Stephens and Stephens 1986: 22), the state chose not to pursue OFS (Johnson 2001, 11). Instead, the state focused on moving from an economy based on agriculture to one built on industrialization. In this context, business incentive legislation was used to encourage foreign capital to invest in the island.

Foreign interests would come to own much of the productive sectors of the country and income inequality would soar (Stephens and Stephens 1986: 30). Already fraught with the residual racial divisions from the colonial era, the society was ready for change (Seaga 2009: 66-68; Stephens and Stephens 1986: 25). A democratic socialist

[132] See: Caribbean Elections: Barbados Election Centre. Retrieved January 9, 2019 (http://www.caribbeanelections.com/bb/elections/bb_results_2018.asp).

[133] Of this number, 200 worked in government agencies and only 8 were described as "academic lawyers" (Newton 1988, 146-147; Table 4).

government was elected to power in 1972 (the People's National Party or "PNP")—just ten years after political independence—to provide this change. The state then proceeded to nationalize key industries and implement legislation supporting a variety of social programs, which required tremendous bureaucratic resources (Winston 1983: 152; Stephens and Stephens 1986: 69-84).

Jamaica's current economy is driven by tourism, bauxite, and foreign direct investment ("FDI") (Berry 2014: 12-13; IMF 2016: 16), during the colonial period it was limited to agriculture—primarily the export of banana and sugar under a restrictive British regime (Panton 1993, 1-4). In the early 1950s, Jamaica's mining sector began to grow and at the time of political independence, the country's bauxite industry was its main source of income and economic growth (Stephens and Stephens 1986: 22). Indeed, by "the 1960s, Jamaica was the world's largest producer of bauxite, the base mineral in the manufacture of aluminum, a metal which played a very important role in post-war development of the world capitalist economy" (Stephens and Stephens 1986: 26, 30-31). This sector would eventually decline for several reasons, including lack of state coordination capacity (Barclay 2010).

Bureaucratic/Legal Expertise in Jamaica

Like Barbados, bureaucratic and legal expertise in the commercial law arena was weak (Rajbansee 1972; Interview #7; Interview #10). Commentators argue Jamaica's early development failures were due to, among other things "thin layers of leadership, limited technocratic skills and intellectual resources" (Panton 1993: 45; Stone 1981). Despite attempts to build a competent and well talented bureaucracy, the British colonial

experience led to dysfunction within the government in the post-colonial period (Stephens and Stephens 1986: 40-41; see also Fong 2010).

Unlike Barbados, the Jamaican colonial experience did not allow for adequate institutional learning for indigenous Jamaicans for a variety of reasons. Patterson (2013) points to factors such as geography and social distance between ex-slaves and colonists post abolition as a few of the reasons for this outcome. Significantly, the planter-class did not permit ex-slaves to be involved in governance (Daniels et al. 2011: 140) and educational opportunities were more limited. Consequently, the literacy rates were much different from those in Barbados. For example, in the 1940s, "only 74 [%] of the population 10 years and older could both read and write" (Patterson 2013: 19). As far as racial groups were concerned, the Black literacy rate was 72%, while 97% of Whites were considered literate (2013: 19). In Barbados, the racial disparity was smaller—90% for Blacks and 98% for Whites (2013: 19).

Perhaps one reason for the lower education rates in Jamaica is the many absentee plantations owners, who didn't invest as heavily in educational institutions (see, example, Ragatz 1931; Patterson 2013). Patterson (2013) suggests that, for a variety of geographic and social reasons (including the higher likelihood of slave rebellion), colonists were less likely to settle in Jamaica, as compared to Barbados. In this vein, the assumption is that the difference in colonial experience meant a difference in the quality of the institutions that developed. At one extreme—one that requires further empirical research—an argument could be made that the colonial institutions in Jamaica were not as developmental as those in Barbados (see, example, Acemoglu and Robinson 2012; Patterson 2013; Kohli 2004). Consequently, upon gaining self-government, Jamaican

political leaders sought to lead a state apparatus that served the interest of the poor and previously excluded masses (Daniels et al. 2011: 139-140),[134] which ultimately served to undermine the professionalism and effectiveness of the civil service.[135]

Where it concerns the law as a tool for development, one view is particularly aware of the limits on how much legal reform can accomplish. Specifically, there is a sense that legislation is merely one way of pacifying the population without providing them with anything tangible. Frederick Nunes (1984: 50), a law student at the UWI in the mid-1980s, makes the case in the student run law review journal that:

> At least one example of this illusory function of the legislature has been documented with solid statistical data. It has been shown that in Jamaica both the People's National Party (PNP) and the Jamaica Labour Party (JLP) have consistently (1948-1974) created the illusion of equal opportunity in access to high schools while in fact, far from all classes having equal access to high schools, one net consequence has been to squeeze the poorer classes out of primary schools. But the populace, totally taken by the illusion, is fully supportive of the legislation.

Consistent with Daniels et al.'s (2011) thesis, this skepticism is directly tied to what is considered a populist response to the previous power and influence of the colonial government. The view is that post-colonial leaders are primarily interested in symbolic gestures and lack the intent or capability to implement true reform (Nunez 1984: 49-50).

Beyond the populism of local leaders, there is also the sense that the colonial administration of the island left the post-colonial civil service in relatively poor

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[134] Daniels et al. (2011: 139-14) note that, post-independence there was an effort on the part of Jamaican leaders to "[reorient] the state apparatus to further the interest of indigenous Jamaicans (who were almost all black working-class citizens), rather than crafting a limited government with institutionalized checks and balances."

[135] According to Stephens and Stephens (1986: 40): "The desire to remain in control stood in contradiction to the need for the creation of new, flexible, and at least partly autonomous state agencies in charge of promoting economic development."

condition—at least as compared to Barbados. According to Stephens and Stephens (1986: 40):

> The legacy of colonialism was also responsible for a large part of the behavioral obstacles to efficient administration. Under colonialism, civil servants were socialized into faithfully executing decisions, not taking them. Thus the civil service was infinitely better at shuffling papers and abdicating responsibility than at planning and managing the implementation of policies and programs (Stephens and Stephens 1986: 40).

Consider the decline of the Jamaican bauxite industry. In addition to a levy imposed by the democratic socialist government in the 1970s that spurred investors to look elsewhere, such as Guinea and Australia, scholars argue that Jamaica's bureaucracy was inadequate to the task of managing the bauxite sector (Barclay 2010). The state's main institution charged with overseeing growth in the industry—the Jamaica Bauxite Institute—failed to properly compensate employees and was therefore unable to retain qualified staff (Barclay 2010).

There was "high turnover of its skilled and senior staff," as a result of the uncompetitive nature of salaries and "forced terminations and government-imposed redundancy," which dashed any hopes for a Weberian type bureaucracy (Barclay 2010: 163). Civil servants could not expect a promising long-term career with the state. The dysfunction in this area was exacerbated by the consequent inability of bureaucrats to coordinate with the private sector to further the goals of the industry (2010: 164). Jamaica would eventually lose its place as the bauxite capital of the world and countries like Australia, Guinea, and Brazil (Jamaica Bauxite Institute would take over (2010: 158).

Coordination Between the State and the BLC

With respect to the BLC, despite similar legal training to their Barbadian counterparts in the United Kingdom and at the University of the West Indies post 1970, there was no apparent cohesiveness or collective effort to enhance commercial activity through law reform on the island (see, example, Lazarus-Black 2008). The democratic socialist government of the 1970s under Prime Minister Michael Manley would not have made such an effort easy by any measure, even if there were sufficient interests (Johnson 2001: 11). Further, during this early period there was tremendous capital flight from the island out of concern for the government's socialist rhetoric and redistribution policies (Stephens and Stephens 1986: 98-100).

The politics of the time notwithstanding, senior lawyers recall there was not significant attention paid to commercial law matters—at least where legislation or legal reform was concerned (Interview #7; Interview #10). The dearth of scholarly or professional materials written in the subject area in local and regional law journals during the 1960s, 70s and 80s supports this general proposition. According to one prominent senior lawyer, who is also active with the CLSC, in the early days commercial law on the island was confined to a small group of elite lawyers who represented wealthy Jamaican families and business (and who were from wealthy families themselves). Importantly, these early commercial lawyers served as business people in their own right—lending money informally to individuals pursuing private enterprise (Interview #7; Interview #15). Less than twenty was a crude estimate for how many of them were in practice in the first decade or two of political independence (Interview #7).

A highly regarded and prolific Jamaican legal scholar who also served in government positions and was actively involved in development of legal education on the island, proffered that he very much doubted that "in the 1960s and 1970s there was even any informal coalition of commercial/business lawyers in the newly independent states" (Interview #15). Another feature of Jamaican society that tends to be touched upon in social conversations—and perhaps related to the nature of the informal coalition of commercial lawyers—is that only a small handful of families control the majority of wealth and power on the island. In turn, the commercial lawyers who represented those families were not particularly interested in legislative reform for the benefit of the larger society—but rather in ensuring that their clients came out ahead in the various private transactions (Interview #10; Interview #7). Even if these lawyers were open to collaborating with the state on legal reforms that would increase commerce on the island, the socialist government in the 1970s was certainly not seeking to coordinate with this group—who were undoubtedly seen as part of the plantocracy, deemed responsible for much if the inequality emanating from the colonial period (see generally Stephens and Stephens 1986; Manley 1975).[136]

In 1980, an island-wide poll of over 1000 persons regarding the social perception of lawyers in Jamaica found "appreciable need" for legal help in areas such as property, landlord tenant, and contract law—to name a few commercial areas (Stone 1982: 114). Nonetheless, when asked which areas of law were in need of reform, the vast majority of respondents were concerned with issues of criminal and family law (see Table 5).

[136] It is vital to note here that, outside of the commercial law arena, lawyers in Jamaica have been vital to a cross-section of the society—particularly where it regards representing individuals and groups involved in a range of "social conflicts" (Stone 1982: 103; see also Ranston 1999).

Table 5: Areas Deemed Important for Reform in the 1980s (Stone 1982: 110-11)

Area in Need of Reform	Percentage of Respondents
"Discriminalising [sic] ganja use"	25%
"Family law (more protection for rights of children[,] mothers and fathers)"	22%
"Easier access to guns by law-abiding citizens"	16%
"Liberalizing foreign exchange restrictions"	12%
"Harsher penalties for praedial larceny"	10%
"Harsher penalties for rape"	10%
"Abolition of or limits to death penalty law"	6%
"More rehabilitation for prisoners"	5%
"Better protection of the motorist under traffic laws"	5%
"Removing vagrancy law"	5%
"Stiffer penalties for overcharging for goods"	5%
"More protection for landlord and tenants"	4%
"Protection of the rights of taxpayer in income tax"	2%
"Increase age of maturity"	2%
"Decriminalize laws governing mental illness"	2%
"More protection of land owners rights"	1%
"More protection of hire purchase buyers"	1%

Another potential reason for the historically minimal interest in commercial law matters is the informal nature of the Jamaican economy.[137] There is a persistent tendency toward doing business outside of the purview of the law—only turning to law when

[137] Consider, for example, the case of Jamaica's copyright laws, which was not reformed for over 80 years (1911-1993)—after the law of the United Kingdom became law of the land. In the interim, the country had a burgeoning music industry (Power and Hallencreutz 2002), which needed the protection of strong copyright laws. According to Jamaican intellectual property expert Dianne Daley (2013: 200-201), Jamaican music (like ska and reggae) was raging success in the 1950s-1970s:

> [b]ut the success of the music ran ahead of the local appreciation of copyright and producers had the upper hand over songwriters and performers. The authorship of some original Jamaican songs was wrongly accredited to producers and royalties were diverted from songwriters leading to conflicting ownership claims. The provisions of the 1911 Act relating to commissioned works and works created by employees and apprentices together with the absence of moral rights appear to have facilitated such practice.

problems arise (Interview #7; Interview #31). Interestingly, one perspective is that in the early post-colonial decades, individuals did not depend so much on law for economic help. Instead, trade unions were the source of assistance and advocacy for matters pertaining to higher wages and better working conditions (Interview #10; see also Sherlock and Bennett 1998: 367-72; Eaton 1995).[138] For these, and other reasons, the commercial law bar does not appear to be particularly influential with the state when it comes to matters of law reform (Interview #1).[139]

This attitude has not changed much, despite the rapid development of commercial laws on the island since the 1990s. The Jamaican BLC, particularly the commercial law bar, does not see itself as necessarily responsible for shaping commercial law—at least where it concerns law's contribution to the larger economy (Interview #7; Interview #1).[140] According to a former Attorney General, government lawyers are essentially the individuals (and, together, the group) making the decision as to what type of business and legislation are appropriate for development—not the private sector (Interview #10). With this type of practice, problems concerning efficient regulations or appropriate regulation

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[138] There was a vibrant labor movement in both Barbados and Jamaica in late colonial and early post-colonial period (see Beckles 2006; Sherlock and Bennett 1998).

[139] Indeed, the private sector appears generally neutral with respect to commercial law reform (Interview #15). A former Attorney General noted that one of the larger issues regarding Jamaican economic development is education. A large swath of the population does not have a good grasp of business or commercial concepts, much less the role law plays.

[140] In terms of organization for collective action, across the Commonwealth Caribbean there have been structural changes to the profession since 1970. First, the University of West Indies became a place where Jamaican lawyers could be trained, which meant greater access to a legal education for a wider cross section of Jamaicans—much like in Barbados (see above). Second, the legal profession was also fused into "attorneys-at-law" from barristers and solicitors (Interview #15). Additionally, the official founding of the Bar Association in 1973, gave these legally trained individuals a formal means of organizing themselves. http://www.jambar.org/index.php?option=com_content&view=article&id=17&Itemid=215. (Last visited January 5, 2019).

for commerce, which could be solved with the help of the private sector, become problems that the citizenry look to politics to solve. Consequently, despite a state with low bureaucratic capacity, the population tends to expect government alone provide solutions and not a coordinated effort with the private sector (Interview #10).

Despite the development of a formal bar association with a fused profession (solicitors and barristers) in the 1970s, and with that development the potential for greater profession cohesion within the Legal Complex, the nature of early political leadership on the island may have blunted the influence of the commercial law bar. Apart from Premier and legal luminary Norman Manley (Ranston 1999), who helped usher the country into sovereignty in 1962, there were fewer lawyer-Prime Ministers in Jamaica than in Barbados post-independence. This is not to say that many lawyers have not been involved in political life in Jamaica over the country's 56 years of political independence.[141] Only few, however, have served as Prime Minister (see Appendices 8 and 9, comparing Barbados and Jamaica in this regard).[142]

More recently, between 1992-2006, lawyer Percival James Patterson served as Prime Minister—the longest serving in the country's history (Spaulding 2011).[143] Jamaica's second elected Prime Minister, Sir Donald Sangster, was also a lawyer. Sir

[141] Records indicating the professional background of parliamentarians (members of parliament) since political independence could not be found in Barbados or Jamaica.

[142] Proportion of Lawyers-in-Chief for Barbados: 7/11 (63.6%); Number of years with Lawyers as chief executive - 32; Proportion since independence 32/53 (60.4%). Proportion Lawyers-in-chief for Jamaica: 2/10 (20%); Number of years with Lawyers as chief executive - 14; Proportion since independence 14/57 (24.6%).

[143] It is worth noting that Prime Minister Patterson was not from a pro-business political party. His party, the People's National Party (PNP), promoted a socialist ideology in the 1970s under Prime Minister Michael Manley.

Donald died, however, in 1967—after only 48 days in office.[144] In the early decades of political independence, fiery trade union activists led the nation.[145] These leaders actively pursued social justice matters and were less known for their economic prowess or technocratic abilities. Consequently, they did not pursue the same types of legislative planning in the business arena as their Barbadian counterparts, nor did they provide the same kind of partnership to private sector commercial lawyers in pursuit of business friendly legislation (see generally Stephens and Stephens 1986). This early dynamic may have set the tone for the relationship and subsequent value placed on the BLC when it comes to commercial law reform, even when more overtly pro-business governments were in office.

Legal Reforms With Limited State Capacity

Notwithstanding, the temporal distance from political independence and the persistent weakness in bureaucratic capabilities, the state appears uninterested in meaningfully courting the skills and insights of the commercial law bar where it concerns law reform in Jamaica (Interview #1; Interview #9). In the past, the Office of the Parliamentary Counsel has even sought technical assistance from international actors to enhance the state's ability to efficiently draft legislation for the country (see, example, The Commonwealth 2015). Much like in Barbados, the government human and financial

[144] See: https://nlj.gov.jm/wp-content/uploads/2017/05/bn_sangster_db_007.pdf. (Last visited January 14, 2019).

[145] These leaders included Alexander Bustamante (1962-1967), Hugh Shearer (1967-1972) and Michael Manley (1972-1980) (Sherlock and Bennett 1998; Stephens and Stephens 1986).

resources are generally slim, which means they can only work on so many complex pieces of legislation at a time and no more (Interview #7).

Despite these realities, Jamaica has consistently sought to improve its business climate to encourage foreign investments, as well as stimulate local ones—especially to help bolster the tourist industry. Recent years have seen greater attention paid to law as a means to achieve this goal. According to the U.S. State Department:

> [B]etween May and December 2013, Jamaica's Parliament passed 11 pieces of legislation to improve the business environment and support economic growth through a simplified tax system and broadened tax base. During 2014 the government continued its reform agenda with the passage of an Insolvency Act to make bankruptcy proceedings more efficient. The establishment of credit bureaus and a Collateral Registry under the Security Interest in Personal Property [("SIPP")] legislation are improving access to credit (U.S. State Department 2015, 4).

With respect to secured transactions, the government adopted the "SIPP Act" in December 2013. The law was modeled on UNCITRAL's Legislative Guide (UNCITRAL 2010; McCormack 2013: 57) and was structured with the help of international experts (Interview #1; Interview #9) like most of the commercial law reforms since the 1990s (Interview #7; Interview #10).[146] In this case, technical assistance was provided by the IDB (Interview #1). The tiny commercial bar, a subset of the approximately 2000 lawyers[147] in private practice (General Legal Council 2018) serving a population of 2.9 million people (70 lawyers per 100,000 people), had strong opinions about the wisdom of this new law for the island—at least in the model of Article

[146] Jamaica also pursued business law reforms in the early 2000s after the 1990s collapse of the local banking sector, as a result of corporate governance failures (Interview #3; Kirkpatrick and Tennant 2002).

[147] See: General Legal Council (Jamaica). https://www.generallegalcouncil.org. (Last visited December 28, 2018).

9 (Interview #1; Interview #9). They were, however, unable to exert significant influence on policy makers in the decision to adopt the law (CLSC 2013).

There was much debate between the Chief Parliamentary Counsel, tasked with preparing draft legislation, and various external consultants over the exact language of the law and how best to adapt it to the Jamaican landscape (Interview #1). The CLSC voiced concerns, even objections, to a law they deemed foreign and insufficiently tailored to achieve its goal of increased lending to Jamaican SMEs (Interview #9; Interview #1; Interview #7). To this end, the CLSC (2013) prepared a lengthy report that critiqued the proposed law.

In addition to the expected inefficiencies associated with the steep learning curve for a new legal regime, there were concerns that certain unique features of secured lending on the island would remain problematic going forward (Interview #1). For example, some of the CLSC's concerns included: the high cost of stamp duty;[148] the issue of resolving where old and new security interest would be registered (Interview #9); and the technical capabilities of government agencies to afford borrower and lenders access to the public registry (CLSC 2013: 63-81).

The BLC warned that, "while it no doubt can be useful to draw and rely on experiences and legislation from other jurisdictions [the state] must ensure that the Jamaican legislation and jurisprudence is best suited toward our own experiences,

[148] Stamp duty is a fee or tax associated with loan documents, typically required by the lender to be paid by the borrower (CLSC 2013: 66). The lawyers argued that, through their practice experience, one the major hurdles to greater access to finance for SMEs was the cost of stamp duty—[a tax on the loan documents.] At the time, the Stamp Duties Act required "ad valorem stamp duty at a rate of $3.00 (plus 24% surcharge) for every $200 or fractional part of $200 of the amount secured in respect of any 'mortgage other than real property'" (Commercial Law Sub-Committee 2013: 65). Additionally, there were in existence several potential collateral registries that would prove confusing for lenders and borrowers under a new regime (2013*:* 67-68).

expectations, development goals and economic reality" (CLSC 2013: 42). CLSC also feared that the law was not targeted enough and would, therefore, be resisted by larger commercial banks (Interview #9). Perhaps one of the more significant concerns was that the major commercial banks would ignore the new law in preference for traditional lending—which relied on land as collateral—and kept SMEs at disadvantage (Interview #15; Interview #9). They will see it as an option they are not mandated to pursue in a private contracting arrangement.

The key point here is that the BLC knows how commercial rules (including consumer laws) work in action—not just what they say on the books. Based on the observed reaction of consumers with respect to particular regulations governing lending and borrowing, it was apparent to them what reforms would stimulate greater commercial activities among SMEs and poor clients, and which ones would just provide more onerous regulations—despite their elegance. There is therefore advantage to the state seeking the advice of these actors when crafting legislation for economic growth, and not just the insights of economists.

The government proceeded with secured transactions reform, nonetheless. Several lawyers were of the opinion that, absent the IMF's influence and the state's interest in climbing the Doing Business rankings, secured transactions reform would not have been undertaken so swiftly (Interview #1; Interview #7; Interview #9). [149] In other

[149] There is reason to believe the Jamaican government would have pursued reforms to enhance their reputation internationally, as well as address the issue of constrained access to credit among small firms. The pace of the reform is curious, however. It may have taken a much longer time to achieve without IMF input. According to Jamaica's former Minister of Industry, Investment and Commerce, one of the goals of the secured transactions reform and other business friendly legislation is to "improve the ease of doing business in Jamaica and therefore improve our ranking internationally" (Hylton 2013).

words, international organizations like the IMF and WB tend to have some greater influence over the timing of local legislation than local experts due to their lending capabilities and the country's economic needs—including how local political leaders envision the nation's economic identity. The consensus among the legal and political class, however, was that secured transactions reform was needed. What exactly it would look like was always unclear (Interview #9; Interview #1).

The SIPP Act, as adopted, is replete with bells and whistles, such as an electronically searchable registry,[150] a more straightforward method of registering collateral, and an easier mechanism for determining priority—areas of weakness under the old laws. On paper, it is a boon to lending. In a recent operational review of the reforms, however, Jamaica's Ministry of Industry, Commerce, Agriculture and Fisheries ("MICAF") found that the fundamental goal of the new secured transactions laws and practices has not been achieved (Government of Jamaica 2017). According to MICAF:

> [T]he overarching objective of the Secured Transactions Regime was to increase access to credit by the MSME sector through the introduction of systems that would facilitate the ease and transparency of using moveable, non-traditional collateral in securing loans. In achieving this objective, the writers conclude that there has been no appreciable increasing of credit issued to the MSME sector over the past three years as a result of the Secured Transactions Regime (Government of Jamaica 2017: 24).

MICAF further indicated that it is still unclear whether the new secured transactions regime is appropriate for Jamaica's circumstances. Interestingly, MICAF acknowledged the island's lack of capacity to interpret and apply the new laws effectively, but did not encourage closer consultation with the local BLC. Instead, the ministry noted that:

[150] The new registry is called the National Security Interests in Personal Property Registry and has a searchable website: https://www.nsippregistry.gov.jm/public/aboutfilingoffice.aspx. (Last visited January 10, 2019).

> [T]he information gathered in the Operational Review suggests that there is a need for an international expert to provide further guidance to [the Government of Jamaica] in improving the Regime. The review also points to need for [the Government of Jamaica] to ensure that it systematically develops its own cadre of policy experts in this specialized area, working closely with development partners, academia and other stakeholders (Government of Jamaica 2017: 24).

In short, notwithstanding the state's bureaucratic weaknesses, it has resisted seeking the support and guidance of the BLC—one potential way of enhancing its capacity—in undertaking an important new commercial law regime.

Conclusion

This chapter concludes by suggesting legally trained individuals can be effective in "commercial cause lawyering," and can supplement the state's bureaucratic capabilities for law reform. This ability, however, is subject to the appropriate social and historical context—much like the pursuit of political liberalism in the post colonies (HKF 2012c). In Barbados, the colonial and post-colonial experience appears to have promoted an affinity for law—and by extension lawyers in government. The presence of lawyers in political posts and government officials willing to work with private sector lawyers to shape legislation likely facilitated the rise of the OFS sector on the island. In Jamaica, the opposite appears to have occurred. A colonial and post-colonial experience that undervalued law (Daniels et al. 2011) and a role for the BLC in shaping commercial legislation may have led to a lack of effective collaboration between the state and this group in recent years when political leaders were considering a variety of commercial law reforms.

In the following chapters, this dissertation suggests that local leaders, including the BLC, may have also been constrained in their views of what types of commercial law

reform are appropriate for their society based on how they have come to identify with industries in the country. The chapters suggest that CEI has played a silent, yet important, role in secured transactions reform in both Barbados and Jamaica. In Barbados, it has inhibited reform—at least for now. In Jamaica, it facilitated reform, even in the face of hesitation on the part of an influential interest group—such as local commercial lawyers. Chapter 4 describes the concept of CEI and highlights the CEIs for Barbados and Jamaica—including how they developed.

CHAPTER 4:

CONCEPTUALIZING COMMUNITY ECONOMIC IDENTITY (CEI)

Introduction

This chapter shows how the concept of CEI, developed in the rural and environmental sociology literature, specifically Shannon Bell and Richard York (2010), is applicable to how jurisdictions conceive of and pursue commercial law reforms. For example, as noted previously, Delaware is iconic in corporate law (Kahan and Kamar 2002; Roe 2003). It is known for being the default jurisdiction for incorporation when firms go public (Anderson and Manns 2015). While it is debatable whether Delaware's attractiveness is ultimately based on corporate governance rules that are more favorable to shareholders (race to the top) or a system that benefits managers (race to the bottom), it is clear that Delaware has developed an identity—or at least a brand—as the legal home for a great many corporations (Winter 1977; Baysinger and Butler 1985; Fischel 1982; Cary 1974; Bar-Gill et al. 2006).

To date, absent from the scholarly discourse is a sustained inquiry into how the communities are legally impacted by the industries they so deeply identify with, and how this identity affects future legal reform. Such an exploration is important because communities that are known for specific industries sometimes resist reforms that, from a rational-actor perspective, would increase their social welfare.[151] Surprisingly, even weaker or dying industries have proven persistently influential in certain places and capable of motivating public sentiment. Take the recent case of the town of Grimsby in

[151] One argument could be that the major industries (in terms of business volume) in these places drive favorable legislation through effective lobbying efforts. Indeed, powerful corporate and special interests are known for their ability to influence rules that are beneficial to their causes (see, example, Khanna 2004; Haddock and Macey 1987; Revesz 2001).

North East England. Grimsby was once a major fishing hub. Today its main industry is fish *processing* (as opposed to fish catching)—but, notably, much of the fish that is processed there comes from outside of Grimsby and the United Kingdom (Segal 2018). The industry, as a result, benefits from Britain's membership in the European Union ("EU") by way of uniform regulations, which lower tariffs and minimize hurdles with customs. Notwithstanding, "70 percent of residents voted to leave the [EU]" (Segal 2018). And now they have to cope with the fact that the absence of a robust UK fishing industry leaves them without the fish to process.

As odd as this vote appears under the circumstances, *The New York Times* reports that Grimsby's "leave" vote was inspired by an abiding local sentiment for the town's fishing history and a sense that the EU's regulations have undermined "their sovereignty" and "exclusive right to trawl in Britain's seas" (Segal 2018). In other words, the residents of Grimsby saw the EU and the policies and regulations it spawned as having erased a part of their identity. To quote the Chief Executive of Grimsby Fish Market: "This is a seafaring nation…Think of the Royal Navy, Nelson, Trafalgar. And every city has people who died at sea. So when fishermen said, 'We want to come out of the EU,' everyone wanted to back the fishermen" (Segal 2018). Consequently, what appears at first blush to be irrationality—if one only considers money—becomes sensible (or at least more comprehensible) once identity is taken into account (Edelman 2004).[152] In this case, the Grimsby community—led by fishermen—responded to the need to preserve the economic component to its heritage.

[152] Lauren Edelman (2004: 186) argues: "rationality is itself a social phenomenon."

The community nostalgia for diminished industries, as illustrated by Grimsby, is also observable in the United States—such as in the Rust Belt, Coal Country, and other regions known for their timber, ranching or automobile manufacturing industries.[153] The industries that once drove the local (and regional) economy are either in decline or have long since disappeared. According to some commentators, one of the reasons Donald Trump won the 2016 presidential election is his promise to bring back some of these industries (Graber 2017).[154] While a strong interest in economic growth and jobs is one explanation for this line of pursuit, commentators have argued that the sun has permanently set on some of these commercial activities—with advancements in technology and international trade helping to seal their fate and ushering in a new era (Fort, Pierce, and Schott 2018).[155] Simply put, the market has spoken and more efficient modes and sources of production have won out (Schumpeter 1942). But market mechanisms alone do not explain the attachment that people still feel to this now-outdated economic model. CEI does. This dissertation explains how once developed and entrenched, CEI can in turn shape future commercial law reform in a community. It lays

[153] Residents of farming regions in the United States also complain of uniform regulations that do not take into consideration their unique needs (see, example, Wuthnow 2018: 101-106).

[154] One of the ways candidate Donald Trump proposed to achieve this goal is through the withdrawal of the U.S. from the North American Free Trade Agreement (NAFTA)—a treaty whose terms he claims undermines the economies in these communities (Wuthnow 2018).

[155] Yet, in the face of this pessimism, the Trump Administration, in response to constituent demands, has begun to roll back regulations that are unfriendly to these communities. For example, shortly after taking office, the President rescinded environmental rules intended to protect waterways from coal waste and imposed tariffs on China, as well as some of the country's closest allies (Devaney and Wheeler 2017; Swanson and Tankersley 2018). See also The White House, President Trump: Putting Coal Country Back to Work (February 16, 2017). Retrieved January 9, 2019 (https://www.whitehouse.gov/briefings-statements/president-trump-putting-coal-country-back-work/). According to some commentators, this apparent turmoil is due to more than economic isolation. Some social groups feel "left behind" culturally as a result of the rapid and pervasive changes wrought by globalization (Wuthnow 2018).

the foundation of a research agenda that will provide a thick account of the phenomenon and its relationship to business reform.

An inquiry into the connection between CEI and law reform is timely. The current pushback against trade agreements and their domestic implications in developed countries (Corning 2017; Urata 2017), as evident by Britain's exit from the EU over sovereignty and economic concerns (Lewis 2016; Goodwin and Heath 2016; Young 2017; Gamble 2018) and calls from parts of the American electorate to "make America great again" economically and culturally (Wuthnow 2019), suggest a need to study the social forces driving communities toward specific regulations of private enterprise. The CEI-legal reform analysis is relevant to national level legislation in places like Barbados and Jamaica, as well as in the United States and other countries with a multilevel system of governance. It will inform policymakers about where they may find resistance to even the most popular business reforms and practices. For example, international actors, like the World Bank and United Nations—which have historically proposed best practices for countries to adopt—stand to gain from understanding why some developing countries are not in a hurry to adopt their recommendations, despite the promise of economic growth. An analysis of CEI's relationship to law reform, therefore, enriches current economic approaches to legal development by taking into account the way communities construct public identities and engage particular professional communities (such as the legal profession), both of which affect specific legislative choices and norms in ways that may otherwise seem irrational.

Rural and environmental sociologists have used CEI to explain how corporate actors associated with extractive industries manipulate specific community culture and

ideology to further their own profit motives (Bell and York 2010; Mayer 2018; Lewin 2017; Perdue and Gregory Pavela 2012; Crowe, Silva, Ceresola, Buday, and Leonard 2015; O'Faircheallaigh 2013). According to Shannon Bell and Richard York (2010: 117): "owners and managers of extractive industries actively construct, maintain, and amplify [CEI] in order to ensure that certain ideologies dominate in communities that historically depend on natural-resource extraction." The primary goal in this regard is to ensure that their industries remain legitimate in the eyes of the community, even during times of economic downturn. For example, the coal industry in West Virginia is intricately interwoven into the everyday life of the residents, historically controlling various facets of social interactions—by way of its ownership interest and visible presence in various local institutions (schools, water supply, stores, etc.) (Bell and York 2017: 120). Hence, the geographic area and the community within it are known to comprise "Coal Country."

One of the key takeaways from Bell and York's (2010) groundbreaking work in the West Virginia community is that CEI, as crafted by corporate leaders, need not be associated with an industry that continues to provide tremendous economic benefits to the community (Mayer 2018: 2). As long as the industry is constructed as part of the fabric of the community, it gains support from the larger public. This identity is based on both collective self-perception and interactions with external actors—which help to shape those perceptions. In the case of West Virginia, Bell and York (2010) argue that coal elites have sought to cultivate a community identity and dependence around coal. This identity is important because of how it shapes the choices communities make with respect to the rules that govern their public and private spheres.

Theoretical Basis for Bell and York's (2010) CEI

The theoretical basis for Bell and York's (2010: 113) conceptualization of CEI is environmental sociology's "treadmill of production model." This model is used to explain why there is harm to the environment as a consequence of capitalist activities. According to Bell and York (2010: 113):

> First introduced by Allan Schnaiberg (1980) in order to explain why environmental degradation in the United States had grown dramatically since World War II, the treadmill of production model argues that ecological destruction is intrinsic to capitalist (as well as some other) modes of production. Schnaiberg contended that the economic boom following World War II led to increased production and profits, which were invested in the development of new production technologies. These technologies came with large operating expenses that needed to be financed, however, and industries responded to these fixed costs by further increasing production so as to increase profits. The increase in production led to an escalating need for natural resources, which were extracted at grater rates and used in ways that 'substantially increased both the volume of production waste and the toxicity of wastes.' This pattern of increasing extraction and degradation in order to generate greater and greater profits has become the central operating framework of the global market.

The problem, however, is that the environmental harm that stems from extractive industries tend to more significantly impact those groups working in the industry—not the capitalists or wealthy who gain the majority of the profits (Bell and York 2010: 115). The workers are dependent on the industry for their economic survival in many instances, although their health is at risk as a result of the environmental harm caused by the industry. But, what happens when the very technology that increases profits causes a reduction in the availability of these jobs in poor communities? Drawing on the Marxist tradition, Bell and York (2010: 117) theorize that the capitalist class is inclined to find ways to keep the larger community dependent on the industry. The strategy they propose is one of "legitimation via ideology manipulation, "whereby the community comes to

identify with particular type of activity (2010: 117). Bell and York (2010: 117-118) explain:

> The efforts of extractive industries to lure the public into identifying with industry are part of this same process, where logging and mining, for example, come to be seen not simply as sources of employment but rather as key features of individuals' and communities—that is, workers often come to identify first and foremost as logger or miners, and communities come to identify as logging or mining communities.

Bell and York (2010) focus on the coal industry in West Virginia as an example of where the community's identity has become intertwined with that of the coal mining industry, but note that this kind of identity dependency is also observable in other extractive industries in the United States. Consider the cases of the timber industry and the ranching industry. In each, jobs have declined in these industries, but the communities still identify with the activity and hold close to them as part of their culture (2010: 118).

The essence of Bell and York's (2010) CEI thesis is that capitalist create a culture around their chosen industry with the intent to keep communities committed to them, especially when times are economically difficult. Consequently, where economists would find economic reasons to justify the commitment to an industry that is failing or has failed (explanations such as transactions costs, switching costs, sunk costs, path dependency, and so on, come to mind), sociologists would add that important social meaning is attributed to some kinds of work.

Making Way for A New Vision of CEI

While the existing theoretical work on CEI provides a window into the relationship between communities and industries, it's intellectual and policy potential has not been fully explored. This chapter builds on the work of Bell and York (2010), but also departs from their perspective in important ways. First, it suggests CEI need not be limited to extractive industries. Non-extractive industries can become identified with a community and hold sway over its identity and culture—albeit in different ways. In this regard, CEI may not be widely entrenched as an ideology in the minds of the general public—but guide the thinking of policymakers or other community leaders.

These leaders decide what types of reforms are suitable for a community based on their concept of what types of economic activities the jurisdiction is well suited to undertake. Consider the case of Delaware, once again, where the average citizen may not consider Delaware to be the epicenter of corporate law—as it concerns the attraction of firms for incorporation. Nonetheless, leaders (legal professionals, business persons, and policy makers) have a vision of Delaware as exactly this kind of place and make decisions about policy reforms in light of this identity—economic benefits aside (Roe 2003: 594).

Second, this chapter proposes that CEI is not solely shaped by capitalists or the wealthy—in pursuit of their own economic self-interest. Instead, it suggests local leaders (policymakers, businesspersons, activists, legal professionals and others) also shape CEI. These leaders successfully create a narrative around why a given commercial activity is particularly suitable for their community.[156] The narrative created, however, is not

[156] It is quite feasible that external actors can influence local leaders—such as in the case of many post-colonies that were influenced in their institution building and policy making by the empire

unconstrained (even though it can constrain leaders). Indeed, it is limited by the reality of the circumstances within which the community exists. Specifically, the CEI narrative is constrained by factors such as the environmental landscape (geography) of the community, the historical choices of the community (path dependence), and economic competition with other communities.

Third, this chapter discusses the potential for multiple, and even changing CEIs in a community. It briefly considers what happens if a community identifies with multiple industries and what that may mean for their policy choices. Fourth, accepting the potential breadth of the CEI concept and power of this type of identity once adopted, this chapter suggests that CEI is pertinent to commercial law reform—since communities are likely to prioritize business regulations around the type of CEI they have or are seeking to develop.

Conceptualizing a More Expansive CEI

CEI transcends communities with extractive industries. At the core, identities—including CEI—help shape and communicate commitments (Brooks 2006).[157] Indeed, an identity can be used as a signaling device to indicate to others the type of programs to which a community is committed and, therefore, more inclined to use limited resources to

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that colonized them (Kohli 2004). See also the discussion of Barbados and Jamaica and the WB's Doing Business Indicators in Chapters 5.

[157] According to legal scholar Richard Brooks (2006: 2032), "[s]ocial identities communicate a person's commitments to groups, communities, institutions, conventions, beliefs, and ideals."

support (2006: 2033-2034).[158] CEI is an indicator of a community's commitment to a certain type of economy,[159] and related lines of legal reforms. For example, a community committed to an agricultural economy and economic profile will be more interested in legal reforms that benefit this sector—perhaps to regulations governing farmer financing and the production of seeds (WB 2017a; Small 1996). But how should we situate CEI as an identity?

CEI is a shared identity, not an individual identity or a collection of individual identities. Individual identity is an internal perspective of who one is in relation to "different positions or role relationships" inhabited in a given society (Stets and Burke 2003: 128-152). Identity is formed as a result of the interaction between the self and society and are the "meanings one has a group member, or as a role-holder, or as a person" (Callero 2003: 115-133; Goffman 1959). For example, how we come to understand roles like parent, student or professor, represent our personal identity with respect to these roles (Goffman 1959). According to sociologists Francesca Polletta and James Jasper (2001: 285), collective identity, on the other hand, speaks to the:

> cognitive, moral, and emotional connection with a broader community, category, practice, or institution. It is a perception of a shared status or relation, which may be imagined rather than experienced directly, and it is distinct from personal identities, although it may form from part of a personal identity.

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[158] Consider the example of the case of *Burwell v. Hobby Lobby, Inc*., where the Supreme Court ruled that the religious beliefs of a corporation means they are not legally obligated to provide contraceptive coverage to their employees. 134 S. Ct. 2751 (2014).

[159] Consider, for example, South Korea's rapid economic development and the state's support of specific industries (Kohli 2004: 84-126; see also Amsden 1989). There is also the case of India, where "a narrow ruling alliance of political and business elite increasingly steers national economic policy." Consequently, India has grown rapidly in recent decades with the help of the state—with growth "concentrated in communication and business services" (Kohli 2012: 10).

CEI is a collective identity that is tied to a particular industry or enterprise that forms a unique social connection between individuals in a place. Similar to Benedict Anderson's (1983) theory of nationalism as being the product of "imagined communities," CEI, in some instances, is the product of an imagined tie of leaders to an industry by way of a common view of the importance of that industry to the society. Much like individual identity, collective identity is constructed through social interactions and the internalization of meanings about a role occupied (Polletta and Jasper 2001: 285). For example, West Virginia became known as Coal Country through efforts of industrial elites to make coal a part of the fabric of the community and the community's ultimate acceptance of this economic role (Bell and York 2010). In the case of nation states, CEI may be attributable to how countries view their economic role in the international community and the international community's receptivity to this role.

Next, this dissertation discusses how leaders (typically elite actors), geography, political dynamics, history and inter-jurisdictional competition are, collectively and individually, potential shapers of CEI(s) through diffusion and other mechanisms (see, example, Meyer 1997: 147; Hopkins and Wallerstein 1977). While each factor is discussed separately, they often overlap in reality, and each typically influences the other. This list is also by no means exhaustive. They, however, represent areas that previous scholars have considered to be important to a community's economic affairs.

Influences on CEI

Community Leaders

Community Leaders are the key actors where it concerns CEI. Indeed, Bell and York (2010) characterize CEI as a phenomenon constructed by corporate elites—pursued out of economic self-interest (Mayer 2018: 2-3). This characterization is understandable, given that the concept is rooted in the neo-Marxian school (Bell and York 2010: 111). But, CEI can also be driven by ideology that is divorced from a profit motive. More specifically, community leaders may seek to celebrate or build on historical and cultural aspects of the community through a particular type of commercial activity they are simultaneously attempting to monetize (Kowalski 2011). This is tied to the "impression management perspective," where the "cultural attributes of countries have to be strategically managed to generate the kinds of favorable impressions that might attract tourists and investors into the country" (Bandelj and Wherry 2011b: 11; Aronczyk 2013; King 2018; Comaroff and Comaroff 2009).

To clarify, CEI is related to the idea of "nation branding" made popular by Melissa Aronczyk (2013), but is distinct from the branding concept. Whereas nation branding speaks to a group of professionals (which Aronczyk (2013) calls the Transnational Promotional Class (TPC)) who use expert advertising tools and techniques to promote nations abroad, CEI—as conceived and used herein—is concerned with how the local community uses a particular identity to make local (or internal) policy choices. It is less concerned about advertising and more about the framework for implementation based on an established or desired identity. To this end, CEI is not about "cultural commodification" (see Comaroff and Comaroff 2009; Bandelj and Wherry 2011; Wherry

2008). It is about discerning the nature of one's historical, cultural and environmental strengths, and using them to discern what types of commercial activities best promote a desired economic community. In this regard, CEI is closer to Michael Porter's (1990) comparative advantage thesis and even closer to George Akerlof and Rachel Kranton's (2000) identity economics thesis.

In the case of Porter (1990), communities are choosing to pursue an economic activity that they can undertake at a lower cost than others—which then benefits an even larger community. With CEI, communities are choosing to identify with activities they consider themselves historically and culturally well equipped to undertake. In the case of Akerlof and Kranton (2000: 748), choices related to economic matters are considered based on the identity of the individual (with identity being an "extension of the utility function"). This sometimes leads to outcomes that may seem irrational to some. Similarly, choices about what types of institutions to build or invest in can lead to counterintuitive outcomes when community identity is considered as part of the utility function. In other words, communities may seek to pursue outcomes that reaffirm who they want to be, but undermine their economic well-being in other ways.

The leaders in a community who craft and promote a CEI narrative are those individuals who typically have more stature, credibility and access to prominent media sources for idea dissemination than average community members. They also likely have more direct contact with leaders from other communities, not to mention the ready transmission of their narratives abroad. Indeed, they are the agents more likely to communicate to others regarding how the country is to be socially, culturally and economically understood. These individuals certainly include, but are not limited to,

policy makers, professionals (such as lawyers, doctors, academicians, etc.) and successful businesspersons. For example, a government official may explain to the press: "our country specializes in tourism;" or "our country is known for international business." And, where it comes to law, local leaders are particularly influential with respect to reform measures related to community identity—both due to the range of their social influence and easier time organizing for collective action because they typically comprise smaller groups (Olson 1965). Consequently, local leaders contribute in two main ways to how a CEI develops.

First, community leaders may actively be involved in the legal and economic practices that make the activity possible. For example, businesspersons, commercial lawyers and policymakers may craft tax legislation geared at incentivizing foreign direct investment in hotels and simultaneously invest in the hotel industry. Second, community leaders shape how communities see their economic landscape by actively crafting a narrative, such as: "our jurisdiction is a haven for tourism with an outstanding product to offer." This narrative focuses decisions about legal reform, public investment and political attention. But community leaders are not unconstrained in their ability to develop a CEI through legal reforms and narratives. Indeed, they are limited by a range of factors, including geography, historical choices, and inter-jurisdictional competition. Each is discussed in turn below.

Geography

Geography can prove instrumental to how community leaders shape CEI. Indeed, a well-known argument (and discussed in Chapter 1) among some economists is that a

community's level of economic development (or underdevelopment) can be attributed to its physical location in the world (see, example, Diamond 1997; Krugman 1996). If this thesis holds true, and is not counteracted by the quality of institutions subsequently development (Rodrik et al. 2004), geography can therefore shape the set of potential industries that are viable in a community and, therefore, the likelihood a community will come to identify with a particular industry. Indeed, if there are no beaches, it is highly unlikely a community will seek to promote surfing as a recreational and economic activity.

Historical Choices (Path Dependence)

Beyond the physical environment, the political landscape of a place can prove invaluable to how the CEI unfolds by shaping how legal rules are used in pursuit of economic prosperity—and not just from a democratic or authoritarian rule perspective. For example, the political response of post-colonial local leaders to colonialism can lead policymakers to choose an economic path that is either productive or harmful (see Daniels et al. 2011). As discussed in Chapter 1, Daniels et al. (2011) suggest that political exclusion of target groups within a society in the colonial period had immediate and long-term consequences for the economy in these places—such as the failure to cultivate a developmental class of leaders who are skilled at policymaking.[160]

[160] According to Daniels et al. (2011: 140-141):

> The effects of this political exclusion [during the vast majority of the colonial period] further extended into the economic sphere, as the lack of representation for blacks frustrated the rise of a strong Afro-Jamaica middle-class, able to advocate for limits on the arbitrary exercise of governmental authority. Decisions taken by an unrepresentative legislature had the effect of helping to

Historical choices, broadly speaking, are also contributors to a community's economic structure and the types of industries it cultivates. For example, Atul Kohli (2004) theorizes that the core nature and characteristics of states were formed long before political independence—during the colonial period—and, in some instances, have become embedded in who they are today. This argument is intertwined with the idea of institutional path dependence. For example, in some cases, colonial empires set the stage for how post-colonial bureaucracies would manage the country (2004: 17-18). Take the example of colonial Nigeria. Britain invested very little in developing a centralized state or even "an effective civil service," leaving sovereign Nigeria with the immense task of "overcome[ing] the original deficiencies of state construction" (2004: 18).

Nigeria's turbulent economy has been, at least in part, attributed to Britain's weak institutional investment during the colonial period and immense focus on extraction of natural resources and exportation of basic commodities (2004: 291-366). Ultimately, what emerged on the other side of political independence was a neopatrimonial state,[161] which lacked the foresight "and the organizational capacity to promote development" (2004: 364). In other words, weak institutional capacity, shaped by historical happenstance, can limit how the government's and community leader's view of their

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> transform the black population into a proletariat working class with little economic agency or freely own property….Some scholars connect these trends—minimal participation for Jamaicans in the colony's legislative council and large-scale economic disenfranchisement—with the philosophy of the Jamaican government that assumed power following independence in 1962, finding that after nearly a century of political and economic exclusion, Jamaica's leadership focused on reorienting the state apparatus to further the interests of indigenous Jamaicans (who were almost all working-class citizens), rather than crafting a limited government with institutionalized checks and balances.

[161] According to Francis Fukuyama (2004: 26), a neopatrimonial state exists within a modern state uses "political power to service a clientalist network of supporters."

capability to cultivate specific kinds of commercial enterprises and, consequently, whether or how a CEI emerges.

Inter-jurisdictional Competition

Another factor that may influence CEI development is inter-jurisdictional competition.[162] A country's competitive prowess will depend—at least in part—on its neighborhood and who it perceives its economic rivals to be (Beckert 2010: 160-162). As mentioned above, the theory of comparative advantage proposes that countries will be most successful in those areas of production in which they have natural advantages due to their geography, natural endowments or historical circumstances (Wade 1990: 14). For example, "[a] country whose climate [favors] coffee or rice cultivation should export coffee or rice" (Wherry 2006: 125).

International economic law may also have an influence over how countries develop their competitive position. For example, there is an ongoing debate over whether the WTO helps or hinders the development of industries within a country. Specifically, some scholars are concerned the WTO, through its legal constraints, does not give poor

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[162] Porter (1990) notes:

> Competitive advantage is created and sustained through a highly localized process. Differences in national values, culture, economic structure, institutions, and histories all contribute to competitive success….Ultimately, nations succeed in particular industries because their home environment is the most forward-looking, dynamic and challenging.

Certainly other forms of interactions between nations can be influential to the economy. For example, international relations, immigration, international development all have a role to play in the economies of nation states. Inter-jurisdictional competition is used here only as a representative example.

countries enough policy autonomy to develop and promote chosen domestic industries to the benefit of their local communities (Santos 2013). Other scholars argue the WTO "has been a success in terms of increase in global trade and gains in global economic welfare" (Santos 2013; 171; Bhagwatti 2004). Regardless of the side taken in this debate, it is apparent that the WTO has the potential to influence how the leaders in certain states regulate certain domestic industries—and, in so doing, can either conflict with a country's pre-existing CEI or shape the development of a future CEI (Santos 2013: 171-172).

Changing Identities and Persistent Identities

While community leaders, geography, historical choices and inter-jurisdictional competition, can all play a role in the development of CEI, it is not always apparent what a community's CEI is at first blush. Indeed, at a given point in time, it may not even be readily discernable from an examination of the major sectors that drive the community's economy. For example, while a community may be well known for and identify with coffee production, as is the case in Costa Rica, much of its gross domestic product may come from elsewhere—like tourism.[163] Further, countries may be in the process of transitioning identities—developing one sector at the expense of another—providing opportunities for political contestation by entrenched interests. A community's CEI may

[163] BBC News. Costa Rica Country Profile. Retrieved January 8, 2019 (https://www.bbc.com/news/world-latin-america-19414068).

also be undergoing deliberate construction[164] on the part of community leaders, or may even be contested by different groups within a particular community (Mayer 2018).[165]

One way of discerning a country's CEI is through the discourse and narratives provided by community leaders. As mentioned earlier, these leaders often articulate a vision of the existing economy and economic priorities that can provide some guidance regarding where the larger community's affinities reside regarding local commercial enterprises. In some instances, however, careful historiography or sociological study of state institutions, business culture and the local community will be required to determine the nature of a community's economic identity, including whether one even exists.

Returning to the case of upper middle income Costa Rica, the OECD considers the country's agriculture sector—which produces coffee—to be an important part of the economy, even though it contributes just over five per cent of GDP to the country.[166] While it is unclear what Costa Rica's CEI is at this juncture (because we have not studied it), the OECD proposes that the country has successfully evolved from its agricultural focus "to one with high-value-added industries linked into the global value chains" (OECD 2016).

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[164] Take, for example, the case of the American State of South Dakota. Prior to 1981, the state was know for "agriculture and meat-packing." State leaders, however remade the economy into one that supported credit card companies by revising the usury laws—which had limits on the various fees and rates that could be charged on loans. Arguably, leaders reconstructed the state's economic identity (Sullivan 2013). Retrieved January 7, 2019 (https://www.theatlantic.com/business/archive/2013/07/how-citibank-made-south-dakota-the-top-state-in-the-us-for-business/425661/).

[165] Mayer (2018) discusses the divergent support for the oil and gas industry in Colorado.

[166] The Central Intelligence Agency, The World Factbook: Costa Rica. Retrieved December 2, 2018 (https://www.cia.gov/library/publications/the-world-factbook/geos/cs.html).

There are also some countries that market multiple identities. Take, for example, the island economy of Barbados (discussed below), which markets itself as both an offshore banking center and tourist haven. But, perhaps even more interesting than the case of a transitioning CEI or a place with multiple CEIs, is the case of CEI's where the industry associated with the CEI has completely declined but residents continue to identify with the culture that has emerged around it (Bell and York 2010).

Rural sociologists provide significant insights into CEIs associated with declining industries, as well as reasons for their existence (Bell and York 2010; Eaton 2016). According to Bell and York (2010: 112): "many rural communities are left with an identity tied to a particular extractive industry, even though that industry no longer provides many jobs or plays a dominant role in the local or regional economy." Weston Eaton (2016: 77), drawing on Ann Swidler's (1986) "culture as a toolkit thesis," suggests that the cultures that develop around specific sectors can be seen as a "way communities construct meaning around industry, place, and natural resources, and how community residents draw upon these meanings to defend their way of life." It is this interest in meaning making—as a way to support a particular vision of the community and way of life—that proves important to the way law reform is approached, but which is given little attention in economic theories.

Conclusion

This chapter provided a brief overview of the CEI concept, including potential sources of influence and its ultimate relationship to law. Specifically, it explained that CEI is how a community—typically led and shaped by the narrative of leaders—comes to

view itself in relation to a particular commercial enterprise (or enterprises). This identity is tied to cultural meaning making, which can certainly be parlayed in economic gain, but is not exclusively based on economic motivation. Law becomes implicated in the CEI framework because industries are tied to underlying legal infrastructure. If future industries are accompanied by regulations that conflict with or detract from those supporting the CEI industry, there is likely to be pushback from policymakers. Chapter 5 shows how CEI is relevant to legal reform in Barbados and Jamaica.

CHAPTER 5:

COMMUNITY ECONOMIC IDENTITY IN JAMAICA & BARBADOS

Part I: CEI and Jamaica

Who Were We?

To frame the larger historical context for Jamaica's economy and CEI, it is important to recall the island's colonial beginnings. Jamaica was first colonized by Spain in the 1490s (after the island was stumbled upon by Christopher Columbus on his journey to the East Indies). The land the Spanish found was already inhabited. A group of nomads known as the Tainos (also known as the Arawak Indians) lived there (Sherlock and Bennett 1998: 44). These early inhabitants died at the hands of Spanish colonizers, which led to the need for additional slaves to work the land. From the time of the early colonists, Jamaica was seen as "ideal farming country and quickly acquired the reputation as a supplier of domestic animals and ground provisions to the armies of conquest on the American mainland, as well as to other islands in the region" (1998: 69).[167]

The first Blacks (a very small number according to reports) to grace the shores of the island came with the Spanish in the early 1500s. The slave trade with Africa in Jamaica began under the Spanish, and in a little over a century the number of resident Blacks slowly grew (1998: 68). According to Sherlock and Bennett (1998: 77), after Jamaica changed colonial hands in the mid-1600s, upon capture by the British, there were

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[167] Sherlock and Bennett (1998: 72) note that:

> A Physical survey of the island reveals extensive flat, fertile plains to the south of the main mountain ranges which run from east to west, almost all the way across the island. These grassy plains, watered by many rivers made better farm lands than the steep, wooded hills on the north and the harbours in the south coast were easier to navigate. Those mountain ranges, difficult to traverse except by experienced woodsmen, have through the centuries, provided cover for all who struggled to escape enslavement and imprisonment.

approximately "1,500 persons of African decent in the island, some of whom were free." While the initial product of choice on the island was cocoa, in the latter part of the 1600s the demand for sugar in Europe led to a change to this product—and ultimately a transformation in the economic structure of the island—calling for more slaves. Caribbean historian and former Prime Minister of Trinidad and Tobago, Eric Williams (1970: 137), highlighted the steep increase in the number of Blacks required to service the sugar plantations. "In Jamaica, the ration of slaves to whites was one to three in 1658, nearly six to one in 1698. There were 1,400 slaves in the former year, 40,000 in the latter" (1970: 137).

In the colonial period, sugar plantations were prominent in Jamaica (like on other islands in the region) (see Appendix 6). But, sugar would eventually decline in importance to the country's economy as a result of the abolition of slavery, inefficient production, and the negative (slave) stigma associated with the industry, among other reasons proffered by experts (see, example, Petley 2018). By the late 1930s, the sugar industry had significantly deteriorated and was not a major contributor to the economy (Keith and Keith 1992: 117). And, while agriculture persisted by way of banana cultivation, it also held the stigma of being associated with peasant work and fizzled in the decades following political independence—in large part due to type of international economy the newly independent nation faced (see, example, Walker 2010).

Jamaica's Bauxite industry, born in the early 1950s (Barclay 2010: 158), would ultimately prove quite valuable to the island's economy. Its reputation in the decade of the 1960s soared (Stephens and Stephens 1986: 26). At this point, "Jamaica was the world's largest producer of bauxite, the base mineral in the manufacture of aluminum, a

metal which played a very important role in post-war development of the world capitalist economy" (1986: 26). Despite Bauxite's prominent status in the country's economy—contributing 14 per cent of GDP in the 1970s (Keith and Keith 1992: 10)—it is difficult to say if it ever amounted to the country's CEI for at least two reasons (1992: 27). First the leaders who controlled the industry were foreigners—associated with primarily American and Canadian firms (Stephens and Stephens 1986: 26-27). Accordingly, "[t]his meant not only the loss of repatriated profits but, more important, the lack of [local] control over development" (1986: 26). The island was home to the industry, but local leaders had relatively little say in how it was managed—and were therefore not well-equipped to craft a narrative around the importance and centrality of bauxite to the society.

Second, this type of foreign-owned, capital-intensive sector, provided higher incomes for only a few Jamaicans—contributing to high inequality—which was one of the factors that led local political leaders to seek to take the state and the industry back for the majority of Jamaicans (1986: 10-60; see also Manley 1990). Arguably, the industry did not promote a type of shared identity among Jamaican leaders, which is synonymous with the CEI concept—at least where it concerns extractive industries (Bell and York 2010). Perhaps this was due in part to inadequate time and effort spent on the part of the foreign elites who controlled the industry to shape and develop a strong cultural tie between the industry and the rest of the community, including local leaders—as in the case of the coal industry in West Virginia (Bell and York 2010).

Importantly, the Jamaican economy faced a crisis in the mid-1970s, sparked in large part by a combination of high international oil prices and a decline in receipts from both

the bauxite and tourist industries (Stephens and Stephens 1986: 27-31). The writing was on the wall. The bauxite industry had begun to lose its stature. In addition to a significant bauxite levy imposed by the democratic socialist government of the 1970s, which spurred investors to pursue investment opportunities in places like Guinea and Australia, scholars argue that Jamaica's bureaucracy was inadequate to the task of overseeing the bauxite sector (Barclay 2010: 158-167). Between the late 1970s and the early 1980s, Jamaica would lose its place as the bauxite capital of the world, relinquishing its status to countries like Australia, Guinea, and Brazil.[168] China and India would soon join the list of countries that surpassed the island in an area in which it was once dominant.

CEI and Secured Transactions Reform in Jamaica

Who Do We Want to Be?

With the fall of bauxite, tourism became the main industry in town. Tourism is an outgrowth of Jamaica's natural endowments—its warm climate, beautiful beaches and stunning water falls, among other features—but was not the inevitable choice for this still nascent post-colonial nation. In the 1950s, local leaders (wealthy Jamaicans), with the help of the government, transformed the island from a place where a few affluent visitors would visit periodically to a mecca for tourists (Panton 1993: 13). Policymakers sought to diversify the economy in the post-World War II period by boosting the development of the tourism sector through legislation like "the Hotel Aid Encouragement Law of 1944" (1993: 13). Sensing the potential for growth in the mid-1950s, the state provided tax

[168] See: Development of the Bauxite/Alumna Sector. (http://www.jbi.org.jm/pages/industry). (Last visited January 2, 2019).

incentives to encourage investors to direct capital to the industry (1993: 13). As a result of these programs and the drive of local entrepreneurs, the sector grew significantly between the late 1960s and mid-1970s, and the island went from a mere 44 hotel rooms in 1880 to 9010 hotel rooms in the mid-1970s (1993: 13).

By the 1970s, tourism was directly responsible for the employment of approximately "7,000 people and indirectly created an equal number of jobs, thus accounting for about 2 per cent of the employed labor force" (Stephens and Stephens 1986: 27). Wealthy Jamaicans built and owned hotels and partnered with the government to market the island as a tourism destination (Seaga 2009: 190-191). "In 1968, 53 [per cent] of hotels on the island were in local hands compared to 39 [percent] for foreign owners (9 [percent] belonged to both)" (Panton 1993: 13). It soon became clear that better transportation for tourists to the island would further bolster the industry (Government of Jamaica 1962).[169] Thus, the government formed an "Airline Policy Committee comprised of government officials to recommend the appropriate policy" to enable such transportation (1993: 13). Eventually, the government leased aircrafts from an established airline—British West Indies Airways (BWIA)—and created its own Airline (the once famous Air Jamaica) to shuttle tourists from North America to the island's resorts (1993: 191). In the 1980s, the state once again sought to boost tourism with the help of various IFIs (Seaga 2010: 44-46).

[169] In this report, the government noted concerns about the decline in the number of "short-stay visitors" to the island, and a desire to enhance air transportation to the island for tourists. According to the Government of Jamaica (1962: 3): "A number of new air services were established in further efforts to facilitate travel between Jamaica and other countries, and plans were being made during the year for the establishment of a national airline."

Jamaica's political and business leaders have shaped and promoted the island as a tourism destination. While there have been efforts in recent times to diversify the country's economy, the island is predominantly understood by Jamaicans and marketed to the world as place with a vibrant culture, white sandy beaches, tropical music and, of course, all-inclusive resorts (Davis 2017; Planning Institute of Jamaica ("PIOJ") 2009; Smith 2012; Stupart and Shipley 2012). Indeed, Jamaican scholar and Dean of the School of Hospitality and Tourism Management at the University of Technology, Gaunette Sinclair-Maragh, and her co-author Douglas Hoston (2018), have linked tourism to Jamaica and Jamaican culture as far back as the 19th century, and argues that Jamaican culture and tourism are inextricably intertwined. Effectively, tourism presents an opportunity for the expression of Jamaica's rich "shared culture from ethnic and racial diversity in its population as well as from the sense of difference within each of these groups" (Sinclair-Maragh and Hoston 2018: 4). Tourism is interconnected with Jamaica's cultural products, which include: crafts, sports (as reflected in Usain Bolt's international athletic success), music (particularly reggae, made popular by Bob Marley) and food (for example, its world renowned jerk chicken) (PIOJ 2009: 216; JAMPRO 2017). Jamaica's Trade and Investment Organization ("JAMPRO") (2017) suggests that the success of the tourism industry is directly related to:

> A strong country brand. Jamaica's exploits in sports, music and cuisine have endeared the country to many of the world's citizens and made it one of the strongest country brands in the world. This brand strength along with deliberate actions such as the addition of airline seats out of key markets, increased marketing spend [sic] and the addition of new brands has fuelled growth in the industry.

In short, Jamaica's tourism sector is intricately intertwined with the identity of the nation and built on the cultural history and achievements of the people—not just beaches and

waterfalls. But, beyond "nation branding" (Aronczyk 2013), what type of legal institutions do leaders seek to construct at home to maintain the industry? It appears that the development of friendly commercial laws is one way to ensure that both investors and tourists will find the country an appealing place to visit and invest their money. To this end, in recent years the country's business and political leaders have sought to reform a swath of the country's commercial laws to promote investment.

What Type of Commercial Laws Do We Need?

Jamaica's well-documented economic struggles since gaining political independence (WB 2012a; 2004b, 2005; Henry 2013; Stephens and Stephens 1986; Bullock 1986; Harris 2010; PIOJ 2011), high crime rate (Alleyne and Boxill 2003; Jaffe 2013), and bureaucratic inefficiencies (Barclay 2010; Mooney and Schmid 2018; Fog 2010) makes the country an unlikely candidate for one of the best places to do business in the Commonwealth Caribbean.[170] Notwithstanding, the island nation has performed reasonably well on the Doing Business rankings in recent years, and has surpassed Barbados more recently (between 2015 and 2018).[171] Indeed, from as early as 2004, the World Bank recognized Jamaica for its aggressive efforts to reform its business environment—from contract enforcement to bankruptcy law—in line with global best

[170] In the Doing Business 2006 (2006: 3) report, the WB explicitly noted that:

> While Jamaica ranks close (at 43) on the ease of doing business to France (at 44), this does not mean that businesses are better off operating in Kingston rather than in Paris. Crime and macroeconomic imbalances—2 issues not directly studied in Doing Business—make Jamaica a less attractive destination for investment.

[171] See: WB (2004b); WB (2005); WB (2007); WB (2008): WB (2009); WB (2010); WB (2011); WB (2012); WB (2013); WB (2014); WB (2015); WB (2016); WB (2017); WB (2018).

practices (WB 2004a). Indeed, the Jamaica government has paid close attention to the Doing Business indicators to determine how best to reform to ensure an efficient and friendly business climate for both local and foreign investors (PIOJ 2009: 139; Hylton 2012).

Since tourism, Jamaica's CEI, is not dependent on a specialized set of statutes, there are fewer constraints on the types of legal reforms that the government can undertake. To some degree, it provides the country with more flexibility in its commercial lawmaking. According to a UN report, tourism is an industry "that links together a series of cross-cutting activities involving the provision of goods and services such as accommodation, transport, entertainment, construction, and agricultural and fisheries production" (UN 2007). Stated otherwise, tourism incorporates a wide range of actors, including transnational corporations (TNCs) and SMEs—underscoring the need for an overall efficient legal framework, especially for foreign direct investment ("FDI") (2007: xi). The UN notes that "[t]ourism is an activity where capital, infrastructure, knowledge and access to global marketing and distribution chains are critical. [And] FDI is often considered one of the most effective engines for harnessing these elements" (UN 2007: 6).

Further, the types of investments chosen by hotel chains (franchise or management contract) are influenced by factors such as staffing availability, access to capital and the presence of a strong and capable legal system (UN 2007). It is therefore unsurprising that Jamaica has paid such great attention to its business climate in recent years at least, as evident by its Doing Business performance.

Some of the reform efforts are said to be in reaction to the country's banking crisis of the late 1990s, however, where several banks and insurance companies collapsed—in part due to poor corporate governance laws (Goldson 2013; Kirkpatrick and Tennant 2002). But, aside from the banking crisis, a better business climate increases the likelihood of FDI—including in the tourism sector. For example, recall from Chapter 4 that, in 2013 alone, the state adopted some 11 pieces of commercial legislation to promote easier business transactions (United States Department of State 2015: 4). Reforms continued into 2014 with the passage of insolvency legislation to facilitate more orderly bankruptcy proceedings. Significantly, at the end of 2013, the government adopted the SIPP Act, as a way of enabling easier access to credit on the island (Graham 2013).[172]

Some of the members of the Jamaican commercial law bar—the BLC—met with government representatives to discuss the merits and demerits of the new law (Commercial Law Sub-Committee 2013: 4-5). As mentioned in Chapter 4, they lacked the ability to convince the government to refrain from wholesale adoption of the new law.[173] This begs the question: why would the state adopt a law that it was advised required further careful consideration by local experts?[174] Perhaps the laws marketing

[172] According to Jamaica commercial lawyers, while SIPP is similar in structure to Article 9, it grew out of Canada's secured transactions laws (for example, Interview #1).

[173] The members of the Commercial Law Sub-Committee detailed some of the concerns with the proposed secured transaction legislation (see, generally, CLSC 2013).

[174] It is quite feasible that Jamaican commercial lawyers were skeptical of the law because they were unsure how it would impact their practice. At the very least, they would be required to relearn the inner workings of secured transactions under this new regime. At worst, it could minimize need for legal assistance on the part of potential client's—consequently lowering the demand for their services. The document that laid out the concerns of the commercial law bar, however, appears to be an impartial overview of the cost and benefits of adopting a modern secured transactions legal regime (see, generally, CLSC 2013).

value—in terms of its potential benefits for a better business environment—more than anything else, played an important role.

In making the case for secured transactions reform in Jamaica, the IDB, for example, argued persuasively that modernizing Jamaica's secured transactions laws pursuant to the ideals and models proposed by the WB and UN (as well as other developed countries (such as Canada and Australia)) would enhance access to credit for SMEs and greatly benefit the tourist sector. Pursuant to Holden (2009: 3), on behalf of the IDB:

> There are many sectors in Jamaica that could benefit from secured transactions reform. The tourism industry is one. Hotels take bookings from operations in the United States and Europe. Typically bookings are made several weeks in advance. While a deposit may be paid, the bulk of the payment occurs after guests have left. Operators expect hotels and other tourist industry service suppliers to give credit terms that range from 15 days to 45 days. Tourist industry representatives indicated that while payment is reliable, it is often late, which puts substantial strain on the industry's cash flow. However, these accounts receivable are high quality assets that under the current system are difficult to use. A well functioning collateral framework would allow tourism industry service providers to pledge the receivables and receive advances of between 60 and 80 per cent of the outstanding amounts.

The specific promise of greater access to credit for small hotels and SMEs operating in the tourist sector surely made the adoption of a modern secured transactions regime attractive and easy to accept—even in the face of criticism. Consequently, policy makers may very well have determined that the potential benefits that would accrue to tourism—the CEI—would make any associated risks and costs worthwhile (Holden 2009: 3).[175]

[175] For example, in 2013, the government had to secure technical assistance in the amount of US $653,000 for the drafting, implementation and advertisement of SIPP, as well as other business friendly reforms (Jamaica Gleaner 2013). The government further borrowed US $100m in 2016 to implement reforms associated with the SIPP Act (Jackson 2016). Another US $500,000 was required to operationalize the new collateral registry and train judges and others working in financial institutions and other business regulations with no guaranty that SIPP would be a

The outcome demonstrates that legal reforms—when viewed through the lens of a CEI—may overlook inefficiencies and costs (social and economic) because of the need to protect or enhance an industry that bears immense social importance to the local community. In the case of Jamaica, the specific secured transactions reforms adopted were done against the advice of the BLC—but the intent was surely to pursue a legal regime that would enhance the local business environment and bolster the tourism sector. And, to some degree, aspects of these goals may have been met. For example, in the years following Jamaica's adoption of the SIPP Act, the country performed better on the Doing Business ranking and the report specifically acknowledged its reforms in the area of secured transactions. How this translates to a more vibrant tourism industry is yet to be seen. It should be noted, however, that the BLC did not oppose secured transactions reform across the board. They saw value to the reforms for the economy. They were, however, concerned with how compatible the law would be with pre-existing rules and institutions (see, example, Pistor 2002).

What About the IMF?

It bears noting that some commentators may argue that Jamaica's secured transactions reforms were undertaken, not because of CEI, but in the context of a conditional loan from the IMF. In other words, the government had little choice in the matter. This perspective lacks a larger context, however. A look at Jamaica's reform history shows a clear intent to adopt a broad set of global best practices where it concerns

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success. See Implementation of Business Climate Reforms in Jamaica. Retrieved August 26, 2018 (http://competecaribbean.org/wp-content/uploads/2016/09/CC-Project-Highlight-Implementation-of-Business-Climate-Reforms-JA-v2.pdf).

business regulations going back over a decade (See, example, WB 2004a). Once again, the Doing Business noted: "Among the least regulated economies, Jamaica has aggressively adopted best practice regulation over the last two decades" (2004a xiv). Indeed, in Jamaica's letter of intent to the IMF, the Minister of Finance asserted that the country was "deeply committed" to the reforms the government proposed "and intends to pursue them regardless of any formal financing arrangement with the [IMF]."[176] It is well known that governments sometimes use the IMF's reform requirements in connection with a loan facility as an excuse to undertake reforms that would otherwise be politically difficult (See, example, Przeworski and Vreeland 2000).

Perhaps more important though, and in the interest of comparison, we should consider the case of Barbados. Barbados recently signed on to an IMF agreement for a $290 million extended fund facility in an effort to help it recover from its economic difficulties over the past ten years. According to the IMF, both Barbados and Jamaica suffered from "low growth and increasing debt."[177] But, while the IMF agreement noted: "There is significant room for improvement, as indicated by Barbados' relative low ranking in the World Bank's Doing Business indicator where Barbados was ranked recently well below key regional peers[,]" there was no indication from the document that the country has agreed to reform its secured transactions laws (IMF 2018: 51). As part

[176] Letter of Intent from Peter D. Phillips, Minister of Finance and Planning, Jamaica and Brian Wynter, Governor, Bank of Jamaica, to Christine Legarde, Managing Director, International Monetary Fund. Retrieved January 7, 2019 (https://www.imf.org/external/np/loi/2013/jam/041713.pdf).

[177] Letter of Intent from Hon. Mia Mottley, Prime Minister and Minister of Finance, Economic Affairs and Investments, Barbados, to Christine Legarde, Managing Director, International Monetary Fund. Retrieved January 7, 2019 (https://www.imf.org/external/np/loi/2018/brb/091418.pdf; https://www.imf.org/en/News/Articles/2018/10/01/pr181370-imf-exec-board-approves-us-290-million-ext-arr-under-ext-fund-facility-barbados).

of Jamaica's agreement with the IMF, however, it was explicitly stated that the government would pursue secured transactions reform, "to facilitate increased access to credit" (IMF 2013: 6). Assuming that the IMF operates similarly in all developing countries, it is fair to assume that the governments have some flexibility in the determining the specific types of commercial law reforms they would like to pursue under an IMF agreement. It is further reasonable to assume that the choice of reforms is guided by their policy priorities. In the case of Barbados, the IMF (2018: 47) agreement stated that:

> The Government will strengthen the efficiency and quality of the [Government of Barbados procurement process thereby improving the ease of doing business and reducing costs, including by establishing the office of the Contractor General as an independent entity to review contracts of the central Government and the statutory corporations…We will review our legal and regulatory framework for engaging in Public-Private Partnerships (PPPs), and will request technical assistance from the IMF in doing so; PPPs can play an important role in sustaining growth and increasing potential growth, when done right.

Consequently, two points can be made. First, reforming the secured transactions legal regime in Barbados is not solely a matter of policy priorities based on low state bureaucratic or financial capacity. Certainly state capacity may have played a role (see Mottley 2002), but it is clear that the government could have sought financial and technical help from the IMF (World Bank, CDB or other IOs) if it thought secured transactions reform was relevant to the panoply of commercial laws it needed to reform. That is, if it thought it was necessary for its CEI. Second, it cannot be said that the Government, as an ideological matter, will not seek help from the IMF with respect to funding or technical assistance with legal reforms because they were willing to do so as part of their current agreement with the organization.

Conclusion

Part I suggests that Jamaica's commitment to tourism as a CEI has shaped the types of reforms it has chosen to pursue. Given the absence of a CEI built on a set of specialized laws (like offshore banking) and tourism's reliance on a broad set of activities and regulations that invite investments, a range of commercial laws beneficial to tourism have been adopted at a frantic pace over the years. Policymakers have appeared less concerned with the technicalities of each regulation and more so consumed with the symbolic value of having the regulations on the books. Business regulations that represent global best practices, such as those promoted by the Doing Business indicators, cast the country in a positive light to the international community—from whence FDI stems—even if there is no empirical evidence that the reforms actually increase investments. In other words, by way of its breadth of social and legal coverage,[178] Jamaica's tourism sector has proven pivotal in allowing the country immense flexibility to pursue a wide range of business reforms that promise an overall healthy business environment. Given Barbados' similar economic profile, as a tourism center, it would be reasonable to expect that secured transactions reform would be equally beneficial to the sector and readily embraced. This has not been the case to date.

Part II turns to the case of Barbados. It argues that Barbados' CEI of offshore banking may have shaped its seeming lack of receptivity to a broader cross-section of commercial law reforms.

[178] The UN has noted that tourism covers a range of activities and speak to laws pertaining to environmental laws, land use laws and transportation regulation, to name a few (UN 2007: 6, 91).

Part II: CEI and Barbados

Who Were We?

Barbados had one continuous colonial experience under Great Britain. The English colonized the island in 1627 and the island remained a British territory until 1966 when it gained political independence. Unlike Jamaica at the dawn of Spanish colonialism, the land that the English found when they arrived in Barbados was not inhabited. Prior to their arrival, there were no indigenous Barbadians. Instead there is evidence that a group of migrants known as the "Saladoid-Barrancoid" inhabited the island somewhere between "350-650 AD" (Beckles 2006: 3; see also Ligon 2011). Since they were long gone when the English arrived, colonists had an uninhabited terrain on which to settle. This suggests the English had a clean slate upon which to build institutions (see Acemoglu and Robinson 2001; Engerman and Sokoloff 2002). According to Barbadian historian Hilary Beckles (2006: 9): "Barbados was probably the least problematic of all the Caribbean settlements made by the English. There was no armed resistance from an indigenous community and no war against a rival colonizing nation."[179]

Despite the ease of settlement, Barbados of the 1600s was initially uninviting from another perspective—that of development. According to English "explorer"[180] Richard

[179] Patterson (2013: 7 & 12), in explaining why English colonist would find Barbados attractive note: "The fact that [Barbados] is flat also means that the ocean breezes cool the island to a greater degree than is possible in mountainous Jamaica. Thus the reputation of the island as being more congenial to Europeans, and settled life more generally, is not entirely imaginary."

[180] It is unclear whether Ligon was actually an explorer. According to the introduction to his account of Barbados, *A True and Exact History of the Island of Barbados* (2011: 1), he "left England for the Caribbean in 1647 with a party of Royalist exiles as the fortunes of the English Civil War in favor of parliament's forces."

Ligon (2011: 13), who visited Barbados in the mid-1650s and spoke of the experience of one Sir Henry Colt:

> Nor did the environment seem to promise much at first. Colt was very contemptuous of what he saw: 'For your soil it is naught, nothing else but loose sand. Your ground which you esteem the best is but the leaves and ashes of your trees. Dig but half a foot deep and there will be found nothing else but Clay [sic]. Your water is thick and not of the best.' He also found the planters' wanting in their attention, 'all things carrying the face of a desolate and disorderly show to the beholder.' He wrote that in ten days 'I never saw any man at work.' Instead the planters wasted their time and money in fighting and drinking.'

Initially, the crop that proved easy to develop was tobacco and the colonists sent what they produced to Europe (Beckles 2006: 16). But, as the market in Europe became flooded with tobacco, they began to grow cotton as an alternative product (2006: 17). Soon, however, this market would also become saturated and there was need to find another type of product to sustain the colonial economy. Sugar would become the deliverer, and would carry the Barbadian economy for the next three centuries. While the first Blacks (about ten) "were among the party of colonists who first settled Barbados in 1627," their numbers would increase exponentially to serve the needs of the sugar plantations on the island (Beckles 2006: 20). Williams (1994 [1944]: 23),[181] noted that:

> A change in the economic structure produced a corresponding change in labor supply. The fundamental fact was 'the creation of an inferior social and economic organization of exploiters and exploited.' Sugar, tobacco, and cotton required the large plantation and hordes of cheap labor, and the small farm of the ex-indentured white servant could not possibly survive. The tobacco of the small farm in Barbados was displaced by the sugar of the large plantation. The rise of the sugar industry in the Caribbean was the signal for a gigantic dispossession of the small farmer. Barbados in 1645 had 11,200 small white farmers and 5,680 Negro slaves; in 1667 there were 745 large plantation owners and 82,023 slaves. In 1645, the

[181] See also Eric Williams (1970: 111-135) for a discussion of the Barbadian sugar industry during the colonial period.

> island had 18,300 whites fit to bear arms, in 1667 only 8,300. The white farmers were squeezed out.

The sugar industry represented the economic lives of the Barbadian people (much like other colonies in the Caribbean) for centuries (Drummond and Marsden 1995). In the post-independence period, however, there was significant contraction (see Appendix 7) in the industry for a variety of reasons, including (but not limited to) a change of public sentiment toward the industry,[182] the rising cost of labor, a failure to modernize equipment, and fluctuations in global market prices.[183] An overarching argument appears to be that the plantation elite—the "Plantocracy"—was directly responsible for the rise of sugar in Barbados from the colonial period and had lost their influence in the post-colonial period (1995: 353-354). According to Drummond and Marsden (1995: 353-354):

> The most significant issue here, however, appears not to be corruption *per se*, but rather the way in which the political agenda and the regulation of commercial activity has been manipulated. It does seem that a small, elite group within Barbadian society has been able to defer the 'unsustainability' of is own assets and social position through strategies which have, albeit incidentally, resulted in the creation of different, and often more material and many would argue more consequential, forms of unsustainability. A particular social formation, in this case essentially a pattern of social relations which is no more than a relic of Barbados' colonial past, has been sustained, but only at the cost of degrading the island's environment and the lives of many of its people. Formational unsustainability, which tends to be a feature of all socio-economic systems, has been translated into various forms of material

[182] Indeed, sugar would diminish in social value (and arguably not become a part of the country's CEI in the post-colonial period) due to its negative association with the country and region's history of slavery.

[183] According to Drummond and Marsden (1995: 344), post 1992 there was dramatic decline in sugar cane production on the island due to "liquidity problems." The scholars provide a rich discussion of the multiple reasons the industry fell into crisis in the post-colonial period (1995: 349-353).

> unsustainability, something much more relevant to the central concerns of sustainable development.

Who Do We Want to Be?

By the 1970s, the Government of Barbados was keenly aware that there was need for diversification of the economy away from sugar. In the 1979-1983 Barbados Development Plan,[184] the government explained that:

> Barbados has the smallest proportion of its population living in absolute and relative poverty within the countries of Latin America and the Caribbean which confirms that Barbados possess one of the most equitable patterns of income distribution in the region. This highlights the conclusion that economic planning for Barbados in the 1980's must take as its starting point the fact that the country possesses a relatively highly developed social and economic infrastructure, a wide range of functioning institutions adequately manned, and a population which is adaptable and trainable….
>
> As a result of the small size of the domestic economy and consequential specialization in a limited number of sectors, the country has exceedingly high ratios of imports and exports to national income. This results in critical dependence on the international economy for the maintenance of high levels of domestic economic activity, and renders the country extremely vulnerable to fluctuations in economic activity in its major trading partners, and to radical shifts in the supply situation for key commodities….
>
> It is against this background of an economy with a narrow resource base and highly developed social infrastructure with a literate population which has high expectations, that the planner must fashion a development strategy for the 1980's.

When Barbados gained independence from Britain in 1966, the primary aim of the country's leaders was to transition "from an agrarian based economy to a more

[184] See, for example, Barbados Development Plan 1979-1983 (1979).

diversified one characterized by light to semi-heavy manufacturing and services."[185] While local leaders showed an interest in promoting Barbados' tourism industry, which they inherited as a natural resource, sustained and calculated effort was placed into developing and marketing the country as an OFS center as well (Holder-Olutayo 2016).

OFS was somewhat of a new interest—but one that leaders thought was appropriate for the highly educated population and socially advanced community they had achieved. As the early political leadership (Cheltenham 2015)[186] sought to diversify the economy, the OFS sector made sense based on the strengths of the Barbadian society (see, example, Government of Barbados 2014). Large accounting firms, such as Coopers and Lybrand (now PricewaterhouseCoopers (PwC)), were resident on the island and were actively looking for tax benefits for their clients and domestic lawyers were intent on servicing those clients.[187] As mentioned in Chapter 4, the strong interest of these professionals[188]—local lawyers and accountants—to develop a sophisticated and statute intensive industry like OFS was fortunately attractive to political leaders who were prominent members of the legal elite (Cheltenham 2015; Sears 2016; Barrow 1963-1964). Each government from the 1960s through the 1990s (which is when the industry became successful) slowly led the charge toward OFS through a series of incremental business regulations (Cheltenham 2015; Sears 2016; Carmichael 1996). The state would

[185] Government of Barbados (2005: 11).

[186] See also Sears (2016); Barrow (1963-1964).

[187] See, example, PriceWaterhouseCoopers (2005).

[188] Commentators, such as Thomas Sears (2015:10), have recognized a handful of Barbadian professionals who were responsible for developing the country's offshore sector. Sears (2010) lists some fifteen key individuals in this regard.

proceed during the decades of the 1980s and 1990s to produce legislation and implement a range of regulations to create a competitive, low-tax jurisdiction.

By the mid-1980s, Barbados' OFS sector took "on a role in Barbados equal in importance and revenue to the tourist industry of which it is an integral part" (Carmichael 2001: 56-57).[189] And, today, even a cursory look at the literature produced by the Barbadian government and business community reveals that the local leaders in the country view the island as a tourist haven and an OFS center (Government of Barbados 2014; Carmichael 1996; 2001). Indeed, in *The National Strategic Plan of Barbados for 2005-2025*, the Government of Barbados stated explicitly how the nation is to be conceived economically. According to the document, one of the six goals (number five) of the state is:

> ...to enhance Barbados' prosperity and competitiveness in the world economy. This will require and radical transformation in the way we carry out our productive activities. We must identify those areas of economic activity that are viable and competitive, and that can contribute to sustainable growth, employment and overall prosperity for everyone. Focusing on the export of services such as tourism and international business, while exploiting new ones such as culture and health, will all contribute to a more diversified and prosperous economy.

The OFS sector was purposefully constructed by local leaders (primarily lawyers, accountants and political leaders) in the decades following political independence, and was seen by this groups as a way to build on the country's heritage—high levels of social development, literacy and good governance—and perceived institutional strengths to achieve economic development (Holder-Olutayo 2016; Carmichael 2001; Carmichael 1996). Today, tourism and OFS represent a key part of what Barbados is as a society and

[189] In 2008, OFS held US $50 billion in assets—equivalent to 1300 per cent of the country's GDP at the time (Shipke 2011; Patterson 2013: 28-31).

any harm to either of those industries would be deeply wounding to both the economy and the Barbadian identity. Prior Attorney General, now Prime Minister, The Honorable Mia Mottley, articulated this point precisely in a lecture at George Washington University in 2002 about international pressures on the OFS sector. Pursuant to Mottley (2002: 419): "The only sector more important than international financial services for [Barbados] is tourism. So we will begin to understand the relation to the society in terms of the fall-out from that sector and its impact on the economy and the society."

But, outside of obvious economic motivations, how did the Barbadian society come to identify with tourism and OFS as a part of who they are as a society? Local leaders shaped Barbados' CEIs based on internal and external factors. With respect to tourism, the island's climate, location in the Caribbean and other natural resource allowed for it to be marketed as an ideal place for tropical vacation getaways (MyCoo 2006). In other words, geography mattered for this type of economic endeavor (see, example, Diamond 1997). And then the rest was up to leaders to invest and market the product. Indeed, "[t]ourism was promoted as a major industrial sector during the first four years of [political independence], and government revenues from this sector increased at a remarkable rate" (Beckles 2006: 278). And, by the late 1990s, the vast majority of the country's foreign income (70%) was earned through the tourism sector, which was also the largest employer (MyCoo 2006).

The Barbadian government sought to bolster the industry by strategically determining how land was to be used on the island. Policymakers also ensured the adoption of important legislation, such as the "Hotel Aids Act of 1967 and the Condominium Act of 1971" (Carmichael 1996: 272). The goal of these kinds of laws

was to "[make] Barbados more attractive to internationally mobile capital which [sic] was ready and able to invest in the hotel and resort sector of the economy" (1996: 272).

Barbados' entry into the OFS sector was also influenced to a large degree by geography. In this case, however, geography was important because it placed the island in close proximity to others who were engaged in the OFS activities. Indeed, Barbados' OFS sector was influenced by the experience of OFS jurisdictions like the British Virgin Islands (BVI), Channel Islands and Jersey, among others (Holder-Olutayo 2016; Interview #12). This allowed for the lawyers and accountants, as well as policymakers, to have a sense of best practices among other common law countries (states and territories) deeply entrenched in the offshore banking industry.

In the early days of the OFS sector, lawyers and accountants from Barbados traveled extensively around the Caribbean to understand the structure of the OFS sector in other islands. In essence, Barbados' proximity to other OFS countries incentivized the state to become selectively isomorphic with these jurisdictions, which were similarly situated in terms of size, history and economic structure. These professionals also traveled to more developed countries to encourage firms to come to the island to invest and to spark the negotiation of tax treaties (Interview #6).

Barbados' lawyers, accountants and policymakers, in particular, also gained tremendous insights about the types of tax structures that were most attractive to international investors through the country's close ties to Canada, which began as a trading relationship in 1771 and blossomed to the point where the island was considered by Canada for membership in the then Canadian Federation in the late 1800s (Sears 2016: 3-4; Carmichael 2001: 56-57; see also Beckles 2006). As suggested in Chapter 4, a

significant payoff was the ability of Barbadian policymakers to model local tax legislation relating to OFS after Canada's tax regime. Additionally, in 1980, Canada entered into one of Barbados' first double taxation agreements—sending the fledgling post-colonial nation officially on its way in international business arena (Carmichael 2001: 113). But, why the efforts to promote the OFS sector in particular?

Hints as to why Barbados gravitated specifically toward OFS can be seen in some of the government and private sector's promotional materials. There is typically reference to Barbados' stable political history, long experience with democratic lawmaking and highly educated population. Specifically, both private firms and the national government will consistently note: "The island's first Parliament was established in 1639, making it the second oldest in the Western Hemisphere" (see, example, PriceWaterhouseCoopers 2005: 13). There is also a conscious effort to craft a public image based on what Barbadians already know to be true: Barbados is a place with smart and industrious people with a history of "[skillful] management of the economy and good leadership" (Government of Barbados 2005: 38). One senior lawyer and former judge in Barbados suggested that what many offshore companies are seeking is not just a tax advantage—where they pay *no* tax, for example. They are actually looking for a clean and stable environment for investments, even if they *have to pay* some tax. In this regard, they are pursuing prudent tax planning in a safe social context and in a legitimate manner (Interview #6).

The Barbados narrative and history is ideal in this regard, and a source of immense pride for the people. OFS is also an area that highlights the immense sophistication and foresight of Barbadians. Recall, Barbados lacks natural resources—apart from the

sunshine and its beaches—and relies heavily on the capabilities of its people to build a thriving economy. As such, OFS is both an arena for gaining revenue and foreign exchange, as well as a way to display the immense capabilities of the Barbadian people. It represents *human achievement* based on who they are and what they have learned over the centuries since their tiny island was first occupied.

The first Governor of the Central Bank of Barbados and former Barbadian ambassador to the United States, Sir Courtney Blackmun (1998), responded to the praise heaped on Barbados by IFIs in the 1980s for the country's development success by highlighting the islands rich and "fortunate" history, upon which this success was built. For example, he credits the stable colonial period experienced under one empire—Britain—which allowed for "uninterrupted development of the island" (Blackmun 1998: 62). He also acknowledges the benefits gained from the enduring political and legal institutions introduced on the island by early colonial settlers (Blackmun 1998; see also Patterson 2013). Additionally, in Blackmun's (1998) view, the country benefitted tremendously from the steady leadership of Barbadian policymakers in the post-independence period.

Patterson (2013) emphasizes that this association between Barbadians and good political and economic management skills stems directly from the type of exposure and experience gained with institution building during the colonial period. The country's history "reflects an uncommon commitment to representative government" (Daniels et al. 2013: 131). After slavery was abolished, there was an inclination throughout the Caribbean to restrict freed blacks from serving as legislators. In Barbados, however, colonists allowed such participation—giving these ex-slaves the opportunity to develop

an invaluable understanding of the lawmaking process and associated skills (Daniels et al. 2013; see also Brown 2014).[190]

Tourism and the OFS sector have become linked and marketed together because of their joint reliance on tourists and foreign investment (Elcock 2014; Christensen and Hampton 2005).[191] Barbadians leaders have invested enormously in identifying the country to the world as both a tourist and international business destination (Government of Barbados 2014; Government of Barbados 2005). According to the Barbadian state: "One of the ways of asserting leadership in a global economy is to identify, sharpen and unify that positive 'brand image' of Barbados and use it to market Barbados politically, culturally and in the areas of our greatest economic strength, tourism and international business and financial services" (Government of Barbados 2005: 38; see also Invest Barbados 2009). OFS and tourism are more than economic sectors—they have formed Barbados' CEI because national leaders have come to see development through the lens of these two primary sectors.[192]

[190] Eleanor Marie Lawrence Brown (2014: 28) makes a related argument that "the success of West Indian migrants may be rooted in the early grant of what [Brown] terms "de facto property and contract rights" to West Indian slaves, which allowed their freedmen descendants to become the largest independent Black peasantry in the Americas."

[191] John Christensen and Mark Hampton (2005: 26) note that: "At the operational level island tourism can act as the catalyst that initially attracts [offshore financial center] firms and wealthy individuals to an island."

[192] Tourism is the primary way of inviting high net worth individuals to the island who then make use of the country's offshore banking services (Elcock 2014; Christensen and Hampton 2005). As of 2016, commentators noted the "[OFS] sector employs approximately 4,500 persons and has contributed over $1 billion to the country's gross domestic product annually" (Holder-Olutayo 2016).

CEI and Secured Transactions Reform in Barbados

What Type of Commercial Laws Do We Need?

Barbados' economic success during the early post-colonial decades, openness to foreign investment and aspirations for further growth makes the country a prime candidate for modern commercial laws (see generally Henry 2013). Notwithstanding, there has been a seeming lack of interest in adopting certain types of global best practices in this area. As noted in Chapter 2, the Doing Business indicator's Getting Credit indicator is directly related to how easy it is to access financing in a country based on the perceived quality of the jurisdiction's secured transactions laws. As a reminder, on this sub-indicator, Barbados currently ranks 144 out of 190 countries, with a DTF score of 30—which means it has not reformed its laws to look like a modern secured transactions regime (WB 2019).

Some local commercial lawyers concede that the current secured transactions regime is not as streamlined as Article 9 (in the United States) and is rather cumbersome (Interview #2). To this end, it is more costly and requires additional work on the part of consumers and their lawyers as they seek to consummate lending arrangements. SME borrowers are left waiting for financing as lenders, through their lawyers, are parsing through a variety of regulations and documents to ensure the solvency of lenders, in the event of a default. For example, significant information is required from borrowers about their resources, including the identity of individuals or entities that will serve as guarantors for the loan (Interview #2).

This situation is arguably unsurprising, since in the past decade Barbados has only undertaken formal business reforms in one area measured by the Doing Business report—

Starting a Business. In this category, it ranks 101, with a DTF score of 56.78. Barbados has reformed in an area that matters to the OFS sector. Simply put, firms seeking to come to the island for OFS services (or international business more generally) can easily incorporate to enjoy the benefits offered (Carmichael 1996: 271).[193] Other prime areas that the Doing Business tracks, which are not directly related to the specialized set of laws that make up the OFS legal architecture, have not been reformed to increase business efficiency. This is not to say that the Barbadian state has not been interested in or capable of reforming its commercial laws over the years. In Table 4, I provide a brief flavor of the major pieces of commercial legislation adopted since the 1960s. The point is to demonstrate that the Barbadian state has the capacity to achieve the commercial law reforms it desires.

[193] Carmichael (1996: 271) explains that the ease of incorporation has benefitted other legislative vehicles, such as the "Offshore Banking Act of 1979" and the "Exempt Insurance Act of 1983."

Table 6

Some Areas of Commercial Law Reform From Circa Political Independence[194]

Year	Law Adopted
1965 (year before independence)	International Business Companies Act of 1965
1967	Hotel Aids Act of 1967
1971	Condominium Act of 1971
1979	Offshore Bank Act of 1979
1981	Trademark and Patent Laws
1982	Companies Act of 1982
1983	Exempt Insurance Act of 1983
1984	Foreign Sales Corporation Act of 1984
1985	Trustee Act
1986	Amended International Business Companies Act of 1986
1992	Amended International Business Companies Act
1995	The International Trust Act
1996	Shipping Act of 1996
2001	Bankruptcy and Insolvency Act
2002	International Financial Services Act
2007	International Commercial Arbitration Act of 2007
2012	Private Trust Companies Act of 2012

Like the case of Grimsby (referenced in the introduction to this chapter), Barbados is more interested in adopting regulations in the commercial law arena that are beneficial to the local CEI and resists those that undermine it by consuming scarce lawmaking resources. These resources could otherwise be spent bolstering the OFS sector, which rests broadly on three main sets of laws—the Company Act (including the International Business Companies Act), Securities Act and Mutual Fund Act (Interviewee #2).[195] For

[194] The data for this table was taken from Carmichael (1996: 271-273) and Invest Barbados. Retrieved January 5, 2019 (https://www.investbarbados.org/trusts.php).

[195] Interestingly, between 1962 (the date of independence) and 1970, Jamaica had made similar reforms to their commercial laws. According to the Economic Survey reports for Jamaica between 1962 and 1970, the state had adopted laws such as: International Business Companies

example, in the early 1980s when the state passed the new International Business Companies Act, Trevor Carmichael (1990: 78)—a leading commercial lawyer in Barbados—explained:

> The new Barbados corporate legislation developed against the background of a burgeoning local financial services sector and the recognition of the need for a corporate vehicle to effectively service that sector. Prior to 1982, Barbados had already introduced international business companies legislation and was at that time in the process of enacting captive insurance legislation in addition to its offshore banking legislation. It was recognized by policy makers and professionals that outdated corporate legislation was inconsistent with attracting foreign originated companies and the servicing of such entities.

Barbados was at the forefront of the reform to company laws in the Caribbean region at this time. Some commentators even referred to its Companies Act of 1982 as "a model for the region" (Brewer 1990). But, instead of undertaking an extensive overhaul of the country's secured transactions regime, something the Barbadian state could undoubtedly do quite quickly and well, no such efforts have been made. Instead, the OFS community in the country appears willing to innovate around existing laws to the extent necessary to enable efficient lending activities within the OFS sector. For example, on occasion, they have used the laws and resources of other jurisdictions (such as Canadian province or New York, as mentioned in Chapter 4) to facilitate secured lending on a case-by-case basis.[196] Barbados may therefore lack a "modern legal regime" for secured

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Amendment Act (1964); The Companies Act (1965); and the Hotels (Incentives) Act (1968), to name a few (Government of Jamaica 1962; 1963, 1964, 1965, 1966, 1967, 1968, 1969 1970).

[196] For example, Mary Mahabir (2009: 18) explains:

> [w]ith respect to the international business sector, a number of the companies in this sector have given security for loans either to themselves or their parent company or affiliate or may have acted as guarantor for such loans. The lenders will almost invariably be financial institutions outside of Barbados and the governing law of the transaction will typically be the laws of a province in Canada or of the state of New York. While the majority of the legal issues will,

transactions, but private sector actors—lawyers, accountants and foreign firms—have implemented other mechanisms for increasing access to finance for at least a category of firms directly tied to the OFS sector.

But, why not undertake secured transactions reform to benefit a larger swath of the business community, particularly local SMEs? State and private sector capacity limitations in the face of an onslaught of international demands for transparency in offshore banking may be the simplest answer. As indicated above, local leaders have to make choices about the types of reforms they want to pursue in light of the limited bureaucratic capabilities in a small country. In the past few years, the Barbadian government and professionals (particularly lawyers and accountants) have had to focus their attention on protecting the industry from various international initiatives geared at undermining the OFS—particularly those that target the degree to which the transactions of foreign clients are held confidential (Carmichael 2011). While this dissertation suggests that both tourism and the OFS are Barbados's CEIs, OFS relies more heavily on the legal and accounting skills of local experts than tourism (Johnson 2001: ix).[197]

Importantly, having identified itself as a tourist and offshore banking jurisdiction, it may prove difficult and undesirable for Barbados, particularly Barbadian leaders, to shift course—even if the industry risks folding under pressure to gut significant aspects of its

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> therefore, have to be dealt with under laws other than those of Barbados, there will nevertheless be matters that will have to be dealt with in Barbados. These will include questions of how assets that belong to the Barbados company have to be dealt with. It is unlikely that such assets will be situated in Barbados. Generally, the assets of an international business company will consist of securities, bank accounts and other similar property, but not real property or tangible physical assets. As a practical matter there will, therefore, not be very much that may need to be done in Barbados to realize on these.

[197] Johnson (2001: ix) explained that "a maze of legislation and attendant regulations [is] required to establish an offshore financial industry."

legal protections. This amounts to a matter of entrenchment. There is a pre-existing legal architecture (separate and apart from experts) that is reflective of a certain vision for the country.

This type of legal (and even psychological) entrenchment means that future policy and legislative options are filtered through the lens of the OFS sector. And, due to the smallness and limited state capacity of the country, it is difficult to simultaneously promulgate new complex laws, like secured transactions and comply with the mandates of developed countries where it concerns information sharing in connection with offshore accounts (Mottley 2002: 415-20).[198] In this vein, policymakers have sought to prioritize legislation that benefits the OFS sector (and by extension tourism). For example, the state has signed on to more double taxation treaties (Carmichael 2008), developed a new Private Trust Act (2012), and developed a "Special Entry Permit Programme for High Net Worth Individuals."[199]

Additionally, Barbados has also made efforts to diversify its OFS sector. Recognizing the growing importance of alternative dispute resolution and its benefits to commercial transactions, the state and various stakeholders have worked to create an international business arbitration court and become a center for the alternative dispute resolution of commercial matters (Carmichael 2013; Lavine 2016). In support of this agenda, which complements OFS, the government adopted new laws—such as the

[198] With these limited resources, the state has had to prioritize its commitments. In addition to adopting terrorism legislation, responding periodically to the U.N. Security Council—pursuant to Resolution 1373 dealing with anti-terrorism—and implementing various measures proposed by FATCA (Mottley 2002: 415-20).

[199] http://barbadosoffshoreadvisor.com/barbados-immigration-for-high-net-worth-individuals/. (Last visited December 2, 2018).

International Commercial Arbitration Act in 2007.[200] This pivot to commercial arbitration is akin to what other offshore jurisdictions like The Bahamas (Gomez 2010), Cayman Islands (Cayman Islands Law Reform Commission 2009), and Channel Islands (Morgan and Redmond 1985) have done—rather than immediately pursue modern secured transactions laws. These small offshore banking communities were some of the very places Barbados sought to emulate and borrow legislation from when it initially began to build an OFS sector (Bell 2002: 6).

Conclusion

In summary, a network of specialized laws helped Barbadian leaders (lawyers, accountants, business leaders and policymakers) to build a CEI that reflected the country's strong political and legal institutions, highly educated and sophisticated people, and the nation's burning post-colonial desire to be known as a global leader in business affairs. This identity, once developed, required the said legal framework for its continued existence. Specifically, to maintain the identity of international business jurisdiction, subsequent commercial law reform is required to either directly support the industry or at the very least complement it. Business regulations that represent general best practices for economic growth—but do not directly pertain to the OFS sector—may therefore be ignored or avoided. This is especially the case if they are overly complex and far reaching and, consequently, require too much time and resources to implement. In other words, law facilitated the growth of Barbados's OFS sector—much like law made

[200] The International Commercial Arbitration Act, 2007-45. Retrieved August 27, 2018 (http://www.wipo.int/wipolex/en/text.jsp?file_id=209385#LinkTarget_676). It is worth noting that the law "does not deal with domestic arbitration which is still governed by the Barbados Arbitration act of 1958 (BAA)" (Carmichael 2013).

Delaware—and the OFS sector is subsequently shaping the manner and timing of future legal reform.

CHAPTER 6:

IMPLICATIONS[201]

The preceding chapters sought to bring to attention two factors this dissertation suggests play important roles in the economic growth fortunes of developing countries. First, they suggest a role for the BLC in complementing the bureaucratic capabilities and technical expertise of the state where it concerns commercial law reform. Second, they suggest that CEI can constrain the reform interests of leaders, including commercial lawyers, by prioritizing reforms that support or protect the identity industry. Since developing countries in particular have limited state capacity and must prioritize reforms, understanding these two factors will help academicians and policy makers to promote and implement the best commercial law reforms for a community. This Chapter now turns to a few implications from my state capacity and CEI theses. The sections below discuss both the types of new research questions they generate and the limitations to my own research.

The Importance of the BLC

With respect to state capacity consideration, the analysis of Barbados and Jamaica's commercial law reform efforts provides important new theoretical insights into the potential relationship between the BLC and the state's pursuit of economic development. Specifically, it queries what role the BLC may play in commercial law

[201] I would like to thank the faculties at Cornell Law School, Emory University Law School, University of Chicago Law School, and University of Kentucky College of Law, University of Miami School of Law, University of Toronto Faculty of Law and Willamette University College of Law for their comments to this section of my dissertation, especially David Abraham, Christopher Bradley, Charlton Copeland, Andrew Dawson, William Hubbard, Rafael Pardo, Mariana Prado, Andres Sawicki, George Shepherd and Joanna Shepherd, Aaron Simowitz and Chantal Thomas.

reform. Legally trained individuals serving as private sector lawyers, government counsel and judges are vital to determining how and when a set of commercial laws can be useful to commerce in a country. Indeed, the outcomes of commercial law reforms are influenced by the size, skills, priorities and political influence of the BLC. Throughout their careers, these lawyers may go from private practice to government service, then back to private practice. Some may become judges and others politicians. In each of these roles, they learn about the needs of private enterprise and how law can effectively serve those needs.

In Barbados, a dynamic group of lawyers at different points in the country's post-colonial history laid the groundwork for what became a thriving OFS sector—what this dissertation suggests is the country's CEI. Indeed, the partnership between private sector lawyers and legally trained policymakers made the passage and implementation of complex business incentive legislations feasible. In recent years, as the BLC has chosen to remain silent with respect to some global best practices in business regulation, the state appears to have also refrained from action—instead of leveraging its coordination capabilities to engage the BLC. While more work remains to be done to better understand what types of commercial law reforms the BLC is inclined to support and how the state would react in turn, preliminary evidence suggests that the local bar can be important and influential when it comes to commercial law reform in low capacity jurisdictions and that CEI can focus their attention on a particular set of laws.

In Jamaica, early political dynamics, the absence of legally trained individuals in leadership, a democratic socialist state, the informality of business arrangements, and a small cadre of commercial lawyers that were not developmentally inclined in the early

post-colonial years all contributed to creating a less cohesive commercial bar (BLC) and a looser relationship with the state regarding commercial law reforms. When a formal bar association was formed and lawyers began providing critical feedback on legislation, as in the case of the SIPP Act, economic priorities (CEI)—as identified by policy makers—won the day. The BLC did not carry significant weight and were not seen as a critical component of the state's capacity to adopt and implement commercial law reform.

The Importance of CEI

With respect to CEI, the divergence observed in the approach to secured transactions reform in Barbados and Jamaica suggests that the standardization of commercial law for purposes of economic growth requires a particular type of cost-benefit analyses for developing countries. Some countries must consider how best to use their limited bureaucratic resources to protect and bolster their CEI while assessing which best practices to adopt from more developed countries. Stated otherwise, developing countries must make a decision regarding the kind of isomorphism they want to pursue: coercive, mimetic, or normative. Under these circumstances, IOs and more developed countries should consider the reform burden faced by developing countries and approach the standardization of law project (such as those promoted through model laws and indicators) as an ongoing conversation about a variety of legal regime types that could help these countries to modernize their laws without undue burden (see Davis and Kingsbury 2017).

Beyond developing countries, CEI is an important way of understanding how and why legal change happens when best practices promise economic growth in a variety of contexts. A community (state, region or wealth country) may overcome traditional political and economic hurdles to a particular line of commercial law reforms and still face social resistance to those reforms. Stated otherwise, prevailing political economy theories are not capable of explaining legal change—or the lack thereof—in all circumstances. For example, as noted earlier, while Kahan and Kamar (2002: 725) (as well as other scholars (for example Roe 2003)), suggest that Delaware's long-standing competitive advantage over other states could be seen as an economic hurdle that those states would have to overcome to seriously rival the jurisdiction, they concede that these costs may not be sufficient to exclude all states from attempting to compete with Delaware. Indeed, they note the costs may not be high enough to pose an insurmountable deterrent. Consequently, they argue that political constraints to legal reform could be the real obstacle, especially where policymakers deem potential profits from such an enterprise to be inadequate or too speculative in comparison to other sources of revenue and political interests (Kahan and Kamar 2002: 727-35). But, assuming that a set of states were able to overcome both political and economic obstacles, how likely is it that they would choose to copy Delaware's success by replicating its legal system?

Of course, without the appropriate data and the ability to control for a variety of factors, it is hard to say. We would need to find several states that are willing to undertake the economic and political costs of copying Delaware's legal system and then observe which ones actually pursue this goal. While such a study has not been undertaken to my knowledge, it is not unreasonable to assume that some states would

refrain from this undertaking. This dissertation suggests that a state with a well-established CEI, may at the very least contemplate how a Delaware type corporate law product would fit with its pre-existing identity. In other words, CEI may serve in some circumstances as a silent, but effective, barrier to reform.

Consider the case where commercial law reforms are objectively beneficial to a community but are not pursued. In Barbados, for example, SMEs are in need of greater access to credit and experts have long argued that secured transactions reform could be one way to facilitate greater lending to these entities. The state, however, has not pursued such reforms to date. Political economy explanations would suggest that costs or domestic politics, or possibly both, could be factors in the reluctance of the state. When compared to Jamaica, however, these explanations fail. While bureaucratic capacity has been similar in both countries, Barbados has for the majority of the post-colonial period had a more vibrant economy (Henry 2013: 22-24) and the elite have been more inclined toward commercial law reform. If costs were a factor, much like Jamaica, Barbados could have received financial assistance from IOs to undertake secured transactions reforms. Similarly, there is little evidence that Barbadian policymakers have political motives for not pursuing reforms in this area. Indeed, from all accounts, the topic has simply not been a matter of priority. The country's concern over the fate of its offshore banking sector, however, has been a major focus of attention—which could explain why secured transactions reform has occupied a lower priority.

Acknowledging the existence of CEI and the role it can play in how communities approach their business reforms allows legal experts to move beyond a myopic focus on the political and economic hurdles to legal reform. Indeed, CEI demands that we

consider specific cultural or ideological barriers to reforms. If experts believe that a particular legal regime can be beneficial to a community and economic and political factors do not sufficiently explain the community's resistance to these reforms, the next step should be to examine the possible existence of a CEI. If the community has a CEI, legal reformers must then decide how to proceed in light of that CEI. One option could be to simply abandon all hopes of reform—at least in the near term. Resistance may be so fierce that legal change is not immediately feasible.

If reform is considered sufficiently important, however, another approach may be to construct a narrative that demonstrates how the reform helps the CEI industry and has little drawback. Another approach may be to find alternatives to the reform that achieves the same ends, but are more acceptable to the community. In the case of Barbados, for example, those interested in reform could promote an alternative to an Article 9 type secured transactions regime that achieves its goals—but requires less time away from offshore banking reforms and is easily and seamlessly implemented.

A Matter of Preferences

Traditional economic approaches to private ordering are concerned primarily with the preferences of rational actors. Specifically, they are concerned with how these actors maximize their preferences when their options are limited. While it is well-accepted that individuals have a wide range of preferences (monetary and non-monetary), little attention has been paid to identity as a factor affecting how public and private law pertaining to economic activities is structured. Even when examining informal arrangements and unusual regulations, which at first blush run counter to economic

theories, scholars tend to avoid situating choices within the context of a larger cultural environment.

While these approaches and others in the rational choice tradition occasionally consider social causes for how parties choose rules to govern business arrangements, they could also benefit from a specific assessment of identity as the source of some seemingly irrational preferences. CEI provides such an opportunity. Instead of seeking to only determine which costs actors are trying to avoid or minimize and how wealth is maximized, we should also entertain the possibility that, in some contexts, parties choose business rules and legal regimes because they support an activity, cause or value that has intangible meanings to a larger community. To that end, CEI expands the range of preferences we can and should consider when analyzing legal reforms for a particular community.

For example, when public choice theory suggests that a particular government agency may be subject to capture by special interests and convinced to make policies that are supportive of that industry (see, example, Eriksson 2016), another option may also be feasible. In some instances, these special interests have tapped into a CEI that their efforts support. Daniel Farber (2017: 185) suggests "small groups may sometimes act as proxies for the broader public interest, so the activities of these small groups may actually improve social welfare." CEI suggests this welfare may sometimes be linked to a community's heritage and symbols—and may provide little, if any, monetary advantage or power to the community—beyond self-identity. Significantly, the awareness that CEI may motivate a preference for, or resistance to, a given set of reforms ensures that we attend to the appropriate set of incentives when promoting legal change.

CEI may also explain why capture is successful in some contexts, as well as how local leaders who are inclined toward capture may behave in ways that do not optimize their economic preferences. With respect to capture, sociologists have long argued that one dimension of power involves the ability of the powerful to shape the perceived interests and desires of others. This type of power quells even the thought of rebellion, and leaves the powerless feeling as if elites should be left unchallenged. John Gaventa's (1982) work, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*, is demonstrative of this phenomenon. Gaventa (1982: 256) studies the puzzle of: "Why, in a social relationship involving the domination of a non-elite by an elite, does challenge to that domination not occur?" He suggests that some "power relationships, once established, are self-sustaining" Gaventa 1982: 256). They shape the interests, wants, desires and needs of subordinates—thereby dispelling the urgency for rebellion (see also Lukes 1974 [2005]). To this end, local leaders who can convince the larger community, including legislators, that a particular CEI is reflective of their best attributes, and should engender both their pride and support, will be capable of controlling the terms of legal reforms—perhaps without opposition. This may even be achieved without promising or delivering money or votes to legislators—the traditional trappings of capture.

Interestingly, local leaders may limit their own economic preferences by way of their identification with a particular CEI. For example, if local leaders believe that the agriculture sector represents the economic identity of the community, they may be focused on developing the best laws and regulations directly pertaining to farming—

"seeds, fertilizers, and machinery" and the like (WB 2017a: 101).[202] They may, in turn, ignore the adoption of model bankruptcy laws that would afford for the efficient restructuring and reorganization of the financial affairs of local agriculture firms—should a small family operation fall into hard times. In short, how local leaders conceptualize the community's CEI may constrain (or expand) their ambitions for legal reform. Indeed, the role self-identification plays in the optimization (or the lack thereof) of elite preferences is not a topic of examination in economic and political theories that seek to explain legal change.

Legal Reform in the Face of Cultural Preferences

Accepting that cultural preferences—embedded in a CEI—may hinder or promote legal reforms in specific contexts, the next course of inquiry is to determine how to engage those preferences.[203] After all, there are some circumstances where CEI may resist an objectively appropriate set of reforms for a community and embrace objectively inappropriate reforms. For example, it may be difficult to replicate Delaware in another community for all the reasons scholars have already mentioned, as well as because new communities may have pre-existing CEIs that conflict with corporate law as a sector. Specifically, the legal infrastructure that supports the pre-existing CEI may require significant reform to allow for a different kind of industry. Consider a community with a

[202] See also: Enabling the Business of Agriculture: About Enabling the Business of Agriculture. (http://eba.worldbank.org/about-us). (Last visited July 30, 2018).

[203] It is important to recognize that different segments within a community may be attached to different parts of the economic space. For example, some residents of coal-mining country may be affected by the pollution associated with the industry and vehemently oppose it. One can, therefore, imagine identities on both sides of the battle over a particular industry from the same community. As such, the community may not support univocally just one thing (Mayer 2018: 1-12).

manufacturing economic identity and what it considers the most suitable labor regulations for this kind of enterprise. If they are now being asked to become the next Silicon Valley (with a wholly different kind of labor and employment regulatory structure), such a change is likely to engender some resistance (Gilson 1999; Saxenian 1994).

An intuitive approach to these kinds of roadblocks is to subtly nudge the community's underlying cultural beliefs and industry attachment toward the desired change. But, this is clearly easier said than done. For example, the OFS sector in Barbados and its underlying regulations are built on the culture, heritage and experience of the Barbadian people—which took centuries to cultivate and is unlikely to change any time soon. Examining how communities change CEIs over time may, however, provide useful insights regarding how legal change can take place in this context. A research agenda that explores how communities change CEIs and the kinds of legal adaptations required for such change would provide some element of a roadmap for this kind of endeavor. Needless to say, the fact that declining industries, such as coal and timber, still remain influential in certain communities suggest that CEI transition is quite complicated (see generally Bell and York 2010). Such a CEI research agenda may therefore include careful investigation into the role worker retraining, migration and demographic shifts in communities may play—if any at all—in CEI change.

Identifying CEI and Interaction Effects

Despite my efforts to describe the concept and role of CEI as it relates to law reform, much empirical work remains to be done. First, it is critical that we have some

way of determining when an industry is a CEI versus merely a major income generator for a community. For example, this dissertation has suggested that bauxite may not have been a CEI for Jamaica in early post-colonial decades—even though it was a significant source of foreign exchange for the island, and Jamaica was the top bauxite producer in the world for a time (Stephens and Stephens 1986: 26; Keith and Keith 1992: 10). Needless to say, this point is debatable. The primary reason for my skepticism about bauxite is tied directly to the lack of control local Jamaicans had over the industry—which was primarily owned by foreign investors (Stephens and Stephens 1986: 26-27). But, in addition to the local control and cultivation of an industry, is there some objective threshold for CEI development that must be met for it to become part of the community's identity? Future research should seek to garner more data about when an industry rises to the level of CEI, and whether certain kinds of CEIs are naturally more influential when it comes to future law reform efforts than others.

One course of inquiry involves the interaction between the CEI industry and other firms in a community. Presumably, firms have their own cultural identity, but may have to operate within a community that celebrates a different kind of industry, as their CEI. Imagine, for example, a technology company like Apple operating out of Jamaica or West Virginia. How would that company's identity change, if at all, within these cultural environments? Specifically, how does regulation built to support the community's CEI impact the company's goals and operations?

Finally, as Barbados demonstrates, some places may have multiple CEIs. In these environments, how exactly does law reform take place? Barbados provided a relatively straightforward situation, whereby tourism overlaps neatly with offshore banking.

Indeed, these two industries complement each other. But, what if we had two very different CEI industries in a given community—with different legal infrastructures? How do decisions about law reform get made? How do the various local leaders compromise to get particular reforms adopted? Does there have to be at least one CEI that is more dominant? These and other related questions require detailed empirical work using multiple methodologies to untangle. They are important questions, however, because CEI—as demonstrated in places like Barbados and Jamaica—has significant social power that reaches into the commercial law domain.

Limitations

There are several limitations to this study. I discuss three of them in this section. First, I touch on matters of definition and scope of concept. Second, I discuss evolution and stickiness of the phenomenon. Third, I close by discussing the matter of causation.

Definition and Scope of Concepts: BLC and CEI

BLC

The Legal Complex has had a range of definitions over time, which can lead to confusion. For example, HKF (2012c: 7) refer to the Legal Complex as legally trained individuals in a community engaged in legal practice. Pursuant to HKF (2012c):

> The [Legal Complex] comprises all those law-practicing occupations that mobilize, whether cooperatively or not, on a given issue at a given moment. Here [they] distinguish between (a) every person with a legal training, which in some countries embraces a very large and diverse group of professionals, business persons, and politicians, and (b) those in a legal complex who are acting as lawyers, whether within the state or private markets, within for profit or non-profit corporation, or within civil society.

Kim Scheppele (2015), however, relies on an earlier work of Lucien Karpik and Terence Halliday (2011)[204], including their work with Malcolm Feeley (Halliday, Karpik, and Feeley 2007), to characterize lawyer-politicians as core members of the Legal Complex capable of using their legal training for illiberal political purposes. This dissertation uses the Legal Complex concept to speak to legally trained individuals broadly, but focus on the BLC as a subset of these professionals who practice commercial law. Missing from this conceptualization is a clear mechanism for how the BLC operates and the social context in which they are led to act in a developmental manner—i.e., pursue business related legislation that is aimed at promoting economic growth for their community.

This dissertation also refers to the state's coordination capacity as being crucial to stimulating the involvement of the BLC in this regard, but more fine grain data (perhaps deeper historical research and a large number of formal interviews with member of this group) are required to better understand how this state-BLC relationship operates in practice. Greater conceptual clarity regarding this dimension of the BLC will afford scholars and policy makers greater insight about how to effectively supplement a state's capabilities when choosing law reform as a means to stimulate economic activity.

CEI

The CEI concept is relevant to community leaders who either directly make decisions about legal reform or influence decision makers about which reforms to pursue. CEI is defined herein as a collective identity of a community that is tied to a particular industry or commercial enterprise. This identity forms a unique social connection

[204] See also Terence Halliday and Lucien Karpik (1997).

between the individuals in the community. For example, many of the residents of Grimsby—the fishing village in North East England (Segal 2018)—identify as fishing people. An aspect of their collective identity (beyond being English or European, for example) is tied to a particular economic enterprise. In practice, however, this dissertation suggests this collective identity is shaped by the leaders of the community—who are either involved in the activity or are appropriately situated in status to frame the narrative of what the industry (or industries) is or should be in that community. In the case of Grimsby, these community leaders may be the fishermen, who hold a revered status among their fellow residents.

It is reasonable, however, to query specifically who these leaders are from case to case, so that they can be readily identified and studied. Since leaders may vary from community to community, especially based on the type of CEI the place has, this kind of precision appears elusive. In the case of Barbados and Jamaica, this dissertation focused on leaders who were lawyers, business persons and community leaders. This choice was appropriate because of the nature of the industries examined—tourism and offshore banking. Both industries are subject to the influence of policy makers, the business class and the legal profession. Business persons are actively engaged in building, running and marketing hotels and other tourism related activities. They are also actively involved in the OFS sector. Policymakers and lawyers are engaged with the types of reforms that will hinder are enhance the success of both industries. Importantly, all of these groups have public platforms, particularly through the media, to communicate a narrative of what the identity of the country should be with respect to the kind of commercial activity

it is best equipped to pursue—based, for example, on history, geography or inter-jurisdictional competition.

In the case of Barbados and Jamaica (and other Commonwealth Caribbean islands for that matter), a study by sociologist Charles C. Moskos (1967) at the dawn of political independence identified a group of top nationalist leaders in these newly sovereign countries. These leaders included, wealthy merchants (business persons), labor union leaders (who often became politicians), media elite (such as newspaper editors) and professionals, such as lawyers (referred to as barristers) (Moskos 1967: 27-40). There could certainly be more refinement or precision to the nature of the leaders that typically shape the CEI, however. As future research into CEI is pursued, this is an area ripe for development.

Evolution and Stickiness Phenomena: CEI and BLC

BLC

Questions abound regarding the origins and resilience of the BLC with respect to developmental activities. For example, how does a state cultivate and maintain a BLC that is willing to act in a manner that helps to serve the development goals of the country? Previous lawyer studies tend to show that lawyers, like many other professionals, are seeking their own self-interest—which often means greater market share with respect to clients (Abel 1985). Is it that Barbadian lawyers were merely pursuing their economic self-interest, which they masked for political and public relations reasons as a national endeavor? This is certainly quite feasible. The narrative conveyed by this group may simply be self-serving. But, the nationalism that existed among the leaders in many of

these smaller ex-colonies suggests that, even if they had desires for economic gain, there was an interest in contributing to national progress (Moskos 1967). However, more data is required to fully understanding the competing and complex motivations of this group. Future research should therefore seek to dissect if possible where the BLC is acting for the large public benefit or merely to protect and promote their own economic interests, or if there circumstances where the two goals easily coincide.

CEI

Another limitation of this study is potentially an incomplete articulation of the origins of CEI. In other words, how does a CEI develop and does it matter for purposes of its conceptual use? Based on my studies of Barbados and Jamaica alone, this answer is unclear. Is it merely that CEI emanates from elite hegemony and, if so, is it merely a study of how power is used by elites to achieve their economic goals (see, example, Gaventa 1982; Lukes 1990)? In the cases of Barbados and Jamaica, elites[205] are certainly crucial to the cultivation of CEI, but they are arguably cultivating these identities as a type of nationalistic endeavor—not purely for their own economic self-interest. To this end, CEI may best be studied as an extension of nationalism. Indeed, the people of Grimsby have seemingly melded their fishing identity into who they are as citizens of England—versus Europe. This dissertation is cautious, however, about casting about nationalism as a uniformly shared concept of the nation among all residents of a country (or community). In this regard, the work of Bart Bonikowski (2017, 2016) could be particularly informative to the concept.

[205] According to Veenendaal and Corbett (2015: 539), elites often dominate political affairs in small developing states "where they have much higher levels of education than the average citizen, thus allowing them to control the policy agenda."

While the theoretical epicenter of CEI is located within the realm of elite actors, such corporate coal executives (Bell and York 2010), there is reason to believe that it may shift depending on the nature of the industry. For example, while West Virginia's CEI is shaped by elites, it benefits from large-scale participation from the community. Many West Virginians or residents of Grimsby may actually know someone (perhaps even a close relative) who works or worked in extractive industries like coal mining or fishing. This type of participation, while subject to narratives promoted by elites, is propelled by the direct experience of the community through actual work. Industries, such as financial services or technology, may be further removed from the community—since a smaller subset of community members will hold jobs in the industry. Recall that in Delaware, where corporate law is arguably the CEI of the state, many residents are not aware of day-to-day activities of corporate lawyers and firms that incorporate in the state and merely benefit from the tax revenues generated in the process (Roe 2003: 594). In this setting, it is likely that the CEI originated with a small group of elites (business persons and lawyers) and is maintained by them as well.

Additional research will be required to discern the difference between the strength and durability of CEIs that stem from different industries. It may be that CEIs from extractive industries are more resilient over time and sticky—i.e., hard to discard or change—whereas CEIs from non-extractive, knowledge based, industries are easier to transition from. A survey of the larger population—in addition to leaders—could provide a sense of how the community views various local industries and the degree to which they identify with extractive and non-extractive commercial activities. Indeed, the stability of a CEI in a democratic society could be linked to the interaction between how

leaders in that society identify with the resident industries and how the larger public identifies with those industries.

The Matter of Causation: CEI and BLC

Perhaps the most significant limitation of this dissertation's discussion of BLC and CEI relates to the issue of causation. Of the many variables that could influence legal policy concerning economic development, it is difficult to conclude that either CEI or BLC is the leading cause. These other potential influencers include a multitude of special interests, imperfect information, state capacity constraints (including coordination capabilities), the availability of informal alternatives, external actors (such as the IMF), etc. While the design of the study, with two comparable countries, seeks to control for a number of these, additional qualitative (and potentially complementary quantitative) work is required to understand the degree to which other variables are playing a role in how states approach their reforms and how much contribution BLC and CEI are making. The goal of this dissertation project is to bring to the fore both phenomena as variables to consider, along with others, when determining how to use law as a tool for economic growth.

Future Research

This dissertation has laid the groundwork for a number of future projects. A few of these are outlined in this section. First, the findings suggest there is a need to better understand the role leaders play in shaping the CEI of a community, and the degree to

which there is overlap with the work of scholars working on nation branding (Aronczyk 2013). Second, there is reason to explore how CEI relates to some of the work of scholars in the behavioral economics camp who study identity economics and even the relationship between "happiness and the law" (see, example, Bronsteen, Buccafusco, and Masur 2013, 2015; Akerlof and Kranton 2011).

Third, in an era when we are still trying to understand the effects of globalization on emerging economies, scholars should study the relationship between commercial/business lawyers and the state to explore whether it presents a path to more beneficial commercial law reforms and relieves state capacity constraints. Fourth, given the disparity in rankings on the Doing Business indicators among similar countries (geographically, historically, culturally, etc.), we should seek to understand if there is a pattern to how countries approach their commercial law reforms. For example, do countries that engage in offshore financial services as a major sector of their economy, or their CEI, pursue a set of reforms around the industry, to the exclusion of other beneficial best practices?

CONCLUSIONS

This dissertation suggests developing countries that share the same legal tradition, such as the common law legal heritage, may have different economic outcomes for at least two previously understudied reasons. First, some states may be better at targeting, adopting and implementing legal reforms that are best suited for their economic goals by way of effective coordination with the private sector legal community (BLC). In this regard, they are able to strategically extend the state's expertise and law reform capabilities. Second, the leaders in these states may have different CEIs, and have focused on different sets of commercial laws to develop this identity.

More precisely, with respect to state capacity, the cases of Barbados and Jamaica suggest that a close examination of development efforts in capacity constraint countries may reveal that legal professionals—particularly the BLC—can be a vital aspect of the state's capability to act when it comes to the use of law in support of economic growth. In the past, we have struggled with how to define state capacity, and have concluded that it is a very contextual concept. Indeed, we have been encouraged to ask "for whom" and "for what" are we trying to cultivate state capacity (Enriquez and Centeno 2012)? This dissertation suggests we ask an additional question: With whom should we seek to build capacity? If a state is seeking to build capacity for law reform, perhaps it is useful to consider the type of legal reforms (business, criminal, constitutional) it desires and identify private sector actors from within the society who are most equipped to support that endeavor—through their understanding of how law works in action.

This dissertation has also shown that CEI can constrain or expand the types of legal reforms a sate may seek to undertake when attempting to stimulate the economy.

To date, CEI has been utilized in a very small rural and environmental sociology literature to explain the attachment communities have to certain extractive industries, but the concept and phenomenon has greater theoretical and policy implications. Industries that are central aspects of a community's identity provide a prominent lens through which local leaders contemplate future commercial law reforms. This may be the case even if these industries do not provide tremendous economic value to the community, or are of declining economic importance. Economic theories suggest that actors should give up commitments that no longer work to their advantage, and the clear fact that actors do not always do this calls for an explanation of the stickiness of particular economic arrangements. Considering CEI, which builds a cultural dimension into what looks like irrational stubbornness, helps to explain what is at stake for communities in giving up particular ways of life.

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Appendix 1.

Henry and Miller's (2008) Graph of Standards of Living in Barbados and Jamaica Following Political Independence



Appendix 2

2019 Doing Business Rankings—Latin American and the Caribbean[206]

Ranking	Country	Distance to Frontier
3	Columbia	95
3	Puerto Rico (US)	95
8	Mexico	90
12	Costa Rica	85
12	Honduras	85
12	Jamaica	85
22	El Salvador	80
22	Guatemala	80
22	Panama	80
22	Peru	75
60	Trinidad & Tobago	65
73	Uruguay	60
85	Argentina	55
85	Guyana	55
99	Brazil	50
99	Nicaragua	50
112	Dominican Republic	45
112	Ecuador	45
124	Paraguay	40
124	Venezuela, RB	40
134	Bolivia	35
144	Bahamas, The	30
144	Barbados	30
144	Dominica	30
144	Grenada	30
161	Antigua and Barbuda	25
161	St. Kitts and Nevis	25
161	St. Lucia	25
161	St. Vincent and the Grenadines	25
172	Belize	20
178	Haiti	10
178	Suriname	10

[206] Source: Doing Business 2019: Training for Reform. Retrieved December 27, 2018 (http://www.doingbusiness.org/en/data).

Appendix 3

Doing Business—Jamaica Reforms 2012-2018[207]

"✔ = Doing Business reform making it easier to do business. "

"✗ = Change making it more difficult to do business. "

Year	Reforms
2018	"**Starting a Business**: Jamaica made starting a business faster by reinstating next-day service for company incorporation." "**Getting Electricity**: Jamaica improved the reliability of the electricity supply in Kingston by investing in the distribution network through several initiatives, including the installation of smart meters and distribution automation switches." "**Trading Across Borders**: Jamaica reduced the time for documentary compliance for importing by implementing web-based customs data management platform, ASYCUDA World."
2017	"**Starting a Business**: Jamaica made starting a business more difficult by removing the ability to complete next day incorporation." "**Paying Taxes**: Jamaica made paying taxes less costly by increasing tax depreciation rates and the initial capital allowance for assets acquired on or after January 1, 2014. Furthermore, companies incorporated for less than 24 months are exempted from paying the minimum business tax. Jamaica also made paying taxes easier by implementing an electronic system for filing of corporate income tax, VAT and social contributions."

[207] Source: http://www.doingbusiness.org/en/reforms/overview/economy/jamaica. (Last visited January 9, 2019).

Year	Reforms
	"**Trading Across Borders**: Jamaica reduced the time of documentary compliance for exporting by implementing an automated customs data management system, ASYCUDA World."
2016	"**Starting a Business**": Jamaica made stating a business easier by streamlining internal procedures." "**Dealing with Construction Permits**: Jamaica made dealing with construction permits easier by implementing a new workflow for processing building permit applications." "**Paying taxes**: Jamaica made paying taxes easier and less costly for companies by encouraging taxpayers to pay their taxes online, introducing an employment tax credit and increasing the depreciation rate for industrial buildings. At the same time, Jamaica introduced a minimum business tax, raised the contribution rate for the national insurance scheme paid by employers and increased the rates for stamp duty, the property tax, the property transfer tax and the education tax." "**Resolving insolvency**: Jamaica made resolving insolvency easier by introducing a reorganization procedure; introducing provisions to facilitate the continuation of the debtor's business during insolvency proceedings and allow creditors greater participation in important decisions during the proceedings; and establishing a public office responsible for the general administration of insolvency proceedings."
2015	**"Starting a Business**: Jamaica made starting a business easier by consolidating forms, but also made it more time-consuming as a result of delays in implementation of the electronic interface with different agencies."

Year	Reforms
	"**Getting Electricity**: Jamaica made getting electricity less expensive by reducing the cost of external connection works." "**Getting Credit**: Jamaica improved access to credit by establishing credit bureaus and by adopting a new secured transactions law that implements a functional secured transactions system, broadens the range of assets that can be used as collateral, allows a general description of assets granted as collateral and establishes a modern, notice-based registry." "**Paying Taxes**: Jamaica made paying taxes more costly for companies by introducing a new minimum business tax."
2014	"**Starting a Business:** Jamaica made starting a business easier by enabling the Companies Office of Jamaica to stamp the new company's articles of incorporation at registration." "**Registering Property**: Jamaica made transferring property more difficult by increasing the transfer tax and the stamp duty." "**Getting Credit**: Jamaica improved its credit information system by creating a legal and regulatory framework for private credit bureaus." "**Paying Taxes**: Jamaica made paying taxes less costly for companies by reducing the corporate income tax rate—though it also increased vehicle and asset taxes."
2013	"**Paying Taxes**: Jamaica made paying taxes easier for companies by allowing joint filing and payment of all social security contributions." "**Trading Across Borders**: Jamaica

Year	Reforms
	reduced the time to import by allowing customs entries to be lodged at night." "**Registering Property**: Jamaica eased the transfer of property by lowering transfer taxes and fees, offering expedited registration procedures and making information from the company registrar available online."

Appendix 4

Barbados Reforms 2012-2018[208]

"✔ = Doing Business reform making it easier to do business. "

"✗ = Change making it more difficult to do business. "

Year	Reforms
2018	"**Paying Taxes**: Barbados made paying taxes more difficult by introducing a new national social responsibility levy of 2% on the value of products before VAT."
2017	"**Starting a Business**: Barbados made starting a business easier by reducing the time to register a company."
2016	"**Paying Taxes**: Barbados made paying taxes more costly for companies by raising the ceiling for social contributions and introducing a new municipal waste tax."

[208] Source: http://www.doingbusiness.org/en/reforms/overview/economy/barbados (Last visited January 9, 2019).

Appendix 5

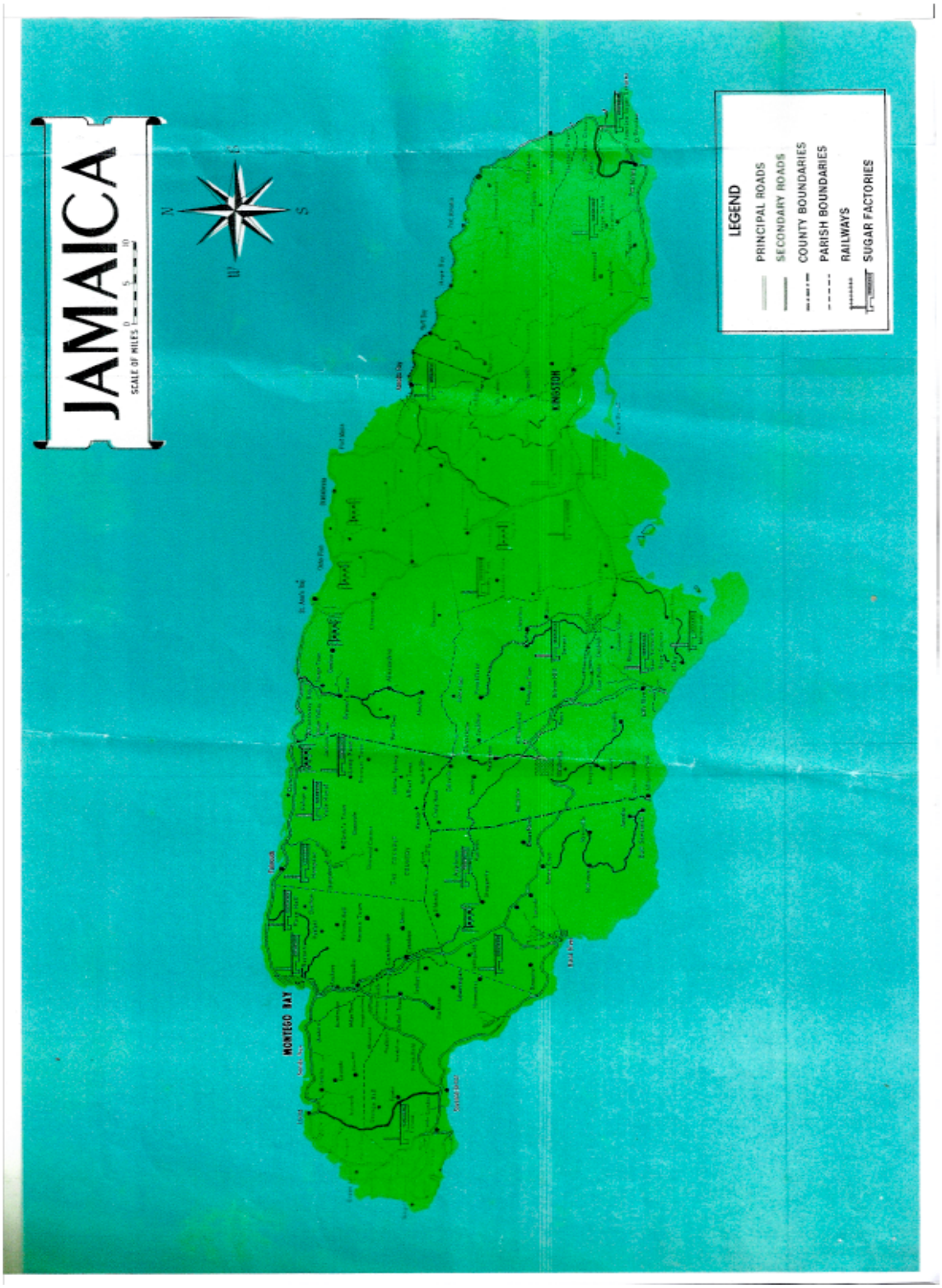
Doing Business 2019 Questions for Getting Credit Sub-Indicator[209]

Questions	Yes/No	Score
"Does the law allow businesses to grant a non possessory security right in a single category of movable assets without requiring a specific description of collateral?"		
"Does the law allow businesses to grant a non possessory security right I substantially all of its assets, without requiring a specific description of the original assets?"		
"Is a description of debts and obligations permitted in collateral agreements; can all types of debts and obligations be secured between parties; and can the collateral agreement include a maximum amount for which the assets are encumbered?"		
"Is a collateral registry in operation for both incorporated and non-incorporated entities, that is unified geographically and by asset type, with an electronic database by debtor's name?"		
"Does a notice-based collateral registry exist in which all functional equivalents can be registered?"		
"Does a modern collateral registry exist in which registrations, amendments, cancellations and searches can be performed online by any interested third party?"		
"Are secured creditors paid first (i.e., before tax claims) when a debtor defaults outside an insolvency procedure?"		
"Are secured creditors subject to an automatic stay on enforcement when a debtor enters a court-supervised reorganization procedure? Does the law protect secured creditors' rights y providing clear grounds for relief from the stay and sets a time limit for it?"		
"Does the law allow parties to agree on out of court enforcement at the time the security interest is created? Does the law allow the secured creditor to sell the collateral through public auction or private tender, as well as, for the secured creditor to keep the asset in satisfaction of the debt?"		
"Are data from retailers or utility companies—in addition to data from banks and financial institutions distributed?"		
"Are at least 2 years of historical data distributed? (Credit bureaus and registries that distribute more than 10 years of negative data or erase data on defaults as soon as they are repaid obtain a score of 0 for this component.)"		
"Are data on loan amounts below 1% of income per capita distributed?"		
"By law, do borrowers have the right to access their data in the credit		

[209] Source: Doing Business 2019: Training for Reform. Retrieved January 2, 2019 (http://www.doingbusiness.org/en/reports/global-reports/doing-business-2019).

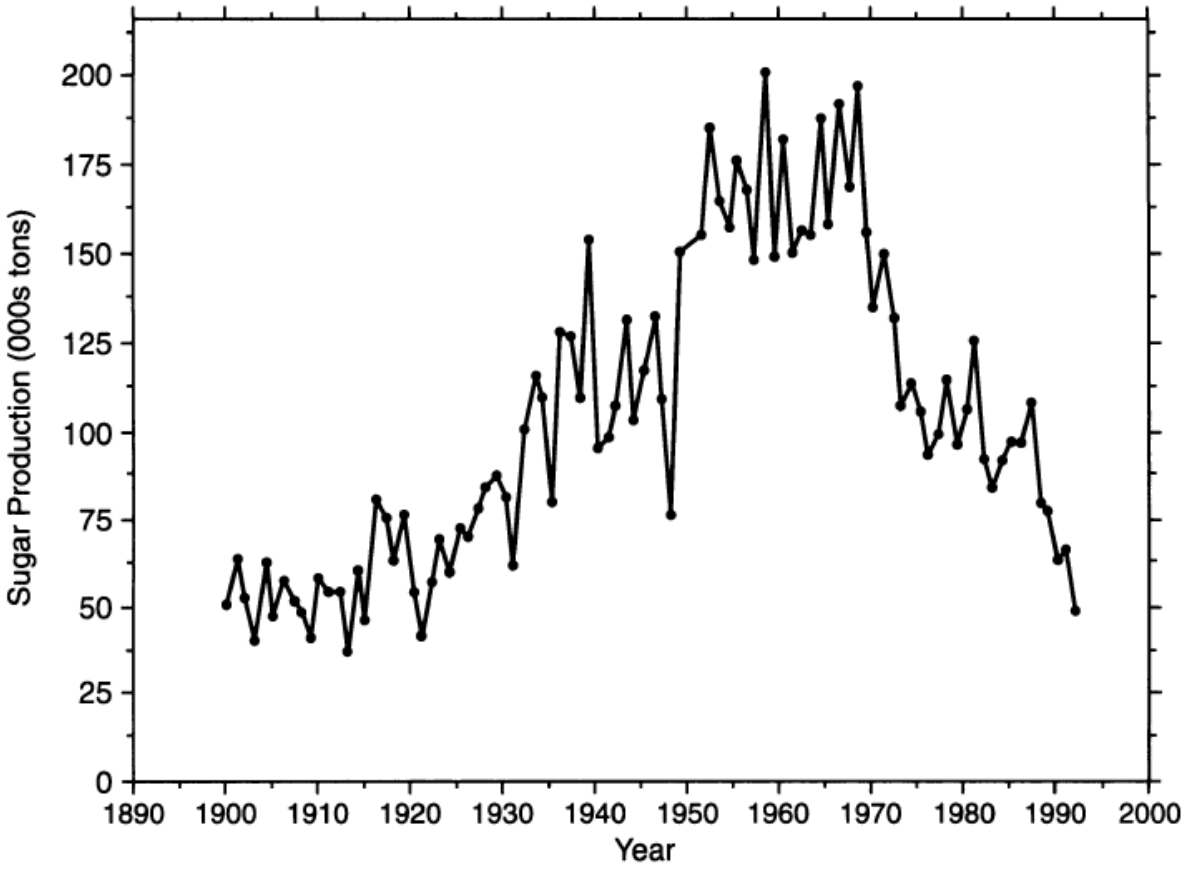
Questions	Yes/No	Score
bureau or credit registry?"		
"Can banks and financial institutions access borrowers' credit information online (for example, through an online platform, a system-to-system connection or both)?"		
"Are bureau or registry credit scores offered as a value-added service to help banks and financial institutions assess the creditworthiness of borrowers?"		

Appendix 6: Map of Jamaica's Sugar Factories Circa 1962[210]



[210] Source: Government of Jamaica. 1962. Economic Survey of Jamaica: 1962.

Appendix 7: Sugar Production in Barbados: 1890-1992 (Drummond and Marsden 1995)[211]



[211] Source: Drummond and Marsden (1995: 344) (whose source was Barbados Sugar Industries Limited).

Appendix 8: Prime Ministers of Barbados from Political Independence to Present

Prime Ministers	Time Period	Profession	Schooling	Political Party
Grantley Adams (Premier)	1952-1958	Cricketer	Oxford	Barbados Labour Party
Hugh Gordon Cummins (Premier)	1958-1961	Medical Doctor	Unclear	Barbados Labour Party
Errol Barrow (First Prime Minister)	1966 (Political Independence) -1976	Attorney	London School of Economics/Inns of Court	Democratic Labour Party
J.M.G. Adams	1976-1985	Attorney	Oxford	Barbados Labour Party
Bernard St. John	1985-1986	Attorney	University College London	Barbados Labour Party
Errol Barrow	1986-1987	Attorney	London School of Economics/Inns of Court	Democratic Labour Party
Lloyd Erksine Sandiford	1987-1994	Unclear (Perhaps Lecturer)	UWI/University of Manchester Economics and Social Studies	Democratic Labour Party
Owen Arthur	1994-2008	Public Servant	UWI Barbados and Mona/Economics and History	Barbados Labour Party
David Thompson	2008-2010	Attorney	UWI/Hugh Wooding	Democratic Labour Party
Freundel Stuart	2010-2018	Attorney	UWI	Democratic Labour Party
Mia Mottley	2018-Present (2019)	Attorney	London School of Economics	Barbados Labour Party

Appendix 9: Prime Ministers of Jamaica from Political Independence to Present

Prime Ministers	Time Period	Profession	Schooling	Political Party
Norman Manley (Premier)	1959-1962	Attorney	Jesus College, Oxford	People's National Party
Alexander Bustamante (First Prime Minister)	1962 (Political Independence)-1967	Labour Activist	No formal education noted	Jamaica Labour Party
Donald Sangster	1967	Attorney (Solicitor) (2 months in office)	Unclear	Jamaica Labour Party
Hugh Shearer	1967-1972	Career Politician	Unclear	Jamaica Labour Party
Michael Manley	1972-1980	Labor Activist/Journalist	London School of Economics	People's National Party
Edward Seaga	1980-1989	Music Producer/Promoter	Harvard	Jamaica Labour Party
Michael Manley	1989-1992	Labor Activist/Journalist	London School of Economics	People's National Party
P.J. Patterson	1992-2006	Attorney	London School of Economics	People's National Party
Portia Simpson-Miller	2006-2007	Career Politician	US/Union Institute & University of Cincinnati - Public Administration	People's National Party
Bruce Golding	2007-2011	Businessman/Career Politician	UWI - Public Administration	Jamaica Labour Party
Andrew Holness	2011-2012	Career Politician	UWI - Development Studies/Management Studies	Jamaica Labour Party
Portia Simpson-Miller	2012-2016	Career Politician	US/Union Institute & University of Cincinnati - Public Administration	People's National Party
Andrew Holness	2016 – present (2019)	Career Politician	UWI - Development Studies/Management Studies	Jamaica Labour Party

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