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The Significance of Foreign Law: A Jamaican Case Study

Kevin E. Davis 

New York University School of Law, USA
Email: Ked2@nyu.edu

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Abstract

Analyses of the relationships between law and society often focus exclusively on domestic laws, meaning laws that emanate from domestic sources. This approach is not necessarily appropriate in contexts that involve significant cross-border flows of ideas, information, goods, services, people, or legal authority. In these cases, there are both practical and intellectual reasons to define the set of laws to be analyzed as including all of the laws, both domestic and foreign, that affect a particular aspect of a given society. In other words, the analysis ought to focus upon sets of laws that are defined in terms of their subjects rather than their sources. A case study from Jamaica illustrates this point. The legal determinants of Jamaica's relatively high homicide rate include many foreign laws and associated enforcement practices—most notably, US laws and practices concerning trafficking in firearms and narcotics, deportation, extradition, and cross-border fraud. Consequently, it will be difficult to understand the relationship between law and society in Jamaica without taking into account all of the laws that affect Jamaicans as opposed to just the laws adopted by Jamaican legal institutions.

Introduction

Legal analyses often make claims that are limited to laws that originate in specific states. A simple example would be an analysis of privacy law in the United States that describes or explains the impact of norms adopted by agencies, courts, and legislatures located in the United States as opposed to norms endorsed by branches of the French state and the European Union (EU) (Watt 2019, 599; see also Siems 2019). This kind of nationalistic source-based approach is a good way of shedding light on the relationship between law and society when laws influence, and are influenced by, people within a single nation-state without any cross-border effects. Cross-border effects are, however, hallmarks of the modern world. The essence of globalization is substantial, though potentially volatile, flows of ideas, information, goods, services,

people, and legal authority across international borders. Therefore, globalization necessarily involves violation of the main conditions that must be satisfied in order to justify the nationalistic source-based approach, thus compromising its analytical value. For example, there is evidence that the privacy practices of firms that operate exclusively in the United States are influenced significantly by EU privacy law, meaning that it often will be misleading to analyze “US privacy law” without taking into account legal norms emanating from the EU (Davis and Marotta-Wurgler 2024). This example illustrates why many scholars have questioned the value of the nationalistic source-based approach to legal analysis.¹

This article uses a case study of a highly globalized society, Jamaica, to shed light on both the limitations of the nationalistic source-based approach to legal analysis and the benefits of an alternative subject-based approach.² The case study focuses on the laws that influence levels of homicide, a topic that is not typically considered to be subject to cross-border influence. Source-based approaches to legal analysis focus on sets of laws defined in terms of properties of their sources, such as their nationality or location. Subject-based approaches to legal analysis, by contrast, focus on sets of laws defined in terms of properties of the social phenomena they govern. The laws that influence a particular subject may emanate from multiple sources and may include laws that emanate from foreign or supranational sources. So, for example, a source-based comparative analysis might compare the narcotics laws adopted and administered by the Jamaican state to those adopted and administered by the Barbadian state. By contrast, a similar subject-based analysis would compare the narcotics laws that govern people located in Jamaica to the narcotics laws that govern people located in Barbados. The difference is that, as we shall see, the laws that govern the use of narcotics in Jamaica may not be limited to Jamaica’s domestic laws.

The analysis in this article builds on and extends theories of global legal pluralism, transnational law, and transnational legal ordering that emphasize the difficulty of analyzing legal systems, either in descriptive or causal terms, without accounting for foreign law. Specifically, the analysis here provides a typology of ways in which to account for foreign law when describing “the range of legalities that course through the everyday experience of people” and emphasizes the importance of one particular channel of influence—international regulatory spillovers (Berman 2020, 10). It also extends literature on how to draw inferences about causal relationships between law, on the one hand, and social, economic, or political outcomes, on the other hand, by emphasizing the need to account for the potential influence of foreign law.³ This may in turn shed light on behavior such as transnational lobbying, thereby contributing to literature on the development of legal systems whose influence extends across

¹ Horatia Watt (2019) poses the question succinctly: “The question, then, is whether, despite globalizing trends towards transnational normativity and convergence through increased proximity, there are still distinct legal traditions, linked to stable communities (whether territorial or otherwise, connected or not to nation states), which are worth comparing, and, if the comparative project remains sustainable despite the changes involved in the process of globalization, what impact such changes are nevertheless likely to bring about to the way comparison is done.”

² Gregory Shaffer (2012) draws a similar distinction between source-based and subject-based conceptions of transnational law.

³ For discussions of other obstacles to this kind of causal inference, see, for example, Spamann 2015, 138–43; Friedman 2016, 63–72; Davis 2021, 46–49.

international borders (Korkea-aho 2016, 45–68). Finally, although the focus of this analysis is on cross-border effects in the international context, it complements analyses of cross-border effects that arise within nation-states.⁴

For the purposes of this article, the term “law” is defined broadly to include all the components of a functioning legal system. These include not only norms but also the institutions that enforce or administer them and the actions of those institutions (Kornhauser 2022). The first section of the article introduces the challenges that globalization poses to the nationalistic source-based approach to legal analysis, and then presents the alternative subject-based approach. The second section uses a case study of the laws that govern homicide in Jamaica to illustrate both the limitations of the nationalistic source-based method and the merits of the subject-based approach. The third section elaborates on the methodological implications of the case study. A brief conclusion follows.

Source-based legal analysis and the challenge of globalization

The nationalistic source-based approach to legal analysis

Our focus here is upon the nationalistic source-based approach to legal analysis, a mode of analysis that involves making claims about laws defined in terms of the states from which they originate.⁵ In other words, the legal units of analysis are defined by reference to the nationalities of the laws’ sources. A classic example would be a comparative study of contract law that defines the laws to be compared as those promulgated by branches of different states (the United States and France in the example from the preceding section).⁶ It is worth noting that the nationalistic approach is only one of several possible source-based approaches. For instance, in some cases, the unit of analysis is a legal tradition—that is to say, laws that share a connection to a historical source such as the English common law courts or the Napoleonic Code (Glenn 2014). Other source-based analyses encompass laws generated by supranational institutions such as treaties (for example, the United Nations [UN] Convention on Contracts for the International Sale of Goods [CISG]).⁷

The nationalistic source-based approach embodies a form of methodological nationalism—that is to say, treatment of nation-states as the appropriate units of analysis.⁸ This kind of methodological nationalism is perfectly appropriate when laws have mutually exclusive relationships with subjects located in specific territorial units. In other words, reliance on methodological nationalism rests on two assumptions. First, to the extent that law affects conditions within a given territory, its influence operates exclusively through the laws of the nation-state with sovereignty over that territory (“domestic laws”). Second, a state’s laws are ultimately shaped by the actors located in its territory. These assumptions guarantee, for example, that English law is the

⁴ A substantial body of US legal doctrine is concerned with whether the US Constitution can be used to invalidate state laws that have cross-border effects. See, for example, *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). For an example of an effort to measure the effects caused by such spillovers, see Zhao, Holtz, and Aral 2021.

⁵ Lewis Kornhauser (2022) uses the term “source” more narrowly to refer to texts rather than states.

⁶ For a robust defense of this approach to comparative law, see Valcke 2018.

⁷ Convention on Contracts for the International Sale of Goods, 1980, 1489 UNTS 3 (CISG).

⁸ On the concept of methodological nationalism, see Wimmer and Schiller 2002.

principal legal influence upon, and is produced exclusively by, the people physically located in England, while French law is the principal legal influence on, and is produced exclusively by, the people located in France.

If the assumptions that support methodological nationalism hold, then for most analytical purposes it will be reasonable to identify the legal consequences of actions in a particular territory by looking solely to its domestic laws. This is true whether the purpose of the analysis is descriptive, interpretive, or causal. That is to say, when the key assumptions hold, nationalistic source-based analysis is valid whether the purpose of the analysis is to explain the legal consequences of action, to understand the ideas about law held by the people of a particular territory, or to serve as an input in the process of formulating and testing causal claims in which law serves as either a cause or a consequence of some other phenomenon. So, for example, in the case of contract law in New York, understanding the effects of a particular action (such as signing a specific contractual document), or attitudes toward freedom of contract, or the factors that drive convergence and divergence in contract doctrine, or the effects of contract law on economic growth will begin by identifying the laws that emanate from sources endorsed by the state of New York and by the United States of America.

Three challenges posed by globalization

Globalization, which is conventionally understood to entail movements of people, capital, goods, services, and data across international borders, poses at least three distinct challenges to the assumptions that underlie methodological nationalism and, by extension, nationalistic source-based legal analysis. First, globalization often is associated with cross-border diffusion of ideas about the content or application of legal norms, also referred to in the literature as legal transplants, translation, or transfers.⁹ Classic examples of international legal diffusion include the diffusion of the Napoleonic Code in the mid-nineteenth century and, more recently, the widespread adoption of norms embodied in supranational instruments such as EU directives and regulations, the CISG, or the Organisation for Economic Co-operation and Development's (OECD) Convention against Bribery of Foreign Public Officials.¹⁰ Instances in which the application of foreign law influence the application of local law include cases where requests for mutual legal assistance or recognition of foreign official acts trigger action in the local legal system.

At first glance, the existence and significance of these kinds of cross-border legal influences—which can occur through an enormous variety of mechanisms—calls into question the value of legal analyses that focus exclusively on domestic sources. Yet, in fact, nationalistic source-based analysis can easily accommodate domestic laws influenced by foreign sources. Whenever a foreign law is adopted or endorsed by a domestic legal institution, the domestic institution can be treated as the source of the law for the purposes of the actors within its territory.¹¹ For example, in a comparison

⁹ For a survey of the extensive literature, see Siems 2018, 231–61. Law that is the product of these kinds of movements of legal norms from foreign or supranational sources is sometimes referred to as transnational law, a term that also has a somewhat distinct subject-based definition (Shaffer 2012).

¹⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, 2802 UNTS 225.

¹¹ This appears to be the approach taken by Valcke 2018, 159–86.

of English and French contract law, it is straightforward to define each country's domestic law to include the EU directives and treaties its courts and legislatures recognize as binding.¹²

A second aspect of globalization poses a more severe challenge to the nationalistic source-based approach. Globalization sometimes is associated with extraterritorial regulation, meaning laws that apply to conduct outside the territory of the promulgating state.¹³ The spheres of application of these laws are defined by non-territorial factors such as agreement, nationality, or religion. For instance, contracting parties often are able to opt out of the law applied by courts in the territory in which they are located by using a combination of choice-of-forum and choice-of-law clauses that point to foreign law and foreign courts.¹⁴ Nationality-based regulation, such as the US Foreign Corrupt Practices Act, allows a state to sanction its nationals for conduct that has taken place entirely outside its borders.¹⁵ Similarly, religious laws such as canon law or Islamic law may span national borders.¹⁶

¹² Legal convergence associated with globalization would pose a different kind of challenge to nationalistic source-based comparative law if it eliminated the differences that, as Catherine Valcke (2018, 587–88) argues at length, make comparison possible. However, concern on this front seems misplaced because legal convergence is generally incomplete. There are many areas of law in which there is little evidence of legal convergence. Moreover, even in areas in which there is convergence, the convergent norms originating from foreign sources do not always completely oust divergent domestic norms. For example, the CISG expressly states that it does not cover the validity of international sales of goods to which it applies. As a result, those issues are governed by domestic laws, which often diverge (CISG, art. 4(a)). In addition, even where there is convergence on legal norms, the effects of those norms generally are mediated by distinctive national and subnational institutions and practices. For example, many treaties are implemented through laws enacted by national legislatures, and even European Union (EU) regulations and treaties that have direct effect are often applied by national courts or enforcement agencies. Consequently, what might at first glance appear to be a uniform law often will have differential effects on subjects in different jurisdictions. Yet another consideration is that, even in cases of true legal convergence, the subjects are likely to have different relationships with the uniform law. It typically will have different effects on peoples' attitudes, beliefs, and conduct, and they are likely to have different levels of influence on its evolution. Finally, international legal convergence typically also is incomplete in the sense that it fails to cover the entire globe. For all these reasons, although cross-border movements of legal ideas are common, they seem unlikely to lead to the kind of legal convergence that precludes comparison (Legrand 1996; Watt 2019, 587–88). Finally, even if globalization tends to eliminate legal distinctions, comparison will still be required to confirm the extent of convergence.

¹³ Extraterritorial application of laws is not associated exclusively with modern globalization. For instance, as James Whitman (1990) explains, in Europe in the Middle Ages, "[d]wellers of a given medieval city or territory would expect the law of that city or territory to be applied to them in whatever court they might find themselves; they might also expect the law of the nation to which their distant ancestors had belonged—for example the law of the Lombards or the law of the Burgundians—to be applied to them."

¹⁴ These clauses are not necessarily given full effect. See, for example, Restatement of the Law (Second) on Conflict of Law §187 (describing circumstances in which a contractual specification of governing law should be given effect under the laws of US states).

¹⁵ Foreign Corrupt Practices Act, 15 USC 78dd-1(g) (which applies the prohibition on bribery of foreign officials to actions outside the United States by firms that are both organized under US law and have securities registered in the United States as well as to certain associated US nationals). Another prominent example of a US federal law with extraterritorial reach is 26 USC 1471, which requires foreign financial institutions to report certain information on accounts held by US persons.

¹⁶ See Code of Canon Law, Canon 208, 1983, stating that laws bind all the Christian faithful: "Even those Muslims who refer to their allegiance to a spiritual leader or to the Shiite legacy of 'Ali more than to their

Extraterritorial regulation poses a well-recognized threat to the nationalistic source-based approach because it challenges the assumptions that underpin methodological nationalism. In each of the examples above, it would be misleading to say that the relevant subjects are governed solely by the laws of the territorial state. Nor are they necessarily governed solely by foreign law. Rather, they are governed by a combination of laws administered by an ensemble of institutions, some but not all of which have a connection to the territory in which the actors are located. Many commentators have stressed the importance of accounting for this kind of legal pluralism in legal analysis (see, for example, Reimann 2001; Menski 2009; Husa 2011; Berman 2012, 2020; Halliday and Shaffer 2015; Davis 2018; Klabbers and Palombella 2019, 9–10; Santos 2020, 99–120, 513–16).¹⁷

There is a third aspect of globalization that challenges methodological nationalism and the associated approach to legal analysis: foreign laws may cause international regulatory spillovers, meaning that they may influence actors or activities to which they do not apply directly.¹⁸ When people, goods, services, or capital move across borders, or when actors operate simultaneously in multiple territories, they typically become subject to the laws of different states, either consecutively or concurrently. Laws that apply to these sorts of cross-border activities are sometimes referred to as transnational law (Jessup 1956), and when norms from multiple sources apply simultaneously, the concepts of global legal pluralism (Berman 2012) and inter-legality (Santos 2020) come into play. It is unclear whether the concepts of transnational law, global legal pluralism, or inter-legality encompass foreign law that induces international regulatory spillovers because it is debatable whether any of those concepts capture situations in which people or things that move or operate across borders are influenced by laws that do not directly apply to them.¹⁹

Yet there are clearly situations in which law indirectly influences actors or activities outside the territory of the promulgating state because it applies directly to

membership in the worldwide umma would deny that Islam is or should be defined or bounded by local or national borders” (cited in Bowen 2004, 882).

¹⁷ On the definition of legal pluralism, see Merry 1988, 870 (who defines legal pluralism as “a situation in which two or more legal systems coexist in the same social field”).

¹⁸ In Davis and Florencia Marotta-Wurgler (2024), we acknowledge that international regulatory spillovers are sometimes defined as specified in the text accompanying this note, but, there, we limit our definition to situations in which actors not only change their behavior but also do so in a conscious effort to comply with foreign legal norms.

¹⁹ Philip Jessup’s (1956, 2) classic subject-based definition of transnational law embraces “all law which regulates actions or events which transcend national frontiers.” It is unclear whether the term “regulates” covers situations in which law influences without being applicable. Meanwhile, in his well-known text on legal pluralism, Paul Berman (2012, ch. 2), defines legal pluralism as a situation of “normative overlap” where different communities “assert normative authority,” meaning that they either “assert jurisdiction to adjudicate a dispute” or establish the norms that will be applied by a decision maker. His focus throughout appears to be upon norms that are “binding.” Similarly, in another well-known treatment of the subject, John Griffiths (1986, 2; emphasis added) defines legal pluralism as “that state of affairs, for any social field, in which behavior *pursuant* to more than one legal order occurs.” By contrast, Sally Merry’s (1988, 891) broader definition of legal pluralism (quoted in note 15 above) may encompass indirect regulation by foreign law. She suggests, with some hesitancy, that a situation in which European missionaries influenced South African society in the colonial era “could be described in terms of legal pluralism—the interaction between the African and missionary legal order.”

related actors or activities.²⁰ For example, there is evidence that a change in US law that removed a ban on sales of assault weapons in certain states increased homicides in neighboring Mexican municipalities by increasing access to guns (Dube, Dube, and García-Ponce 2013). During the 1920s, prospective migrants from Italy to the United States were motivated to invest in education in order to pass the literacy test for migrants adopted by the United States in 1917 (Cox 2009, citing Cometti 1958, 827–28). Finally, firms with operations in the EU often ensure that products marketed to US consumers conform to standards established by EU law because they find it uneconomical to conform to multiple standards (Davis and Marotta-Wurgler 2024), a version of the phenomenon that Anu Bradford (2020) labels the “Brussels effect.”

Legal diffusion, extraterritorial regulation, and international regulatory spillovers do not only complicate the analysis of which source’s laws influence any given subject, but they also complicate the analysis of which actors are likely to try to influence the legal output of any given source. People and firms governed by laws from multiple sources often are motivated to try to shape all the laws that govern them. So, for example, the Brussels effect gives US firms incentives to lobby EU regulators in Brussels, even if they do little business in the EU (Bradford 2020, 138, 196, 254–57).

In summary, legal diffusion, extraterritorial regulation, and international regulatory spillovers disrupt the assumptions that underpin methodological nationalism by causing relationships between sources and subjects to proliferate.²¹ These forms of globalization allow laws emanating from any given source to govern—that is to say, influence—subjects in multiple nations’ territories. They also allow the subjects in each territory to be governed by laws from multiple sources. Figure 1 provides a schematic illustration of the difference between a situation in which relationships between laws and territories are mutually exclusive (nationalistic law) and one in which there are multiple overlapping relationships (globalized law). The figure illustrates three distinct channels through which laws emanating from a source in one territory can affect subjects in another territory: legal diffusion, extraterritorial regulation, and international regulatory spillovers. As noted above, it is unclear whether the concepts of transnational law or legal pluralism capture all three of these channels of influence, and, even if they do, it is helpful to distinguish the channels because they have distinct implications for legal analysis.

Subject-based approaches to legal analysis

The fact that nationalistic source-based approaches to legal analysis fail to capture all the possible channels through which foreign law can influence activities in a given territory highlights the need for an alternative approach—namely, one that defines the laws to be analyzed by reference to characteristics of the subjects affected by the law. For these purposes, a “subject” can be virtually any social phenomenon, typically

²⁰ Werner Menski (2009, 58–65) has written extensively about the implications of indirect influence through South-North migration for comparative law methodology.

²¹ For general discussions of this point, with emphasis on the first two factors, see Reimann 2001; Nelken 2011; Michaels 2016; Watt 2019, 603–11.

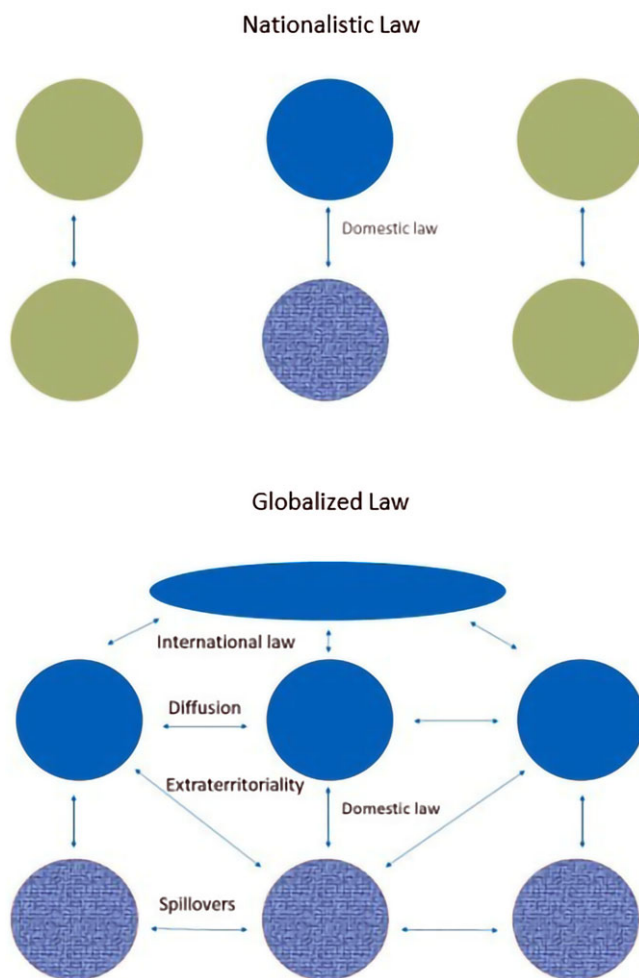


Figure 1. Nationalistic versus globalized law.

defined in terms of both the actors and the activities involved. For instance, suppose the aim is to undertake a comparative analysis of “English contract law” and “US contract law.” Under the source-based approach, the analysis of English law would include only contract laws emanating from, or endorsed by, English institutions. These would include, for example, EU laws that continue to have direct effect in England under the terms of the European Union (Withdrawal) Act 2018.²² By contrast, a subject-based approach would analyze all the laws that affect contracting by English nationals or, alternatively, people located in England.²³ This approach would include

²² European Union (Withdrawal) Act 2018 (UK), c. 16.

²³ The set of subjects can be defined along other dimensions as well, such as ethnicity or religion. Also, as noted in the above discussion of transnational legal orders, laws that emanate from the same source can have heterogeneous effects upon subjects. Taken together, these points suggest that of the effects of laws from a single source on people of different ethnicities located in the same territory, which can be classified as an example of the subject-based approach. This would include the mode of analysis that

EU laws that have not been given direct effect by the British Parliament but either apply extraterritorially or are followed by English firms responding to the Brussels effect. In fact, under the subject-based approach, many EU laws would also be included in the set of laws that affect contracting in the United States, and a comparative analysis might include a comparison of how extraterritorial EU law and the Brussels effect influence English and US subjects respectively.

Source-based analysis is well suited for studies that attempt to describe or explain how laws vary across space or time. Characteristics of sources often influence the characteristics of laws, and so it generally will make sense to identify laws by source when trying to explain legal variation. For example, if the objective of a study is to explain variations in the jurisprudence of constitutional courts, then it seems natural to compare the jurisprudence of different courts. The central argument in this article is that there are many circumstances in which the subject-based approach to defining the set of laws to be analyzed will be more useful than the source-based approach. To begin, suppose the purpose of the analysis is a practical one, such as predicting, understanding, or potentially altering the legal consequences of peoples' actions. An analysis that omits the legal sanctions that flow from certain sources will be of limited value. For example, it is not helpful to advise a firm that it can pay bribes without fear of prosecution under the laws of Country X if the payments are likely to attract sanctions under the UK Bribery Act (which has broad extraterritorial reach) and if transferring the proceeds of bribery to the United Kingdom will create liability under UK anti-money laundering laws.²⁴

Subject-based analysis may also be useful when the purpose of the analysis is intellectual rather than practical. An analysis that omits the UK Bribery Act and UK anti-money laundering laws is likely to be unhelpful if the purpose is to understand the firm's attitudes toward anti-corruption law, why it refrains from paying bribes in Country X but not in Country Y, and, perhaps, why Country X has invested less than Country Y in enforcement of its anti-corruption laws. The point of these illustrations is that, for many practical and intellectual purposes, legal analysis is most useful when it encompasses all the laws that affect a particular subject, regardless of their source. Those sources may include not only domestic legal institutions and the domestic institutions whose laws the domestic institutions have endorsed but also foreign institutions involved in extraterritorial regulation and the regulation of cross-border activity. A subject-based analysis admittedly may not be suitable for explaining changes in laws that apply to many groups of subjects, but it can still form a part of such an analysis. For instance, an analysis of all the laws that govern payments to public officials by firms doing business in Country X will not be sufficient to understand the evolution of the UK Bribery Act. However, the application of the UK Bribery Act to firms in Country X and those firms' efforts to either lobby against or evade the statute may be an interesting part of the story of the UK Bribery Act.

Sherally Munshi (2015) calls "minor comparativism," which focuses on understanding law from the perspective of subjects who are members of a minority group.

²⁴ Bribery Act 2010 (UK), c. 23.

Homicide in Jamaica: a case study in legal globalization

The remainder of this article uses a case study of laws bearing on homicide in Jamaica to show the importance of taking foreign laws into account when analyzing what might at first glance appear to be a largely domestic subject. There is ample literature on the ways in which foreign law affects domestic criminal law in countries like Jamaica, but less attention has been paid to other channels through which foreign law might regulate domestic criminal activity (Nelken 2011; Aaronson and Shaffer 2021).²⁵ For instance, there have been important efforts to link violence in postcolonial societies like Jamaica to the legacies of colonial legal regimes (Thomas 2011, 106–24). In addition, literature on contemporary transnational legal orders has explored the ways in which domestic criminal justice systems are influenced by foreign norms, including international human rights law (Hamilton 2014; Aaronson and Shaffer 2020, 3–48). The literature on transnational legal orders also considers how foreign law operating extraterritorially might influence cross-border activity such as transnational bribery or drug trafficking as well as atrocities such as torture (Aaronson and Shaffer 2020). However, because homicide is not generally considered to be a transnational or international crime, little attention has been paid to the ways in which foreign law might influence this kind of activity independently of domestic law.

In fact, there is a variety of ways in which foreign extraterritorial regulation and international regulatory spillovers have influenced homicide in Jamaica. The first subsection below shows that Jamaica is a highly globalized society whose remarkably high homicide rate is difficult to explain solely by reference to conventional nonlegal factors. The next subsection questions the extent to which it is possible to understand legal influences upon patterns of homicide in the country solely by reference to the features of the Jamaican criminal justice system. The final subsection discusses a series of other factors that the relevant literature identifies as drivers of homicide in Jamaica and that can be linked to foreign laws.

Homicide in Jamaica

The implications of a phenomenon like legal globalization are likely to be most evident in the societies in which it is most prevalent.²⁶ Jamaica, like many other Caribbean countries, fits this description. Relative to most OECD countries, it has high levels of trade and large inflows of remittances.²⁷ It is also globalized in the legal sense—most notably, because it relies on the Judicial Committee of the Privy Council as its final court of appeal. The Judicial Committee is formally part of the Jamaican legal system, but it also hears appeals from several other Caribbean countries, is physically located in Britain, and is staffed primarily by British judges. For all these

²⁵ Closest in spirit to the subject-focused analysis favored here is, perhaps, Aas 2013, 199–201.

²⁶ See Seawright 2016 (“a case study is more likely to succeed the further the quantity to be discovered is from its population mean.”).

²⁷ In 2019, trade was equal to 90 percent of the gross domestic product (GDP) in Jamaica compared to an average of 57 percent among countries in the Organisation for Economic Co-operation and Development (World Bank, “Intentional,” n.d.; World Bank, “Trade,” n.d.). In 2019 remittances equaled 16.2 percent of GDP in Jamaica, the thirteenth highest figure in the world for that year (World Bank, “Personal,” n.d.).

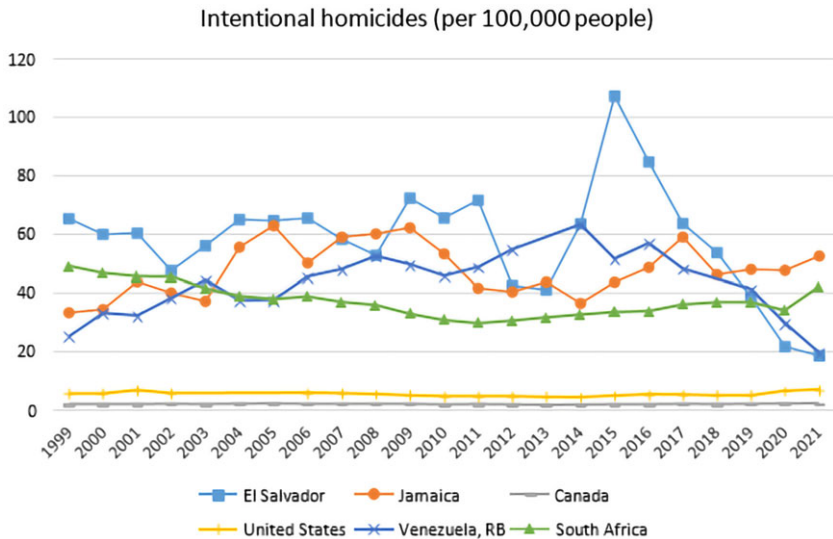


Figure 2. Homicide rates in selected countries.

reasons, the Judicial Committee seems particularly susceptible to the influence of actors who are foreign to Jamaican society.

There are probably several social phenomena in Jamaica that cannot be explained without accounting for the influence of foreign laws, but, in this article, we will focus on just one: Jamaica's exceptionally high levels of homicide. For decades, local officials have characterized the high level of violent crime as Jamaica's most pressing problem.²⁸ On several occasions since independence, widespread violence has prompted the government to declare a state of emergency, thereby granting members of the security forces extraordinary powers and allowing them to suspend certain civil liberties (*Jamaican Gleaner* 2018). Since January 2018, the government has declared several long-lasting localized states of emergency in areas experiencing particularly high levels of violence (*Jamaican Gleaner* 2019). The emblematic indicator of Jamaica's violence problem is the country's homicide rate. In recent years, Jamaica has vied with El Salvador, Honduras, Venezuela, and South Africa for the highest rate in the world. *Figure 2* shows these countries' recent homicide rates, together with the much lower rates in the United States and Canada.

Jamaica was not always such a violent society. When the country gained independence in 1962, the homicide rate was 4.6 per 100,000 people. As *Figure 3* shows, the rate increased significantly following independence, with a sustained increase between 1990 and 2004, and it reached exceptionally high levels during the last few years of the 1970s, from 2004 to 2010, and from 2015 to 2018.

²⁸ See UN Office on Drugs and Crime and World Bank 2007, i (quoting former Prime Minister P. J. Patterson: "Without a doubt, the high level of violent crime remains our most troubling and pressing problem"); Harriot and Jones 2016, 1 ("for more than three decades crime and violence have been primary issues on the Jamaican governmental agenda").

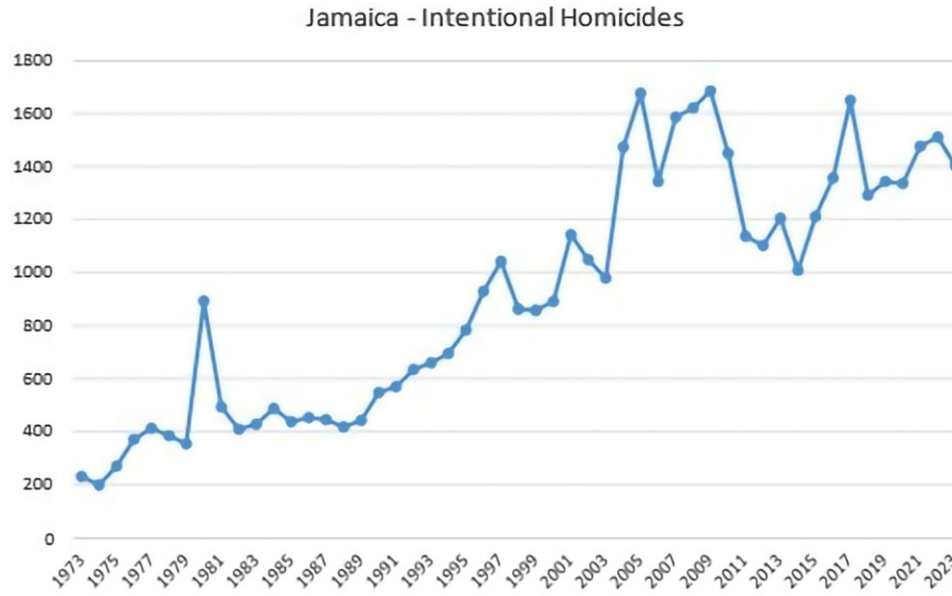


Figure 3. Homicides in Jamaica, 1972–2023.

The conventional wisdom is that homicide rates in the Caribbean, in general, and in Jamaica, in particular, are influenced heavily by nonlegal factors such as economic growth, income inequality, the size of the youth population, and urbanization (Soares and Naritomi 2010, 40–46; Patterson 2019, 138–42). Cross-country comparison suggests that Jamaica is exceptional along several of these dimensions. Since it attained independence in 1962, the country has experienced low rates of economic growth and high levels of inequality and urbanization (Patterson 2019, 141–42). At the same time, Jamaica has higher homicide rates than many other countries with similar demographic characteristics and levels of economic development, poverty, and inequality (UN Office on Drugs and Crime and World Bank 2007, 32; Jaitman 2018). Consequently, it is far from clear that the domestic economic, social, or legal factors usually emphasized in cross-country analyses can explain Jamaica's remarkably high homicide rate.

Domestic criminal law

The cross-country literature suggests that, to the extent that homicide is influenced by legal factors, the relevant factors are the size of the police force, the prevalence of incarceration, the effectiveness of the judiciary, the government's overall integrity, and, perhaps, the harshness of penalties (Soares and Naritomi 2010, 40–46; Patterson 2019, 138–42). It is unclear to what extent these factors explain Jamaica's situation. On the one hand, some sources characterize the Jamaican criminal justice system as overburdened and the police as corrupt and abusive (UN Office on Drugs and Crime and World Bank 2007, 111–12). On the other hand, authoritative international sources suggest that the Jamaican police are relatively effective and that the courts and prosecutors are not corrupt.²⁹ The question of whether the penalties prescribed for homicide influence the homicide rate in Jamaica is even more complicated. Jamaican law has provided for the death penalty for murder since colonial times, and the relevant laws remained in force after independence (J. Campbell 2015, 441). The Constitution provides for several fundamental rights and freedoms, including the right to life, but its terms strongly suggest that recognition of those rights was not intended to affect laws or practices relating to the death penalty.³⁰ Despite these laws, however, no one has been executed in Jamaica since 1988 (Amnesty International

²⁹ See UN Office on Drugs and Crime and World Bank 2007, 116 (“[i]n general, though, the overall homicide clearance rate in Jamaica is comparable to that in other countries with sound police forces and similar levels of economic development”). In 2020, the World Justice Project ranked Jamaica's criminal justice system as 13/30 in Latin American and the Caribbean, 14/42 among upper middle-income countries, and 49/128 globally (World Justice Project 2020).

³⁰ The Jamaican Constitution's prohibition on torture or inhuman or degrading punishment is subject to a proviso that saves laws, and actions authorized by laws, that are in force prior to the adoption of the Constitution. Constitution of Jamaica, para. 13(7). The Constitution goes on to shield execution of death sentences from constitutional challenges based on delay or the conditions of detention (para. 13(8)). Until it was amended in 2011, the Constitution also contained a broad “savings clause” stipulating that neither laws that predated the adoption of the Constitution nor actions taken under the authority of those laws could contravene any of the fundamental rights and freedoms and explicitly provided that a death sentence was not a violation of the right to life. Constitution of Jamaica 1962, §§ 14(1), 26(8). On the background to the inclusion of savings clauses in Caribbean constitutions and how they have been interpreted, see Robinson, Bulkan, and Saunders 2015, 48–52, 240–46 (sections 1-042-1-043 and 5-023-5-025).

2018).³¹ The story of how this came to pass provides our first illustration of the potential relationships between foreign and domestic laws.

The death penalty has long been a hotly contested political issue in Jamaica. Local actors have launched several initiatives to abolish the death penalty,³² and they made significant progress in 1992 when the scope of the mandatory death penalty was narrowed dramatically.³³ However, the Jamaican House of Representatives voted against abolition in both 1979 and 2008.³⁴ Moreover, in 2011, Parliament amended the Constitution to adopt a Charter of Fundamental Rights and Freedoms that explicitly shielded the death penalty from scrutiny based on delay or conditions of detention.³⁵ Throughout this period, Jamaican politicians cited popular support for the death penalty and the island's high rate of violent crime as justifications for retention (see Burkeman 2002; Luton 2008, quoting remarks by Alva Ross, Dudley Thompson, and Ferdie Neita, members of parliament).

Local debates about the death penalty in Jamaica—as well as elsewhere in the anglophone Caribbean—have taken place against the backdrop of significant interventions by the Judicial Committee of the Privy Council and international human rights tribunals (Simmons 2000; Knowles 2004, 282–308; Amnesty International 2018). The watershed was the 1993 decision of the Judicial Committee of the Privy Council in *Pratt and Morgan v. Attorney General for Jamaica*.³⁶ In that case, the Judicial Committee unanimously decided that execution of a person more than five years after being sentenced to death would violate their constitutional right to be free from “inhuman or degrading punishment or other treatment,” even if that period included appeals and petitions to international bodies initiated by the convict.³⁷ The direct effect of this decision in Jamaica was to require commutation of the sentences of over 150 people who had been on death row for longer than the stipulated five-year period (Simmons 2000, 271n43).

The decision also had the practical effect of halting further executions because condemned people were entitled to delay execution for more than five years by appealing consecutively to international human rights tribunals—specifically, the UN Human Rights Committee and the Inter-American Commission on Human Rights (Simmons 2000, 283–84; Helfer 2002, 1872–77). In subsequent decisions, the Judicial Committee held that convicts had a right to petition international human rights bodies before being executed,³⁸ that it was unconstitutional to make the death penalty mandatory,³⁹ and that the penalty could only be imposed in cases involving the “worst of the worst” or the “rarest of the rare” where there was “no reasonable

³¹ See also Offences against the Person Act (Jamaica), § 3(1)(A) (prescribing the death penalty for homicide).

³² For a study of resistance on the part of local condemned prisoners, see J. Campbell 2017.

³³ Offences against the Person (Amendment) Act 1992, s. 3(b).

³⁴ See *Jamaica Gleaner* 1979a, 1979b, 2008; Jamaica Information Service 2008a, 2008b; Luton 2008. In 1979, the Senate voted for an eighteen-month suspension of executions (*Jamaica Gleaner* 1979b).

³⁵ Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (Jamaica), § 2 (enacting section 13(8) of the Constitution of Jamaica).

³⁶ *Pratt and Morgan v. Attorney General for Jamaica*, 1993 UKPC 1.

³⁷ *Pratt and Morgan*, 1993 UKPC, 1, paras. 82–85.

³⁸ *Lewis v. Attorney General of Jamaica*, 2000 UKPC 35.

³⁹ *Lambert Watson v. R.* (Jamaica), 2004 UKPC 34.

prospect of reform.”⁴⁰ Jamaica pushed back on these rulings by withdrawing from the Optional Protocol to the International Covenant on Civil and Political Rights, the instrument that made it possible for Jamaican convicts to petition the UN Human Rights Committee, and by amending the constitutional provisions that the Judicial Committee relied upon to thwart executions (without reinstating mandatory capital punishment) (Simmons 2000; Robinson, Bulkan, and Saunders 2015, 245).⁴¹

The Judicial Committee’s Caribbean death penalty jurisprudence developed against the backdrop of a shift in European law toward abolition of the death penalty and heightened scrutiny of the death penalty by human rights bodies and some of the national courts in the region (Inter- American Commission on Human Rights 2011, paras. 20–21, 23–38). It also was shaped in response to advocacy by, on one side, the legal representatives of Caribbean governments and, on the other side, Caribbean death row convicts and their defense counsel. The defense teams included Caribbean lawyers, but they were supported by a dedicated cadre of lawyers and international human rights non-governmental organizations based in London.⁴² From the perspective of the Judicial Committee at least, the London-based lawyers played a critical role. In a case from the Bahamas, Lord Steyn said that the Judicial Committee was “crucially dependent” on the “invaluable” contributions of London-based lawyers. He went on to say: “[I]ndeed without [the service rendered by these lawyers] the petitions and appeals from Caribbean countries could not be considered properly.”⁴³ This story of how British judges and lawyers, who were themselves influenced by legal diffusion from Europe and elsewhere in the Caribbean, halted the application of the death penalty in Jamaica illustrates one of many ways in which foreign laws can influence the evolution of domestic laws.

Ultimately, though, it is unclear whether these changes in Jamaican law had a significant influence on the prevalence of homicide. On the one hand, the suspension of executions in 1988 coincided with the beginning of a period of sustained increase in the homicide rate. On the other hand, literature from other countries casts doubt on whether there is any causal connection between laws concerning the death penalty and the prevalence of homicide (Donohue and Wolfers 2009, Greenberg and Agozino 2012).

Foreign law

Social scientists who have focused on the determinants of levels of homicide in Jamaica and variations in those levels over time have identified several factors besides the economic, demographic, and legal factors emphasized in the more general literature summarized above. These factors include the structure of partisan politics, economic crises, illicit trade in firearms and drugs, deportations, extraditions, and cross-border fraud. As we shall see, all of these factors are, to some extent, influenced by foreign law, whether through diffusion, extraterritorial regulation, or international regulatory spillovers.

⁴⁰ *Trimmingham v. R.* (St. Vincent and the Grenadines), 2009 UKPC 25.

⁴¹ Optional Protocol to the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171.

⁴² James Campbell (2017) focuses on efforts of death row prisoners in the 1970s. Laurence Helfer (2002) shows that from 1994 to 1999 over 85 percent of defendants were represented by British law firms or a London-based non-governmental organization, with only two of 149 represented by Caribbean attorneys.

⁴³ *Higgs v. Minister of National Security* (Bahamas), 1999 UKPC 55, para. 73, per Steyn J. dissenting.

Constitutional framework and partisan politics

The increase in the rate of violent crime following independence was driven by a combination of economic and political factors (Thomas 2011, 34–38; Edmonds 2016; Gibson and Grant 2018, 59). Shortly after the introduction of universal adult suffrage in 1944, two main political parties emerged: the Jamaica Labour Party (JLP) and the People's National Party (PNP). Both parties soon began to engage in various forms of political violence, mainly aimed at disrupting meetings of the opposing party (Sives 2010, 17–23). Over the next three decades, tensions rose as rural-to-urban migration and a slowdown in economic growth in the 1960s led to the emergence of a large population of poor, under-employed, and unemployed people in the western parts of Kingston, the capital city. The political parties began to battle for control of these areas.

The 1962 Constitution, which was the product of negotiations between the United Kingdom and Jamaican representatives, “locked in a two-party system” by formalizing the position of the leader of the opposition and giving them the power to nominate a sufficient number of senators to be able to block, or at least delay, key constitutional amendments.⁴⁴ After independence, levels of political tribalism increased as first the JLP and then the PNP governments preferentially allocated public benefits, such as public contracts and housing, to their supporters. The distinctively Jamaican form of political clientelism reached its pinnacle with the construction of housing projects that were allocated almost exclusively to the supporters of one party, with violence often being used to drive out members of the disfavored party. The JLP moved first by creating an enclave called Tivoli Gardens. The result was the emergence of so-called garrison communities: enclaves dominated by people affiliated with a single political party and engaged in violent conflict with neighboring communities (Sives 2010; Thomas 2011).

Levels of violence increased in the 1970s as pre-existing social divisions were exacerbated by the ideological polarization and economic hardship that marked the successive administrations of Michael Manley, a member of the PNP, who was prime minister of Jamaica from 1972 to 1980 (Sives 2010, 78–117). Manley's embrace of democratic socialism and overtures to Fidel Castro led his political opponents to ratchet up ideological tensions by labelling him as a dangerous communist. Tensions increased further in the latter part of the 1970s as the Jamaican economy fell into crisis, reflecting the impact of high levels of government spending, the oil crisis involving the Organization of the Petroleum-Exporting Countries, and capital flight. In 1977, Manley's government felt compelled to seek a loan from the International Monetary Fund. The terms of the loan required the government to adopt austerity measures set out in a Structural Adjustment Program. The resulting declines in government expenditures and currency devaluations caused significant economic hardship. The combination of all these factors sparked an increase in partisan political violence—that is to say, violence committed by armed groups identified with political parties. In 1980, an election year, there were 889 homicides, up from 351 in the previous year (Sives 2010, 107–17). After the 1980 election, politicians reduced their levels of support for gangs, and politics became a less significant driver of violence.

⁴⁴ Constitution of Jamaica, ss. 35, 49. See generally Robinson, Bulkan, and Saunders 2015, 101, quoting Parkinson 2007, 197–98.

The UK-influenced provisions of the Jamaican Constitution may not have been the sole factors behind either the partisan politics or economic crises of the 1970s, but they were contributing factors (Ryan 1999; Girvan 2015). A constitutional framework that provided more space for additional political parties might have reduced the intensity of party affiliations. It is an open question whether UK law should be characterized as foreign law in relation to Jamaica around the time of independence. In other words, it is unclear whether embedding partisan polarization in the Jamaican Constitution should be characterized as the choice of Jamaican legislators rather than the result of British fiat. If we regard this as a Jamaican choice, then the ensuing consequences illustrate the potential effects of diffusion.

Importation of firearms

A high proportion of homicides in Jamaica involve the use of firearms.⁴⁵ Since the mid-1970s, Jamaica has had relatively strict gun laws (Calathes 1990). During the period of partisan violence in the 1970s, and particularly in the lead-up to the 1980 elections, most illegal firearms were obtained from politicians intent upon arming their supporters. More recently, members of the police and the army have been implicated in trafficking firearms and ammunition, along with a variety of private actors (Leslie 2010, 41–46). The majority of the illegally imported firearms appear to originate in the United States, sometimes after passing through Haiti or another country (Ahmed 2019; US General Accounting Office 2024, 13). In 2009, US authorities stated that most guns seized in Jamaica were traced back to three counties in Florida with large Jamaican populations, where a combination of lax gun laws and the weak enforcement of prohibitions on unlicensed gun exports facilitated smuggling (Leslie 2010, 41, citing *Jamaica Observer* 2009). This suggests that the combined effect of the content and the enforcement of US laws governing the purchase and exportation of firearms and the structure of the diaspora is a significant determinant of the availability of firearms in Jamaica, a classic example of a regulatory spillover.

International drug trafficking

Violence in Jamaica is frequently associated with trade in illicit drugs. Beginning in the 1960s, Jamaica became a significant producer and exporter of marijuana, also known locally as ganja. Although partisan political violence was the main causal factor, some of the increase in violent crime during the 1970s was associated with conflicts between gangs over the trade in marijuana. After 1980, for many gangs, revenues from the drug trade replaced resources that were previously provided by politicians (Brana-Shute 2000, 97, 102–5; Sives 2010, 133–35). Marijuana exports to North America fell dramatically in the 1980s, coinciding with an increase in US interdiction efforts and a concomitant increase in domestic production in the United States (Morris 1994, 140–46). Around that time, however, Jamaica, along with other Caribbean countries, also began to serve as a transshipment point for cocaine produced in South America and

⁴⁵ Azam Ahmed (2019) reports that more than 80 percent of homicides are committed with firearms, and Anthony Harriot and Marlyn Jones (2016, 24) reporting weapons used in homicides from 2009 to 2013. More generally, Jamaica appears to experience a high number of firearms offenses relative to other Caribbean countries. See United Nations Development Program 2012, 22.

shipped to the United States, Canada, and the United Kingdom. In the Jamaican case, the level of cocaine trafficking jumped after the 1980 election when several politically affiliated gunmen emigrated from Jamaica to the United States. Once there, they created transnational networks that accounted for significant portions of the US supply during the 1980s and 1990s (Harriot 1996, 67–68; Sives 2010, 133–35; UN Office on Drugs and Crime 2012, 66). Jamaican gangs such as the Shower Posse became infamous for their brutality, both in Jamaica and the United States.

There was a significant drop-off in the amount of cocaine shipped through Jamaica after the turn of the century. The UN Office on Drugs and Crime (2012, 20, 40, 65–66) estimates that by 2007 less than 1 percent of the US supply of cocaine flowed through Jamaica, down from 11 percent in 2000. They attribute the decline largely to an increased enforcement effort on the part of the United States and the United Kingdom (40). Some of the US enforcement activity involved not only collaboration with Jamaican authorities but also operations in Jamaican territorial waters pursuant to a 1997 “Shiprider” agreement between Jamaica and the United States (Haughton 2011). Interestingly, the decline in cocaine shipments coincided with a spike in the level of homicides in Jamaica. A possible explanation is that the disappearance of opportunities in the drug trade prompted criminal groups to fight over opportunities to engage in other illicit activities (UN Office on Drugs and Crime 2004, 66). Moreover, even after this decline in the Jamaican drug trade, Jamaica continued to have the highest per capita rate of drug seizures in the entire Latin America and Caribbean region (Patterson 2019, 150–51). Consequently, although increased domestic and extraterritorial enforcement of drug laws by the United States and the United Kingdom may have influenced the Jamaican homicide rate, the direction of the effect was, at least initially, counterintuitive.

Deportees

The steady increase in violent crime that began in the 1990s is sometimes linked to another external factor with legal antecedents: an increase in the number of people deported to Jamaica from overseas and, in particular, from the United States, the United Kingdom, and Canada (Logan, Bain, and Kairies, n.d.; Nurse 2004, 8; Blake 2017; Morris-Francis 2018, 169). The number of deportations from the United States to Jamaica doubled from 1994 to 2004, and deportations from the United Kingdom increased significantly in the 2000s (Headley and Milovanovic 2016). Between 2000 and 2014, forty-five thousand people were deported to Jamaica, and a 2016 study estimated that criminal deportees represented approximately 2 percent of the island’s population (Burt et al. 2016).⁴⁶

The increase in the inflow of deportees was at least in part a result of changes in the deporting countries’ laws and policies. Most notably, in the United States, a series of reforms between 1986 and 1996 made it mandatory to deport non-citizens convicted of specified types of crimes and expanded the range of crimes that could

⁴⁶ Bernard Headley and Dragan Milovanovic (2016) report that, “from 2000 to 2013, a majority of deportees to Jamaica last resided in the United States (49 percent) and the United Kingdom (30 percent), with the remaining deported from Canada (7 percent) and a combination of other countries (14 percent), primarily in the Caribbean.”

trigger deportation (Blake 2014). The rise in deportations from the United States and the United Kingdom was also driven by crackdowns on Jamaican drug traffickers (Harriot 1996, 67–68). Of course, the crackdowns, and perhaps also the changes in immigration laws, may have been induced to some extent by increases in the level of activity on the part of Jamaican traffickers, and so the resulting deportations cannot be characterized as a wholly exogenous influence on criminal activity in Jamaica.

There is a widespread perception, supported by a modest amount of statistical evidence, that increases in the number of deportees are causally connected with increases in crime rates in Latin America and the Caribbean (Eldemire 2018; Weiner 2018; Ambrosius and Leblang 2019, 2020). Even if this is true, however, it is unclear which portions of the deportee population are responsible for these effects, the extent to which deportees are the perpetrators as opposed to the victims of the additional crimes, and whether the relationship between deportation and crime can be affected by measures designed to reintegrate deportees into the local population (Morris-Francis 2018). For present purposes, the key point is that the laws and enforcement practices of the deporting countries determine the number and characteristics of deportees, which is another instance of an international regulatory spillover.

Extradition and the Tivoli Incursion

Homicide rates in Jamaica fell dramatically beginning in 2010. The critical juncture was the Tivoli incursion, an operation aimed primarily at fulfilling a request from the US government for the extradition of Christopher “Dudus” Coke.⁴⁷ The incursion involved approximately eight hundred soldiers and 370 police officers. During the course of the operation, sixty-nine civilians and three members of the security forces were killed. Coke was the leader of the Shower Posse, also known as the “Presidential Click.” He lived in a well-to-do neighborhood in the hills overlooking Kingston but maintained a base and additional residences in Tivoli Gardens, a neighborhood in West Kingston. Coke was the community’s leading don, known for not only asserting violent control over the neighborhood but also distributing benefits and resolving disputes. Tivoli Gardens, the first garrison community, was a JLP stronghold. At the time of the incursion, its parliamentary representative was Bruce Golding, the prime minister. Coke was known to be a strong supporter of the JLP and had a personal relationship with Golding.

The US government submitted its request that the Jamaican government extradite Coke on August 25, 2009. The request was based on an indictment issued in the Southern District of New York containing charges of trafficking in marijuana, cocaine, and firearms. The Jamaican government delayed compliance with the request for months, arguing that the evidence supporting the indictment was obtained in violation of Jamaican law.⁴⁸ The government, or perhaps the ruling party (it is not clear which), even went so far as to retain a US law firm to lobby the US government

⁴⁷ The account that follows draws primarily upon the findings of the Western Kingston Commission of Enquiry (2016). For other accounts based on firsthand testimony, see Schwartz 2011; Thomas 2011.

⁴⁸ A subsequent commission of enquiry concluded that there were grounds to question the legal validity of the extradition request but that they ought to have been considered at an extradition hearing and that the minister of justice had no discretion about whether to proceed with the extradition request. Commission of Enquiry Appointed by Governor-General of Jamaica 2011, 30–32.

to cease pursuing the matter.⁴⁹ Finally, on May 17, 2010, following considerable pressure from the US government as well as Jamaican civil society, the prime minister gave a televised address indicating that the government would proceed with the extradition, and, on May 18, 2010, the minister of justice authorized enforcement of the warrant. Shortly after the Jamaican government received the US request for extradition, Coke took refuge in Tivoli Gardens. After the prime minister's announcement, his supporters began to mobilize. They blocked the entrances to Tivoli Gardens and built fortifications that included sandbags, explosives, and live electrical wires. There were reports that approximately three hundred fighters from outside the area came to offer support, motivated by promises of monetary payments. They were armed with weapons that included AK 47s, grenades, and at least one .50 caliber sniper rifle (Western Kingston Commission of Enquiry 2016, 35–47, 92–135).

On May 23, several police stations in West Kingston were attacked by groups of armed men, and shots were fired at the Jamaica Defense Force headquarters as well as the nearby police barracks. Two police stations were completely destroyed by fire, and four other police stations as well as downtown Kingston's main market were damaged. Two groups of police officers were ambushed, and two officers were killed. That evening, the prime minister announced the declaration of a state of emergency covering the Kingston area (Western Kingston Commission of Enquiry 2016, paras. 4.8–4.43). At 11 a.m. on the morning of May 24, 2010, a combined force of soldiers and police officers mounted an assault on Tivoli Gardens. They were equipped with armored personnel carriers and a front-end loader, and, in the first two hours of the assault, they fired thirty-six mortar rounds.⁵⁰ In addition, a surveillance plane operated by the US Department of Homeland Security relayed information to the Jamaican forces and made a video recording of part of the operation (Schwartz 2013). The initial assault was met with heavy gunfire and Molotov cocktails, and the security forces were unable to secure control of the area until the evening of May 25 (Western Kingston Commission of Enquiry 2016, paras. 4.44–4.119). Schools and public institutions in the area did not fully resume operations until June 7 (UN Economic Commission for Latin America and the Caribbean 2010, 3).

The immediate benefits from the Tivoli incursion were limited, and the costs were substantial. Most notably, Coke escaped; he may not even have been in Tivoli when the operation began. He was not captured until twenty-nine days later, outside of Kingston traveling toward the city (Western Kingston Commission of Enquiry 2016, para. 13.46). On the other side of the balance, the costs of the operation were high. The economic costs included extensive property damage in the area of the operations as

⁴⁹ The law firm maintained that it was retained by the government of Jamaica but the Jamaica Labour Party (JLP) insisted that it was the client. A commission of enquiry into the matter concluded that the JLP instructed the law firm. See Commission of Enquiry Appointed by Governor-General of Jamaica 2011, 38–42.

⁵⁰ The commission of enquiry found that the decision to use mortars in such a densely populated area, aimed at a target only fifty meters from the nearest civilian building (experts suggested seven hundred meters would have been an appropriate safety distance) was “a serious error of judgement” and “reckless and irresponsible” as well as being inconsistent with international humanitarian law, military best practice, and the right to life enshrined in the Jamaican Constitution. Western Kingston Commission of Enquiry 2016, 313–46, paras. 10.118–10.218, especially para. 10.181.

well as adverse effects on tourism.⁵¹ However, the greatest costs came in the form of lives lost unnecessarily. A Commission of Enquiry formed to investigate the matter concluded that, of the sixty-nine civilians killed during the operation, at least fifteen were probably the victims of unjustified intentional killings after the neighborhood was under the control of the security forces (paras. 10.111–10.113).⁵² Evidence of the extrajudicial killings includes firsthand accounts, together with the nature of the victims' injuries and the absence of forensic evidence that they were armed. In fact, a remarkably small number of weapons were recovered in Tivoli Gardens after the operation: in the first three days, only six firearms were found, and, even after two months, no more than 115 firearms had been recovered (paras. 5.77–5.82).

The longer-term benefits of the Tivoli incursion were more substantial, as reflected in the decline in the homicide rate from 2010 through 2014. Coke was ultimately extradited to the United States, tried and sentenced to twenty-three years in prison (Whyte 2012). The combined effects of the security forces' operation and the capture and imprisonment of Coke appear to have destroyed his gang. And in the aftermath of the Tivoli incursion, the police made concerted efforts to oust other dons (Meikle and Jaffe 2015). They also established a physical presence in garrison communities from which they had previously been absent and stepped up community policing initiatives designed to provide public services previously provided by dons (Meikle and Jaffe 2015). The catalyst for all these events was an extradition request from the US government, a straightforward example of US law enforcement influencing Jamaican law enforcement, which, for present purposes, qualifies as a form of diffusion.

Cross-border fraud

In recent years, homicide in Jamaica has continued to be associated with organized crime, but an increasing proportion of the underlying disputes concern cross-border fraud rather than drug trafficking (Bourne et al. 2013; Chappell 2017; Eldemire 2018). In the most common version of the fraud, “scammers” in Jamaica call people in the United States or Canada and advise them that they have won a prize in a lottery but will have to pay money in advance in order to collect the winnings. To avoid raising suspicions, the calls are often made from telephone numbers with US area codes, and the callers ask for funds to be sent to friends or accomplices in the United States. The victims are often elderly Americans, and some have lost hundreds of thousands of dollars (Weiner 2018). The execution of these schemes requires a fair amount of sophistication and organization. Different people may compile lists of potential targets (known as “lead sheets”), place calls, pose as the callers' supervisors when victims complain, receive the funds from victims, or collect the money when it is

⁵¹ Soon after the Tivoli incursion, the UN Economic Commission for Latin America and the Caribbean prepared an assessment of the socio-economic consequences of the unrest surrounding the operation. It estimated that the total effect on the economy was US \$258.8 million, representing 2.1 percent of the total GDP and 50 percent of the tourism GDP for 2009 (UN Economic Commission for Latin America and the Caribbean 2010).

⁵² Killings by the security forces have been a long-standing and persistent problem in Jamaica. The number of such killings declined significantly after 2013, but it remains high (137 in 2018) (Amnesty International 2016; Independent Commission of Investigations 2018, Table 3).

ultimately transferred to Jamaica (Bourne et al. 2013, 3239; Lewis 2020). In 2012, the Jamaican government estimated that Jamaicans earned three hundred million US dollars annually from these kinds of cross-border frauds (Jamaica Information Service 2012).⁵³

Telemarketing fraud is concentrated in the western part of Jamaica and, especially, in the parish of St. James, the location of Montego Bay, Jamaica's second largest city. The location is not accidental (Lewis 2020, 59–77). St. James is the center of two industries that specialize in training people to deal with customers in the United States and Canada: tourism and call centers. Many scammers have simply redirected their customer service skills—familiarity with North American language and culture as well as the ability to deliver a convincing sales pitch and to placate disappointed customers—to nefarious purposes (59–77). There is a strong link between lottery scamming and violent crime (Eldemire 2018). Conflicts over both lead sheets and division of the proceeds are often settled violently. For the past decade, St. James has had the highest homicide rate in the country, and much of the violence appears to be connected with the lottery scamming industry (Chappell 2017).⁵⁴ St. James was subject to a state of emergency aimed at controlling violence during most of 2018 and 2019 (Jamaica Information Service 2019).

Foreign enforcement agencies play a significant role in efforts to sanction telemarketing fraud. US and Jamaican agencies even created an international joint task force to implement a special project known as Jamaican Operations Linked to Telemarketing to address the problem (Federal Trade Commission 2009; Jones 2016; US Embassy in Jamaica 2017). US prosecutors routinely seek extradition of Jamaicans who have defrauded US residents, and many of them have been prosecuted and sentenced in the United States (Weiner 2018). Foreign authorities also put pressure on multinational money transfer firms such as Western Union and Moneygram to adopt policies that hamper scammers' efforts to use their services to transfer funds across the borders (US Department of Justice 2017; Federal Trade Commission 2018).⁵⁵ These foreign interventions were complemented by legislative reforms in Jamaica, but, in the absence of foreign assistance, Jamaican authorities would struggle to sanction cross-border fraud (Jackson 2016). First, the victims and much of the evidence typically are located overseas. Second, the profits from these schemes are so high that Jamaican police sometimes are tempted to demand a cut of the scammers' proceeds instead of bringing them to justice (Hines 2017).

Jovan Lewis (2020, 178–83) suggests that there is a direct connection between foreign interventions and the violence associated with scamming. He argues that scamming only became associated with violence after 2013 when pressure from US politicians and the international financial community pushed Jamaican lawmakers, US and Jamaican enforcement agencies, and money transfer companies to crack down on scammers and brokers of lead sheets. Lewis argues that the resulting shortage of

⁵³ Jamaica's reported (legitimate) exports that year were US \$4.48 billion.

⁵⁴ "[U]p to 50% of murders in western Jamaica can be traced back to clashes over the proceeds of scamming," according to Peter Bunting, former minister of national security (quoted in Chappell 2017).

⁵⁵ On the impact of those policies in Jamaica, see *RJR News* (2017) (referring to new security measures designed to combat fraudulent transactions); Lewis 2020, 1031–32 (describing scammers' efforts to avoid money transfer firms' detection efforts).

lead sheets prompted an increase in violent competition among scammers. This is an instance in which a combination of the diffusion of foreign norms and enforcement practices, extraterritorial regulation, and international regulatory spillovers appears to have exerted significant influences upon patterns of homicide in Jamaica.

Summary

The foreign laws that have influenced variations in Jamaica's homicide rate over time have exerted their influence through all three of the mechanisms identified at the beginning of this article: diffusion, extraterritorial regulation, and regulatory spillovers. To begin, several of the laws have exerted their influence by way of diffusion through the Jamaican legal system.⁵⁶ For instance, the terms upon which Jamaica secured independence from Great Britain played a role in establishing the political polarization that led to the initial increase in homicides in the 1960s. Subsequently, legal developments in Europe and elsewhere in the Caribbean influenced Jamaican death penalty law through the jurisprudence of the Judicial Committee of the Privy Council. Then, at the operational level, the request for extradition of Christopher Coke dramatically affected the structure of Jamaican organized crime and thereby had a tremendous indirect effect on homicide in Jamaica. Later, externally supported changes in Jamaican legislation and enforcement practices may have influenced the level of violence associated with scamming. Foreign influence on local laws and enforcement practices is a familiar phenomenon in postcolonial societies, and Jamaica's experiences with EU law, regional human rights law, and US law are variants on a common theme. However, the ways in which the decisions of national courts in neighboring countries have influenced Jamaican law through the Judicial Committee as well as Jamaican courts and legislators may be distinctively Caribbean.

Foreign laws have also affected local outcomes through extraterritorial regulation. Cases in which foreign governments have prosecuted people for committing homicide in Jamaica have not played any significant role in influencing homicide in Jamaica. However, extraterritorial enforcement of drug laws by the United States pursuant to the "Shiprider" agreement appears to have indirectly increased homicide by reducing shipments of drugs from or through Jamaica.

Perhaps the most striking lesson to be learned from this case study is how international regulatory spillovers can influence an activity such as homicide by affecting the movement of people, goods, capital, or communications across borders. It is difficult to understand homicide in Jamaica without taking into consideration US, Canadian, and British laws and practices concerning trafficking in firearms and narcotics, deportation, extradition, and cross-border fraud. The illicit trade in firearms has provided the means for killings. Conflicts over the proceeds of drug

⁵⁶ A more comprehensive analysis of external legal influences would consider the role of international law and international institutions. For instance, a decision of the Inter-American Commission on Human Rights prompted the creation of the Jamaican Independent Commission of Investigations (INDECOM), an independent body launched in 2010 with a mandate to investigate security force abuses. INDECOM has been credited with inducing a significant reduction in police killings in Jamaica (Vascianne and Vascianne 2024, 355–58). In addition, since the 1970s, the International Monetary Fund's policies have had a significant impact on fiscal policy and the overall economic environment.

trafficking and cross-border fraud have provided the motives. US, UK, and Canadian law and practices surrounding deportation arguably have expanded the population of alienated crime-prone individuals.

Methodological implications

The preceding analysis suggests that the relationship between foreign law and events in Jamaica is an interactive one; foreign laws do not only influence events in Jamaica, but they also are influenced by them. Both kinds of influence ought to be accounted for in the design of legal research and not only in the Jamaican context.

Foreign influence on local activities

Foreign regulation has significant implications for legal analysis, whether it is motivated by practical or intellectual considerations. To begin, on a practical level, anyone deciding whether to engage in telemarketing fraud or drug trafficking in Jamaica, or contemplating what level of precautions to take against facilitating either kind of activity, ought to—and probably does—take into account not only the sanctions and enforcement practices of Jamaican legal institutions but also the sanctions and enforcement practices of US, UK, and Canadian institutions, both inside and outside of Jamaica.⁵⁷ Therefore, to the extent that an analysis of Jamaican law is designed either to inform the behavior of local actors or to capture local understandings of “the law,” it ought to include a description of foreign laws.⁵⁸

The variety of ways in which local outcomes can be influenced by foreign laws also complicates the task of studying the legal factors that cause those outcomes. Specifically, it is important to investigate the extent to which variations in outcomes are caused by variations in foreign laws as opposed to variations in purely domestic legal or non-legal factors. This means it is important to collect data on potentially relevant foreign laws. It is also important to design studies that can isolate the impact of those variations. So, for example, if the goal is to investigate the legal determinants of homicides in Jamaica, it is crucial to take into account foreign laws governing matters such as deportations and extraditions. Moreover, if the goal is to investigate the importance of non-legal factors—for example, education or inequality—it will be necessary to find a way to isolate the effects of foreign laws. In the context of a multi-country statistical analysis, this might involve finding a way to control for deportations and extraditions. In the context of a comparative case study, it might entail selecting a case that is subject to a similar set of external influences. For instance, there have been several comparative case studies of Jamaica and Barbados (Henry and Miller 2009; Daniels, Trebilcock, and Carson 2011; Dawson 2013). The argument here suggests that a comparison of Jamaica and the Bahamas might be more informative; because of its proximity to the United States, the Bahamas is

⁵⁷ As noted above, the prime minister gave a televised address about the US extradition request that led to the Tivoli incursion, and Christopher Coke responded to information about the request by going into hiding. Jamaican newspapers also have reported on extraterritorial enforcement actions against scammers (Jones 2016; Campbell 2021; Lyons 2021).

⁵⁸ In Rodolfo Sacco's (1991) terminology, this observation implies that, if Jamaican law is defined in a subject-based fashion, then its legal formants will include foreign law.

affected by US laws concerning immigration, drugs, and firearms in ways that are more similar to how Jamaica is affected.

Local influences on foreign laws

Foreign regulation undermines the assumption that legal institutions generally are shaped by and reflect the aspirations and preferences of local actors. An extensive body of literature challenges this “mirror thesis” by documenting how foreign legal institutions and other powerful actors influence local law, whether directly or through international organizations (Siems 2018, 229–302). Relatively little attention has been paid to how the development of individual countries’ laws is shaped by their relationship to foreign subjects, one of whose ramifications might be cross-border lobbying by foreign actors (Bradford 2020). Even the case study above leaves these sorts of questions unanswered. To what extent were reforms to US drug and immigration laws influenced by the activities of Jamaican posesses during the 1980s? Why was the law firm retained by the JLP so unsuccessful in persuading the US government to relent in its pursuit of Coke? These questions, as well as similar questions stemming from the influence of US (or other countries’) law on other foreign subjects, deserve more attention in the comparative law literature.

Applications beyond homicide in Jamaica

Subject-based approaches to legal analysis that account for the regulation of cross-border activities can be applied to a wide range of subjects besides homicide in Jamaica or in countries like Jamaica. Legal diffusion and extraterritorial regulation may be most significant in former colonies or other countries with less prestigious legal cultures that lack the power to resist extraterritorial applications of legal norms (Monateri 2003; Siems 2018, 241, 255). However, international regulatory spillovers can affect any subject that relates to cross-border flows of goods, services, capital, people, or ideas.⁵⁹ These kinds of spillovers certainly can affect subjects in countries that qualify as relatively powerful according to conventional criteria, which in turn suggests that the subject-based approach to legal analysis can be usefully applied to analyze how law influences a wide range of subjects in even the most powerful countries. So, for example, analyses of education in Europe during the 1920s ought to consider the incentives created by US immigration law’s literacy test. Similarly, efforts to understand the contemporary privacy practices of firms in the United States ought to account for the extent to which those firms do business in the EU and are subject to the Brussels effect (Davis and Marotta-Wurgler 2024).

⁵⁹ Anu Bradford’s (2020, 25ff) analysis of the conditions that give rise to the Brussels effect provides a useful starting point in defining the conditions under which regulation of cross-border activities is likely to have a significant effect on a particular subject. Bradford identifies market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility as the key determinants of whether actors will comply with a foreign regulator’s standards.

Conclusion

This article aims to shed light on a fundamental question in legal analysis: what laws should be analyzed? The nationalistic source-based approach defines the sets of laws to be analyzed by reference to the nationalities of their sources. The thrust of the argument above is that, for many practical and intellectual purposes, it is preferable to treat the entire set of laws that affect a particular social phenomenon as the unit of analysis, whether those laws emanate from domestic or foreign sources, keeping in mind that the effects of foreign laws can arise from legal diffusion, extraterritorial regulation, or international regulatory spillovers.

The general point is that the subject-based approach is appropriate whenever the purpose of the analysis is to understand how legal determinants of action, or perceptions of those determinants, vary across societies. This means that the subject-based approach is most appropriate when the purpose of the analysis is to inform and guide the behavior of actors subject to the law. By extension, the same approach will be appropriate if the purpose of analysis is to describe the set of laws that guide the behavior of a particular set of actors. The subject-based approach is also appropriate when the purpose of the analysis is to explain the role that laws play in causing social outcomes; limiting such an analysis to domestic laws will mean omitting an important set of explanatory variables. This in turn suggests that the subject-based approach may also be useful for normative analysis; an argument for (or against) legal reform will be unpersuasive if it ignores a subset of the laws that affect the relevant domain of society.

Implementing the subject-based approach requires identifying and tracing the effects of foreign laws. These tasks are presumably less challenging when the foreign laws apply directly to local actors, such as in the case of extraterritorial regulation, than when their influence is mediated by other actors, such as in the case of diffusion or spillovers. Future research may wish to explore the normative implications of various forms of direct and indirect foreign influence—for example, extraterritorial regulation may be more difficult to justify than causing international regulatory spillovers.

The Jamaican case study illustrates these points by showing that it is impossible to understand the relationship between law and a prominent feature of Jamaican society—homicide—without taking into account all of the laws that affect homicidal behavior in Jamaica as opposed to just the laws adopted by Jamaican legal institutions. This has clear implications for the analysis of Jamaican law. If the purpose is to compare the legal consequences of homicide-related activities, to describe how the legal consequences of these activities vary, to explain variations in homicide across countries, or to support an argument for legal reform, then the analysis should take in account all the laws—domestic and foreign—that affect homicide-related activities in Jamaica. The case study also shows that identifying the relevant foreign laws and tracing their effects may involve highly contextualized social scientific analysis, particularly when those laws exert their influence indirectly through international regulatory spillovers. The merits of the subject-based approach are particularly visible in the Jamaican context because the society is so highly globalized, and its homicide rate is such an outlier. This mode of analysis is likely to be useful in other highly globalized societies, including in other Caribbean countries. However, the argument in favor of the subject-based approach to legal analysis rests on a more general insight about the implications of globalization for legal analysis.

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The Author

Kevin Davis is Beller Family Professor of Business Law, New York University School of Law, New York, NY, United States. His publications include *Legal Heterodoxy in the Global South* (edited with Mariana Pargendler) (Cambridge University Press, 2025) and *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press, 2019). Email: Ked2@nyu.edu.

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