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**EXPERT IDEAS AND TECHNOLOGICAL PRACTICES AS FINANCIAL  
MARKET REGULATORS:**

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**THE IDEOLOGICAL AND PERFORMATIVE REPRODUCTION OF REGULATORY  
NEOLIBERALISM**

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**By Jeremmy Odhiambo Okonjo  
Kent Law School**

**A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor  
of Philosophy  
at Kent Law School, the University of Kent**

**Canterbury, United Kingdom  
June 2018**

**Word Count: 99,882**

## **Declaration**

I certify that the thesis I have presented for examination for the PhD degree of the University of Kent is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent.

## Acknowledgements

One of the key insights I gained in the course of undertaking this project is that any action (including the attribution of meaning) is the sum total of many willing, unwilling, and unwitting people and things. Similarly, this written work is a product of the willed and unwilled collaborations, conflicts, tensions, reflections, sacrifices, and encounters and experiences with/of many people, things and events (of which I am but a peripheral opportunist), over extended times and geographies. I can only thank a few.

I am humbled and grateful for the opportunity to have been supervised by Professor Toni Williams and Professor Donatella Alessandrini. Thank you for accepting my project, and for your patient intellectual leadership, guidance and reassurance, especially as I navigated the new terrain of Critical Legal Studies, and even when I did not have faith in my own work. You have given me the confidence to continue developing my academic vocation.

I wish to express my gratitude to the University of Kent, and also Kent Law School (KLS), for the scholarship award that funded my research, and also for providing me with the teaching opportunity that enabled me to develop a crucial linkage between my teaching and research project. The students and academic and administrative staff at KLS provided a conducive and collegial environment that directly contributed to my project. To Tom, Asta, Will, Eric, Michalis, Gian-Giacomo, Paolo and Brendon, thank you for all the great reflections that not only fed into this work, but also shaped my social perspective. You have made me a better person.

I also wish to thank the Centre for Critical International Law (CeCIL), especially the Director, Dr Luis Eslava, for introducing me to a critical approach to International Law. I am grateful to Dr Rose Parfitt for seeing the potential in my work, and awarding me the inaugural fellowship grant under the KLS-Melbourne Law School (MLS) doctoral exchange program. In the same breath, I wish to thank the Institute for International Law and the Humanities (IILAH) at MLS, University of Melbourne, and especially Prof Sundhya Pahuja, for sponsoring my one-month doctoral fellowship at the institution in February 2017. The interactions with, and useful feedback from, the various scholars and PhD students at MLS inspired me to engage more deeply and purposefully with critical theory. My time at MLS was crucial in dissolving the writer's block I had developed with regard to my thesis theoretical framework. I also thank Melbourne's wonderful summer (to borrow an Actor-Network perspective) for the part it played during the fellowship.

At the commencement of my project, I was warned that undertaking a PhD project is a lonely and depressing path. I am humbled to admit that, with hindsight, my experience was a contrast to the expectations, thanks to the wonderful friends I made over the four-year course. To Christian, Daniel, Diane, Boniface, Beatrice, Kerianne, Marsha, Jill, Nadina, Jonathan, Mark, Daszine, Josh, and all the members of Small Group, thank you for your friendship, good wishes, prayers and encouragement. To Albert, Ursil, Donald and Novelette, thank you for being a wonderful DnA family, and for walking with Fiona and I through the good and bad times. To Jana, Angela and Sophie, thank you for uplifting my spirits through your friendship and reflections. Ali, thank you for literally feeding Fiona and I when we were too busy with our writing, to cook.

To my parents, Wilfred and Elizabeth Okonjo, thank you for your love, selflessness and sacrifices that have provided me opportunities that I cannot take for granted. Thank you. To my siblings, George, Donald, Emily, Joyner, thank you for your friendship, and material and emotional support. I have had the luxury of making some adventurous decisions in my life, including undertaking this PhD project, because I trusted that you would support and walk with me. To my wonderful parents-in-law, Josephat and Peninah Kogera, thank you for providing me a home away from home, and for all the good wishes, emotional and material support. To my in-laws, Gilbert, Flora, Jack, Aileen, Veronica, Karanja, and Brenda, thank you for your support, encouragement and prayers.

To my wife, Fiona, words cannot express how much walking this journey with you has made this project not only possible, but enjoyable. Thank you for being my faithful friend, critic, collaborator, and psychiatrist. I am thankful that we could experience the ups and downs of our projects together.

I dedicate this PhD thesis to my parents, Wilfred and Elizabeth Okonjo. Your immeasurable sacrifice, unconditional love, and prayers, have enabled me to pursue my ambitions.

## Abstract

This thesis examines one key research question: how has the ideational infrastructure of global financial markets impacted on the regulatory reforms within the transnational and Third World financial regulatory orders? It explores the ideological and performative role of ideas and their related technologies and practices in the reproduction of financial capitalism and regulatory neoliberalism in the globalized financial markets and related transnational and national regulatory institutions, specifically in Third World countries. The regulation of the liberalized interest rates in Kenya's credit market forms the basis of a three-part case study on reproduction of regulatory neoliberalism in Third World countries. The study is premised on the observation that the Third World's historical contestation of the transnational financial regulatory order has registered both progress and challenges, but regulatory neoliberalism and the globalization of financial capitalism grows more resilient, despite periodic setbacks.

While noting the significance of structural power, stakeholder interests, and material embedding, in the reproduction of regulatory neoliberalism, this thesis identifies and focuses on specific ideas and related technologies and practices as making an under-stated contribution. It therefore explores the ideological and performative power of neoclassical economic theories, doctrines of legal formalism, technological ideas, artefacts, and their related practices, which form the ideational infrastructure of contemporary financial markets. The thesis examines their role in constructing meaning, relationships and institutions, allocating identities, interests and capacities, defining problems and their solutions, thereby enabling and constraining action.

The main argument explored in this study is that the ideational infrastructure of the financial markets legitimates, constitutes and performs neoliberal financial markets and regulatory neoliberalism, within the transnational and national financial regulatory institutions. By presenting neoliberal financial markets, and regulatory neoliberalism as the only rational form of economic organization, this ideational infrastructure conceals their reproduction of inequality and power asymmetries between developed and developing countries in transnational regulation, and also between lenders and borrowers in Kenya's credit markets. It also restricts the regulatory possibilities available to Third World policy makers and regulators for addressing the externalities of neoliberal financial markets, including, as explored in the Kenya case studies, high interest rates and high indebtedness.

The related key findings of the thesis are four-pronged. The first finding is the transformation of neoliberal hegemony in global financial markets from the centralized structural, military and economic power of the US and other developed countries, to a more decentralized, diffused hegemony embedded in ideologies, discourses, performative practices, and technologies. This is evident in the transformation of liberal hegemony in response to Third World contestation. The second finding is the 'relatively autonomous' agential power of legal, economic and technological ideas and practices underpinning regulatory neoliberalism, when decoupled from their originators. This is demonstrated by the origination and diffusion of ideas to and from the Bretton Woods institutions, and also their embedding within the bureaucracies of Kenya financial markets regulators.

The third insight is the complex, co-constitutive, but not necessarily causal, relationships between legal formalism, neoclassical economic theories, technological ideas, and their related practices, which contribute to the resilience and durability of transnational regulatory neoliberalism. The thesis demonstrates the embodiment of these ideas and practices in the credit information sharing infrastructure, and their simultaneous constitution of neoliberal interest rates markets in Kenya. The fourth insight is the conceptual indeterminacy, inconsistency, and contradiction at the heart of the legal, economic and technological ideologies, and possibilities of harnessing their ideological and performative power towards establishing alternative economic organizations. The three Kenya case studies demonstrates the failure of the legal, economic and technological ideologies and practices employed by Kenyan financial regulators in the interest rates market.

The thesis concludes that the present Third World efforts aimed at contesting the regulatory neoliberalism at the heart of the transnational financial regulatory order should also focus on the ideological and performative power of the ideational infrastructure of the global financial markets. In doing so, TWAIL practitioners should of necessity adopt an interdisciplinary approach in their reflection, conceptualization, articulation, dissemination and legal operationalization of an alternative international financial law praxis.

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## INTRODUCTION

### The Ideological and Performative Role of Ideas and Practices in the Reproduction of Regulatory Neoliberalism in Financial Markets

#### 1. Introduction and Statement of the Problem

Since its 1944 foundation at the Bretton Woods conference, the global financial regulatory order has been subjected to on-going First World/Third World contestation, focusing on both its institutional and normative aspects. The global North has sought to maintain institutional control of the transnational financial regulators, including the International Monetary Fund (IMF), the World Bank (WB), the Basel Committee on Banking Supervision (BCBS), and the Financial Stability Board (FSB), through majority voting rights and higher representation in their governance organs.<sup>1</sup> This institutional control has been achieved through (among other strategies) the discursive use of ideas, including 'Gross Domestic Product' (GDP), and concepts of 'development' and 'under-development', to determine allocation of voting rights and board representations among States.<sup>2</sup> This institutional control has been necessary for preserving these institutions' neoliberal regulatory norms, including the mobility of global capital, the liberalization of domestic financial markets, and a market-centred regulatory model, with minimalist State intervention.<sup>3</sup>

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<sup>1</sup> Robert Hunter Wade, 'US Hegemony and the World Bank: The Fight over People and Ideas' (2002) 9 *Review of International Political Economy* 215, 215. Wade argues that the US structures international financial institutions in a manner that seems to be for the mutual benefit of all the member countries, but which in actual fact caters to its national interests.

<sup>2</sup> Lorenzo Fioramonti, *Gross Domestic Problem: The Politics Behind the World's Most Powerful Number* (Zed Books Ltd 2013) 3.

<sup>3</sup> The term 'neoliberalism' is used in this thesis to refer to the theory of political economy, which asserts that human well-being is best secured by a minimalist State that liberates individual entrepreneurial freedoms and skills by enabling the protection of property rights, free markets and free trade. This eliminates bureaucratic barriers to trade, increase efficiency and productivity, improve quality, and reduce costs, through cheaper commodities and reduced tax burdens. The argument against State intervention is based on the assertion that, first, the State has inferior information compared to the market, and will therefore make sub-optimal decisions, and second, that the interventionist State is bound to be biased due to regulatory capture by organized labour. At a policy and regulatory level, this translates to economic policies such as deregulation, privatization, trade liberalization, capital account liberalization, weakening of labour protections, capital markets liberalization, and other related policies. See David Harvey, *A Brief History of Neoliberalism* (OUP Oxford 2007) 2; The thesis uses the terms 'neoliberalism' and 'neoliberal capitalism' interchangeably, to refer to free-market capitalism, where market forces and market relations are given a predominant role in the economy, while the State plays a restrained, minimalist role. Neoliberal capitalism is distinguished from 'regulated capitalism', which is a form of capitalism where non-market institutions such as the regulatory State and trade unions play major roles in restricting market forces and market relations. See David M Kotz, *The Rise and Fall of Neoliberal Capitalism* (Harvard University Press 2015) 2, 8–9. The

## Regulatory Neoliberalism in Transnational Financial Regulation

Towards this goal of sustaining transnational regulatory hegemony, the global North has championed transnational and national financial regulatory practices of the intellectually-dominant paradigm that Walter has called ‘regulatory neoliberalism’. This refers to idealized Anglo-American regulatory practices, including technocratic, apolitical, market-oriented and (politically) independent financial regulatory agencies.<sup>4</sup> This model has informed the legal structuring of central banks and financial regulators in both developed and developing countries, including Kenya’s Central Bank, as politically-independent agencies. Key assumptions underlying the technocracy of ‘regulatory neoliberalism’ include the claims that legal, economic, and technological ideas, practices, artefacts and institutions underpinning markets and regulatory practice, are scientific, that is, universal, rational, natural, apolitical, and therefore transcendental.<sup>5</sup>

The impact of this regulatory technocracy is that these ideas, institutions, technologies and practices underlying financial market and regulatory practice are ideologically vested with ‘relative autonomy’ from their interlocutors. The concept of relative autonomy of ideas, as developed in Chapter 2, rejects both the formalist and instrumental theorisation of legal, economic and technological ideas. It recognizes that while these ideas are socially constructed, they become durable against social reconfigurations, since they are embedded in relatively autonomous structures, and in fact end up constituting social relations.<sup>6</sup> Nevertheless, despite their constitutive nature, these ideas remain inextricably linked in the totality of social relations and institutions. However, this link is gradually concealed by the fetishized relationships in which individuals conceive themselves as objects, creations or subjects of the ideas they formulated.<sup>7</sup>

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author’s conception of neoliberal capitalism is relevant to this thesis discussion, as it emphasizes the centrality of globalization, financialization, and ideas underpinning neoliberalism.

<sup>4</sup> Andrew Walter, *Governing Finance: East Asia’s Adoption of International Standards* (Cornell University Press 2008) 1, 21, 27.

<sup>5</sup> See Antony Anghie, ‘International Financial Institutions’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004) 223, 235. Anghie notes, for example, that the regulatory technocracy underlying the authority of international financial institutions, is based on their legal autonomy, and the belief that they are arbiters of scientific knowledge on economic development and monetary stability, and that their politicization waters down their credibility as experts.

<sup>6</sup> See Robert W Gordon, ‘Critical Legal Histories’ [1984] *Stanford Law Review* 57, 101.

<sup>7</sup> See Isaac D Balbus, ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’ [1977] *Law and Society Review* 571, 582–583.

### **Third World Contestation of the Transnational Regulatory Neoliberalism**

First World-Third World, and global North-global South binaries and dichotomies are development discourses that have been used by former imperial powers ('developed economies') to illustrate and sustain the economic, political, cultural and other divides between them and post-colonial States ('developing economies').<sup>8</sup> These discourses invariably conceal the historical and consequential relationships between North/South and First/Third World. They oversimplify and distort the complex historical and cultural dynamics within these countries, while justifying the relations of domination between them, systematized in multilateral regulatory systems such as the Bretton Woods Institutions (BWIs).<sup>9</sup> This is discussed in detail in Chapter 3, which examines how the US appropriated discourses of developed and underdeveloped countries in distributing voting rights among member States of the BWIs, with a pre-determined outcome of US hegemony.

Nevertheless, the 150 so-called 'global South' or 'Third World' countries, while entailing diverse historical, cultural, political, economic and social differences, perspectives and interests, also share certain characteristics, including accounting for most of the World's poor. These commonalities have prompted these countries to appropriate the discursive tags of the 'global South' and the 'Third World' as geopolitical caucuses (including the Group of 77, and the non-aligned movement), aimed at contesting the hegemony of the powerful 'global North'.<sup>10</sup> While exploring the power of ideas, concepts and rationalities in transnational financial regulation, this thesis adapts these discursively-reclaimed dichotomies to advance the Third World Approaches to International Law (TWAAIL) project of resetting International Law and regulation to speak to Third World concerns and interests, as discussed at length in Chapters 1 and 2.

Thus, the Third World has, in this effort, also historically advocated for its States' equitable inclusion, representation, and democratic participation in the transnational financial regulatory institutions.<sup>11</sup> It has recognised this institutional reform as necessary for transforming the

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<sup>8</sup> Sundhya Pahuja, 'Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide' (2000) 13 *Leiden Journal of International Law* 749, 749–750.

<sup>9</sup> See Steven Ratuva, 'Subalternization of the Global South: Critique of Mainstream "Western" Security Discourses' (2016) 28 *Cultural Dynamics* 211, 211–212.

<sup>10</sup> See generally, Sivan Kartha, 'Discourses of the Global South' in John S Dryzek, Richard B Norgaard and David Schlosberg (eds), *The Oxford Handbook of Climate Change and Society* (Oxford University Press 2011).

<sup>11</sup> See Stephen D Krasner, *Structural Conflict: The Third World Against Global Liberalism* (University of California Press 1985) 3. Discounting the global North's conventional belief that the Third World merely wants wealth and development, and will accept the global North's control in facilitation of this process, Krasner

normative aspects of the transnational financial regulations to speak for the differentiated concerns and interests of Third World people. These concerns include: State sovereignty and equality within International Law; States' control of domestic resources; and the preservation of national regulatory policy space, to alleviate the harsh consequences of economic globalization on the poorer segments of their populations.<sup>12</sup> A key assertion of the Third World's opposition to regulatory neoliberalism has been that the State plays an important constitutive and regulatory role in markets, and that their regulation should therefore be politicised. This argument has formed the main basis of Third World opposition to IMF Structural Adjustment Programs (SAPs) and subsequent Poverty Reduction Strategy Programs (PRSPs), including in Kenya, where financial markets liberalization has resulted in very high cost of credit.<sup>13</sup> Third World contestation of the transnational financial regulatory order has therefore entailed a critique of the alleged universality of ideas and practices underpinning neoliberalism, and an assertion of their historical, social and geographical contingency.<sup>14</sup>

As discussed more substantively in Chapter 1, Third World contestation of the transnational financial regulatory order has resulted in both gains and losses. For example, Third World contestation, alongside periodic financial crises, and significant geopolitical events (such as the fall of Communism), have precipitated the transformation of the institutional and normative aspects of the regulatory institutions. These transformations include greater Third World States' inclusion, representation and democratic participation, and also the introduction of new governance norms such as the New International Economic Order (NIEO), the International Law of Development (ILD), and the Right to Development.<sup>15</sup> They have also precipitated the transformation of the nature of Western financial regulatory hegemony, from essentially structural hegemony (maintained principally through superior military, economic, and market power), to a more hybrid and decentred type of hegemony that includes structural power, material power, commonality of interests, and ideational or discursive power.

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argues that the Third World recognizes its political weakness and vulnerability, and actually wants not only more wealth and development, but also more control in transnational governance.

<sup>12</sup> See generally, FV Garcia-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (Oceana Publications 1990).

<sup>13</sup> See, for example P Thandika Mkandawire, *African Voices on Structural Adjustment* (Africa World Press 2003).

<sup>14</sup> See, for example, Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade, Law and Development 103, 122. The authors criticize International Law's false claim to universality, and also TWAIL's quest to realize the promise of universality in International Law.

<sup>15</sup> See Garcia-Amador (n 12).

This transformation has occurred alongside the transformation of the global financial markets, including the emergence and diffusion of new financial technologies. Increased technological innovation has increased financial market integration, decentred and vested regulatory power in non-State entities, and universalized financial markets' norms, ideas and practices.<sup>16</sup> A related development has been the increasing financialization of both national and global economies. Financialization in this context refers to the increase, nationally and globally, of financial markets' geographical size, share of GDP and income, significance to the real economy, and political power.<sup>17</sup> According to Epstein, this entails the increasingly dominant role played by financial motives, markets, actors, and institutions, in the operation of both domestic and international economies.<sup>18</sup> Financialization has impacted on the distribution of power, income and wealth, and also in the pattern of economic growth occurring globally and nationally<sup>19</sup>.

In concert with regulatory neoliberalism and globalization, financialization favours accumulation and profit-making through financial channels rather than through trade and commodity production.<sup>20</sup> This has impacted negatively on the Third World, for example, through commodity markets' volatility caused by financial speculation, and financial crises that lead to global recessions.<sup>21</sup> Chapter 4 also discusses the concerns of Kenyan Parliamentarians over the increasing financialization of the Kenyan economy, as evidenced by high lending rates and increased bank profits amidst a depressed real economy, and bankers' preference for investing in financial instruments such as government bonds, rather than financing the real economy.

In addition, financialization has dispersed regulatory power away from transnational and national financial regulatory institutions, to various financial market stakeholders and, as

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<sup>16</sup> See Matias E Margulis and Tony Porter, 'Governing the Global Land Grab: Multipolarity, Ideas, and Complexity in Transnational Governance' (2013) 10 *Globalizations* 65, 66–68. The authors underscore the emerging multi-polarity of power relations in transnational governance, and the assertion of the ideational and material dimensions of transnational governance.

<sup>17</sup> Matthew D Stephen, 'Rising Powers, Global Capitalism and Liberal Global Governance: A Historical Materialist Account of the BRICs Challenge' (2014) 20 *European Journal of International Relations* 912, 922.

<sup>18</sup> Gerald A Epstein (ed), 'Introduction: Financialization and the World Economy', *Financialization and the World Economy* (Edward Elgar Publishing 2005) 3. As noted by Epstein, the meaning of the term 'financialization' is contested.

<sup>19</sup> Ronald Dore, 'Financialization of the Global Economy' (2008) 17 *Industrial and Corporate Change* 1097, 1097.

<sup>20</sup> Greta R Krippner, 'The Financialization of the American Economy' (2005) 3 *Socio-Economic Review* 173, 174.

<sup>21</sup> Epstein (n 18) 5; Sam Ashman, Ben Fine and Susan Newman, 'The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development' (2011) 47 *Socialist Register* 174, 175.

argued in this thesis, markets' ideational and technical infrastructure, further embedding regulatory neoliberalism. Hansen argues that as a result of financialization, finance "grows out of control and shapes the world in its own image, by enacting and circulating a specific narrative".<sup>22</sup> This results in the capture and framing of the social domain by, and according to, financial imperatives, and consequently contributes to neoliberal globalization, transnational regulatory neoliberalism, and financial market and social instability.<sup>23</sup>

### **Resilience and Reproduction of Regulatory Neoliberalism in Financial Markets**

As argued in Chapter 1, Third World contestation has not deterred the reproduction of transnational regulatory neoliberalism, and its negative impacts on the more vulnerable segments of Third World people.<sup>24</sup> Thus, the 2008 global financial crisis was hailed as a revolutionary moment for a fundamental transformation of the transnational financial regulatory order. Indeed, as demonstrated by the tone and content of the various reports produced by various high-level inquiries (including the G-20, FSB, IMF and World Bank), transnational and national regulators across the Atlantic signalled their loss of faith in market-centred financial regulatory models, and called for regulatory reforms to stem systemic, macro-prudential and micro-prudential risk.<sup>25</sup>

However, as discussed in Chapter 1, the post-2008 reforms have not yielded the anticipated fundamental shift in ideational paradigms of regulatory policy. For example, the revised bank capital adequacy standards adopted under the BCBS (Basel III Framework) in 2011 retained the neoliberal, market-centric mechanisms for risk-management, including the use of risk-weighting methodologies and technologies of Credit Rating Agencies (CRAs), underpinned by

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<sup>22</sup> Per H Hansen, 'From Finance Capitalism to Financialization: A Cultural and Narrative Perspective on 150 Years of Financial History' (2014) 15 *Enterprise & Society* 605, 609.

<sup>23</sup> *ibid.* See also Stephen (n 17) 922.

<sup>24</sup> For example, after the 2008 crisis, the International Labour Organization warned that the economic crisis would morph into a social crisis, as some 200 million workers, mostly in developing countries, will be pushed into poverty if rapid action was not taken to arrest the impact of the crisis. See United Nations, 'Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System' (United Nations 2009) 12.

<sup>25</sup> See generally Financial Stability Forum, 'Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience' (Financial Stability Forum 2008). See also Financial Services Authority, 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (UK Financial Services Authority 2009) PUB REF: 003289.



the Efficient Markets Hypothesis (EMH), which regulatory paradigm was blamed for the 2008 crisis.<sup>26</sup>

The inability to deliver a radical shift in the regulatory norms underpinning global financial markets has been traced to at least three factors. First, Third World States' voices granted representation within transnational regulatory institutions have been underwhelming in the regulatory debates.<sup>27</sup> Second, the more dominant Third World States coalescing around the BRICS, have seemed to support status quo regulatory paradigms that favour them as emerging powers, and even shot down radical financial regulatory proposals such as the Financial Transactions Tax (FTT).<sup>28</sup> Third, within their domestic markets, Third World policy makers and regulators have continued to champion the discredited neoliberal financial regulatory policies they have historically contested at the transnational level, including, for example, financial market liberalization. This Third World preference for regulatory neoliberalism is demonstrated in the Kenya case studies on the Central Bank of Kenya (CBK) and National Treasury officials' resistance to the interest rate regulation.

Consequently, almost ten years since the 2008 crisis, the failure of the promised radical financial regulatory reform has become apparent. In 2015, for example, the United Nations Conference on Trade and Development (UNCTAD) noted the failure of transnational financial reforms to tackle the root causes of global financial instability and recurrent crises, including rapid financial market liberalization, and the removal of capital controls as policy and regulatory tools.<sup>29</sup> TWAIL scholars, including Chimni, also argued that market-based financial regulations remain the dominant regulatory paradigm among Third World regulators and policy makers, as demonstrated by their continued deregulation of financial markets and maintenance of capital account convertibility.<sup>30</sup>

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<sup>26</sup> Financial Services Authority (n 25) 22. The Turner review concluded that the sophisticated mathematics underpinning risk valuation in the securitised credit market incorporated erroneous market-based assumptions, including in the concept of Value-at-Risk.

<sup>27</sup> Eric Helleiner, 'Was the Market-Friendly Nature of International Financial Standards Overturned?', *The Status Quo Crisis: Global Financial Governance After the 2008 Meltdown* (Oxford University Press 2014) 92.

<sup>28</sup> Eric Helleiner, 'Introduction and Overview', *The Status Quo Crisis: Global Financial Governance After the 2008 Meltdown* (Oxford University Press 2014) 18.

<sup>29</sup> United Nations Conference on Trade and Development, 'Financial Regulatory Reform after the Crisis', *Trade and Development Report 2015: Making the International Financial Architecture Work for Trade and Development* (United Nations Publications 2015) 111.

<sup>30</sup> BS Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective' in John Linarelli (ed), *Research Handbook on Global Justice and International Economic Law* (Edward Elgar Publishing 2013) 261.

Porter also observes that the three-decade trend of transnational interdependence in financial transactions and governance is increasing rather than reversing.<sup>31</sup> In addition, Herr also contends that the post-crisis transnational financial regulatory system retains the logic of financialization, and a faith in the role of efficient capital markets, and unregulated financial innovation in economic growth, while leaving unchallenged the interest rate regimes, international capital flows and current account imbalances that were the causes of financial instability in global markets.<sup>32</sup>

Scholars from different disciplinary traditions have weighed in on the various reasons accounting for the resilience of regulatory neoliberalism both within the transnational and national financial sector policy making and regulatory circles. First, structuralists, including Helleiner, contend that transnational financial regulatory neoliberalism is maintained by US structural power, a hegemony underpinned by its superior financial market size, and economic and military power. Thus, the preferences of the US 'Wall Street-Treasury Complex' are reflected in the policy choices of transnational regulators.<sup>33</sup> Second, historical materialists, including Stephen, discount this structuralist conception of a unipolar regulatory hegemony, and contend that this hegemony is also aided by the embedding of financial globalization by technological and structural trends inherent in financialization of the global economy.<sup>34</sup> According to Wigan, this includes the development of financial innovations, such as synthetic financial instruments, which have denationalized finance, and shifted power from States to transnational financial institutions.<sup>35</sup>

This neoliberal materiality is recognized in TWAIL's shift of focus on the operation of international law and regulation, from the international plane of transnational regulatory institutions, to the local sites in the Third World, where International Law is performed in quotidian economic life. These include what Eslava and Pahuja have termed "the sites and objects in which international law operates today...[including] administrative procedures, subject formations, spaces and artefacts, that are usually identified as expressions of other

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<sup>31</sup> Tony Porter, 'Introduction: Post-Crisis Transnational Financial Regulation and Complexity in Global Governance' in Tony Porter (ed), *Transnational Financial Regulation after the Crisis* (Routledge 2014) 5.

<sup>32</sup> Herr Hansjörg, 'After the Financial Crisis: Reforms and Reform Options for Finance, Regulation and Institutional Structure' (2016) 3 *Journal of Economics Bibliography* 172, 16.

<sup>33</sup> Helleiner, 'Introduction and Overview' (n 28) 15–16.

<sup>34</sup> Stephen (n 17) 912, 930.

<sup>35</sup> Duncan Wigan, 'Credit Risk Transfer and Crunches: Global Finance Victorious or Vanquished?' (2010) 15 *New Political Economy* 109, 109, 118.

normative orders, social spheres, or simply innocuous technical or commercial things”.<sup>36</sup> Third, Neo-Marxist scholars, including TWAIL scholar Chimni, also identify the emerging commonality of interests between Third World elites and the ‘transnational capitalist class’, as another reason for the resilience of regulatory neoliberalism.<sup>37</sup>

### **Ideology and Performativity of Financial Markets Infrastructure and Regulatory Neoliberalism**

The role of ‘relatively autonomous’ ideas, technologies and practices in the reproduction of transnational regulatory neoliberalism is also emerging as a significant factor in the reproduction of transnational regulatory neoliberalism. One of the theoretical bases of Critical Legal Studies (CLS) and TWAIL, articulated by Scott, Marks, Thompson and others, has been a recognition of the ideological and discursive nature of mainstream legal ideas, which exercise power on regulators, policy makers and other financial markets stakeholders, through the construction of meaning.<sup>38</sup>

Ideology-critique has also been extended to other academic disciplines, including neoclassical economics and technology studies. For example, Critical Realism scholars, including O’boyle and Macdonough, contend that the packaging of neoclassical economics as rigorous science has given the discipline an ideological power, through its subsequent claims to universality, rationality, transcendence and naturality.<sup>39</sup> Some scholars in the ‘Critical Theory of Technology’ research rubric, including Marcuse, Habermas, and Feenberg, have argued that some ideas and practices underpinning technological society, including ‘technological determinism’, and ‘technological autonomy’, are also ideological. This is because they constitute technology as neutral, apolitical and universal, despite its social origins, and its concealing of relations of domination.<sup>40</sup>

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<sup>36</sup> Eslava and Pahuja (n 14) 109.

<sup>37</sup> Chimni, ‘Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective’ (n 30) 270–271.

<sup>38</sup> Shirley V Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’ (1994) 5 *Eur. J. Int’l L.* 313, 318. Scott argues that ideology critique of law articulates ‘the ways in which meaning can be used as a political tool’. See also Susan Marks, ‘Big Brother Is Bleeping Us with the Message That Ideology Doesn’t Matter’ (2001) 12 *European Journal of International Law* 109, 111.

<sup>39</sup> Brian O’Boyle and Terrence McDonough, ‘The State of Nature and Natural States: Ideology and Formalism in the Critique of Neoclassical Economics’ in Jamie Morgan (ed), *What is Neoclassical Economics?: Debating the origins, meaning and significance* (Routledge 2015) 216.

<sup>40</sup> Herbert Marcuse, ‘Industrialisation and Capitalism in the Work of Max Weber’ in Jeremy J Shapiro (tr), *Negations: essays in critical theory* (MayFlyBooks 2009) 223. See also, Jürgen Habermas, ‘Technology and Science as Ideology’, *Toward a Rational Society: Student Protest, Science, and Politics* (Beacon Press 1971) 81.

A more recent research program that explores the power of ideas and their related technologies and practices in constituting markets, is that of Performativity Theory, first articulated by JL Austin in his Speech Act Theory, where he articulates ‘how to do things with words’.<sup>41</sup> This theory has been extended to various disciplines, including by Butler in Feminist studies, and Searle, in philosophy.<sup>42</sup> Within the sociology of markets, Callon has systematized it into a theory of Economic Performativity, wherein he argues that the body of knowledge or ideas known as economics (which includes neoclassical economic theory, accounting techniques, and marketing), does not merely describe but actually “performs, shapes and formats the economy, rather than observing how it functions.”<sup>43</sup> Economic Performativity Theory has been instrumental in extending the role of ideas and related technologies and practices beyond their ideological function, to that of active constitution or construction of neoliberal and other alternative markets.<sup>44</sup>

Performativity Theory has also gained traction within Critical Legal Studies, whose scholars, including Lang and Birla, explore the ‘constitutive’ role of law in economic markets, and argue that market institutions, including property, contract, economic liberties, and the corporation, are not natural, and are in fact ‘constituted’ by legal ideas, to the extent that law defines them into existence.<sup>45</sup> Thus, legal performativity has been explored by Birla, in the context of the establishment of capitalist market economies in colonial India.<sup>46</sup> In addition, TWAIL scholars

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See also, Andrew Feenberg, ‘Subversive Rationalization: Technology, Power, and Democracy’ (1992) 35 *Inquiry* 301, 318.

<sup>41</sup> See generally, John Langshaw Austin, *How to Do Things with Words* (Oxford University Press 1975). Austin distinguishes between two kinds of speech acts: illocutionary and perlocutionary. The illocutionary act is one in which, in saying something, one is at the same time doing something, e.g. a Judge saying, ‘I sentence you’. Perlocutionary acts, on the other hand, are those utterances that initiate a set of consequences...[that] are not the same as the act of speech.

<sup>42</sup> See generally Judith Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40 *Theatre Journal* 519. See also John R Searle, *The Construction of Social Reality* (Simon and Schuster 1995).

<sup>43</sup> Michel Callon, ‘Introduction: The Embeddedness of Economic Markets in Economics’ (1998) 46 *The Sociological Review* 1, 2.

<sup>44</sup> See, for example, Michel Callon, ‘How to Design Alternative Markets: The Case of Genetically Modified/Non-Genetically Modified Coexistence’ in JK Gibson-Graham (ed), *Making Other Worlds Possible: Performing Diverse economies* (2015).

<sup>45</sup> See Andrew TF Lang, ‘The Legal Construction of Economic Rationalities?’ (2013) 40 *Journal of Law and Society* 155. See also Ritu Birla, ‘Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power’ (2011) 21 *Colum. J. Gender & L.* 90.

<sup>46</sup> See generally, Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Duke University Press 2008).

such as Kennedy, have also recognized the role of legal ideas in the shaping of economic realities.<sup>47</sup>

Performativity Theory has also been extended to technology studies, where Actor-Network Theory (ANT) scholars have argued that the power of technological ideas extends beyond ideology, in at least two ways. First, contend Law and Singleton, the ideas, narratives or ideologies about technologies are not merely descriptive, but actually enact or perform those particular notions of the nature of technological organization. They may affect, alter, or reinforce the existing arrangements of technological reality, despite the possibility of multiple technological realities.<sup>48</sup> For example, as explored in the Chapter 6 Kenya case study, credit information sharing (CIS) technologies are performative because they actualize their prediction (irrespective of accuracy) that a borrower will default on their loan obligations. By representing to credit providers that a borrower is not creditworthy, credit reports restrict the borrower's financing options and makes default inevitable.

Second, argue Caliskan and Callon, as assemblages of various ideologies and practices, these technological artefacts, arrangements and practices are performative in the sense that they perform the other ideologies with which they are politically-encoded, including formal-liberal legal ideologies and neoclassical economic ideologies.<sup>49</sup> Since technological ideologies and practices constitute, and are constituted by, other ideologies and related practices, they are also enrolled in the processes of economic performativity, and legal performativity or constitution of social and economic reality. Chapter 6, for example, explores how CIS embeds on the cognition of borrowers a psychological individualism that constitutes them as the *homo economicus* of neoclassical economics, and the ideologically abstracted legal subject with equal rights and duties.

As evident in the overview of the various research programs on the role of ideas and related technological practices, there is scope for a more systematic and integrated inter-disciplinary study of the ways in which the ideological and performative power of neoclassical economic, legal-formalist and technological ideas and related technologies and practices have contributed

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<sup>47</sup> See generally David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

<sup>48</sup> John Law and Vicky Singleton, 'Performing Technology's Stories: On Social Constructivism, Performance, and Performativity' (2000) 41 *Technology and Culture* 765, 768–769.

<sup>49</sup> Andrew Barry and Don Slater, 'Technology, Politics and the Market: An Interview with Michel Callon' (2002) 31 *Economy and Society* 285, 285–286.

to the reproduction of regulatory neoliberalism within the transnational and also the Third World financial regulatory orders.

## 2. Research Questions and the Thesis Statement

This thesis examines how ideas and their related technologies and practices in financial markets legitimate neoliberal financial markets and regulatory neoliberalism as the only possible economic organization, specifically through the ‘constitution of meaning’ in social life, that is, ideological legitimation.<sup>50</sup> As it will be argued, economic, legal and technological ideas and practices are ideological to the extent that they construct the meaning of property, contractual rights, and individual liberties, thereby legitimating and/or concealing certain relations of domination, through various strategies, including universalization, reification, naturalization, rationalization, and narrativization.<sup>51</sup>

In addition, the thesis also examines how the role of these ideas and related technologies and practices goes beyond description and ideational legitimation, to the actual constitution, shaping and enacting of neoliberal financial market relations and regulatory neoliberalism, that is, ideational performativity.<sup>52</sup> It explores how, for example, by embodying neoclassical economic, liberal legal-formalist and technological ideas that discipline consumers, financial technologies and practices can enact neoliberal financial markets.

The discussion illustrates how, through their ideological and performative power, these ideas, technologies and related practices construct meaning, relationships and institutions, allocate identities, interests and capacities, define problems and their solutions, and thereby enable and constrain action. In this effort, the thesis explores the ideological and performative role of the ideational infrastructure of financial markets, in the reproduction of regulatory neoliberalism within both the transnational and Third World (including Kenya’s) financial

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<sup>50</sup> As discussed at length in Chapter 2, the term ‘ideology’ is conceptualized and used in various ways. The specific conceptual framework for the use of ideology in this study is the relationship between meaning and power, or the exercise of power through the constitution of meaning. See Marks (n 38) 110–112. See also John B Thompson, *Ideology and Modern Culture: Critical Theory in the Era of Mass Communication* (Polity Press 1990) 56.

<sup>51</sup> Marks (n 38) 110–112; Thompson (n 50) 58.

<sup>52</sup> As discussed more elaborately in Chapter 2, ideas and related technologies and practices are deemed ‘constitutive’ or ‘performative’ to the extent that they provide cognitive possibilities and values that bring various social, economic and market institutions into existence. See Lauren B Edelman and Robin Stryker, ‘A Sociological Approach to Law and the Economy’ in Neil J Smelser and Richard Swedberg (eds), *The handbook of economic sociology* (Princeton University Press; Russell Sage Foundation 2005) 540.; See also Lang (n 45); See also Callon, ‘Introduction’ (n 43).

regulatory orders, despite the expectation of radical regulatory reforms, after various periods of financial crises.

The study is premised on the problematic observation that Third World contestation has registered both progress and challenges, but regulatory neoliberalism and financialization of the global and national (including Kenya's) economies grows more resilient, despite periodic setbacks. While acknowledging the significance of structural power of hegemonic States, the common interests of a transnational capitalist class, and material embedding of globalized financialization and neoliberal philosophy in the reproduction of regulatory neoliberalism, the thesis identifies and focuses on specific, 'relatively autonomous' ideas and related technologies and practices as making an under-stated contribution. It therefore explores the ideological and performative power of neoclassical economic theories, doctrines of legal formalism, technological ideas, artefacts, and their related practices, which form the ideational infrastructure of contemporary financial markets.

The ideational infrastructure is conceptualized as entailing at least three key ideational disciplines with complex, co-constitutive, but not necessarily causal, relationships, due to their roles and prevalence in contemporary financial markets. First, as noted by Callon and Lang, the dominant branch of economics – neoclassical (financial) economics – is the main “calculative” framework which equips financial markets players with causal models for interpreting the consequences of various trends and courses of action in the financial markets.<sup>53</sup>

Second, as argued by Eslava, Cutler, Pistor, and Edelman & Stryker, legal norms – originating from *Lex Mercatoria*, and now embedded in international and national law – also play not only a regulatory but also a constitutive role, in creating cognitive possibilities for bringing into existence various legal institutions in financial markets, including juridical persons, property, and contract.<sup>54</sup>

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<sup>53</sup> Lang discusses how the practice of trading in foreign exchange markets requires a causal model to assess the likely consequences of different actions. See Lang (n 45) 165. See also, Michel Callon, 'Actor-Network Theory—the Market Test' (1999) 47 *The Sociological Review* 181, 192. Callon argues that economic theory serves as a frame of reference for market calculation.

<sup>54</sup> See Luis Eslava, *Local Space, Global Life* (Cambridge University Press 2015) xvi. Eslava argues that International Law is both ideological and constitutive, to the extent that it 'forms and reshapes our surrounding realities to such an extent that it actually becomes impossible to conceive of international law as existing and operating except through the very things and bodies it creates'. See also, A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003) 6. Cutler argues that the law is not a neutral objective force 'out there', but is 'in here', both constituting and constituted by social, economic and political forces. See also, Simon Deakin and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' [2016] *Journal of Comparative Economics*

Third, as argued by Callon & Muniesa, and Preda, technological artefacts and practices, prevalent in contemporary financial markets, play constitutive, deliberative and representational roles in market transactions and their regulation.<sup>55</sup> In addition, this ideational infrastructure is conceptualized as both local and transnational, being diffused from multiple sites in the developed and Third World.

### **Research Questions**

The ideological and performative role of the ideational infrastructure of financial markets in reproducing regulatory neoliberalism globally and especially in Third World economies is explored through one main research question:

1. How has the ideational infrastructure of global financial markets impacted on the regulatory reforms within the transnational and Third World financial regulatory orders?

The thesis explores this research question through a series of sub-questions explored in the succeeding chapters:

1. Why has the Third World's historical contestation failed to radically transform the transnational financial regulatory order?
2. To what extent can interdisciplinary ideology critique and performativity theory form theoretical assemblages within TWAIL praxis of resetting the international financial regulatory order to speak for Third World concerns?
3. How has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism within the IMF and World Bank?

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192–193. The authors argue, for example, that law constitutes the institution of property through legal definition, and through setting up systems of State accreditation, legitimation and enforcement of property rights. See also Edelman and Stryker (n 52) 540.

<sup>55</sup> Alex Preda, 'Socio-Technical Agency in Financial Markets: The Case of the Stock Ticker' (2006) 36 *Social Studies of Science* 753, 221. Preda argues that five features constitute agential aspects of financial technologies, in which these technologies constitute the markets: temporal structures, visualization modes, representational and interpretive languages, cognitive tools and categories, and group boundaries. See also Fabian Muniesa, Yuval Millo and Michel Callon, 'An Introduction to Market Devices' (2007) 55 *The sociological review* 1. See also Michel Callon and Fabian Muniesa, 'Peripheral Vision Economic Markets as Calculative Collective Devices' (2005) 26 *Organization studies* 1229.



4. How has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism in Kenya's interest rate markets?

### **Main Argument**

The main argument explored in this study is that the ideational infrastructure of the financial markets legitimates, constitutes and performs neoliberal financial markets and regulatory neoliberalism, within the transnational and national financial regulatory institutions. This ideational infrastructure ideologically legitimates and performs regulatory neoliberalism as the only rational regulatory paradigm, while concealing their reproduction of inequality and power asymmetries. It also restricts the regulatory possibilities available to Third World policy makers and regulators for addressing the externalities of neoliberal financial markets, including, as explored in the Kenya case studies, high interest rates and high indebtedness.

### **Theoretical Framework**

The earlier overview of the various research programs on the role of ideas and related technological practices has introduced the distinct and separate disciplinary and conceptual boxes within which the discussions have been conducted. However, the relationship between legal, economic and technological ideas and practices is one of inclusivity, co-constitutiveness and reflexivity, which relationship is concealed when they are housed in separate conceptual silos. In fact, Scott contends that legal and other ideologies "overlap, compete, and clash, drown, or reinforce each other".<sup>56</sup> In addition, Hunt sees the power of ideology in its ability to "connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents...".<sup>57</sup> Sumner also argues that the construction of a hegemony based on legal ideology "depends upon its ideological encapsulation of a consensus constructed outside of itself in other economic, political and cultural practices".<sup>58</sup>

This ideological co-constitution is demonstrated by Cottier in *International Economic Law*, which, he argues, is shaped by classical economic theories, including David Ricardo's theory of

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<sup>56</sup> Scott (n 38) 319.

<sup>57</sup> Alan Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law' (1985) 19 *Law & Society Review* 11, 16.

<sup>58</sup> Colin Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (Academic Press London 1979) 264.

Comparative Advantage, and Adam Smith's Theory of International Division of Labour.<sup>59</sup> In their exploration of the International Law on sea-bed resources, Koskenniemi and Lehto also demonstrate the dialectic between the legal form and the political-economic substance, arguing that international law expresses conflicting economic ideologies and political power, by transforming them into a shared language and institutional process.<sup>60</sup>

The co-constitutive nature of legal, economic and technological ideologies and practices thus highlights the limitations and partial perspectives of such conceptual-silo approaches. There is therefore scope for a more systematic and integrated inter-disciplinary study of the ways in which the ideological and performative power of neoclassical economic, legal-formalist and technological ideas and related technologies and practices have contributed to the reproduction of regulatory neoliberalism within the transnational and Third World financial regulatory orders. Exploring the research question in this thesis therefore necessitates an eclectic theoretical approach that draws from Critical Theory (including Critical Legal Studies, Critical Realism, and Critical Theory of Technology), Actor-Network Theory (ANT), and Performativity Theory, and deploying them through TWAIL methodologies and sensibilities.

As discussed above, Critical Legal Scholars, including Trubek and Marks, are interested in the ideological nature and role of law, that is, relationships among ideas and images we hold about the law and society, the structures of social life we are engaged in, and how these ideas and images affect the actions we take.<sup>61</sup> The core objective of this approach is critique: laying bare the relationship between ideological legitimation and domination in capitalist societies, and consequently altering meaning and those relationships, in the process of emancipatory politics.<sup>62</sup> TWAIL scholars, including Chimni, have called for engagement with ideology-critique, to understand how the transnational capitalist class influences the foreign economic policy of Third World States towards regulatory neoliberalism.<sup>63</sup>

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<sup>59</sup> Thomas Cottier, 'Cosmopolitan Values in International Economic Law: Myths and Realities' in Beat Sitter-Liver (ed), *Universality, from Theory to Practice: An Intercultural and Interdisciplinary Debate about Facts, Possibilities, Lies and Myths* (Academic Press Fribourg 2009) 34.

<sup>60</sup> M Koskenniemi and M Lehto, 'The Privilege of Universality: International Law, Economic Ideology and Seabed Resources' (1996) 65 *Nordic Journal of International Law* 533, 533.

<sup>61</sup> David M Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575, 575.

<sup>62</sup> *ibid* 590–591.

<sup>63</sup> BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17, 34–35.

Scholars in the Critical Realism school, including Lawson, O'boyle & Donoghou, and Kanth, also engage in the ideology-critique of neoclassical economics. They question its appropriation of the 'closed-system' assumptions and methodologies of natural science, in a bid to ideologically legitimate neoliberal capitalism, and naturalize its excesses (including poverty and inequality) as inevitable and acceptable.<sup>64</sup> Ideology-critique of neoclassical economics is indeed indispensable to TWAIL's critical approach to International Economic Law, which Chimni argues, includes "reveal[ing] the role of economic ideology and power in assigning meaning to [International Economic Law] texts" during dispute resolution processes and legal interpretation.<sup>65</sup>

The increasing digitization of finance and financial markets has also necessitated the ideology-critique of technological ideas and practices through Critical Theory of Technology, and Science and Technology Studies. Scholars in this field, including Marcuse, Habermas, and Feenberg, argue that some ideas and practices underpinning technological society, including 'technological determinism', and 'technological autonomy', ideologically legitimate technology as neutral, apolitical and universal, thereby concealing its social origins and embedded relations of neoliberal, capitalist domination.<sup>66</sup>

Actor-Network Theory (ANT) and Performativity Theory are also deployed in this thesis to demonstrate how regulatory power in transnational and national financial markets are deployed through hybrid assemblages of humans and non-humans (including ideas, discourses, texts, metrics, artefacts, and computing technologies) known as socio-technical *Agencements* (STAs). Law defines ANT as "a disparate family of material-semiotic tools, sensibilities and methods of analysis that treats everything in the social and natural worlds as a continuously generated effect of the webs of relations within which they are located."<sup>67</sup>

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<sup>64</sup> See generally Tony Lawson, 'Mathematical Modelling and Ideology in the Economics Academy: Competing Explanations of the Failings of the Modern Discipline?' (2012) 1 *Economic Thought*; Brian O'Boyle and Terrence McDonough, 'Critical Realism, Marxism and the Critique of Neoclassical Economics' (2011) 35 *Capital & Class* 3; Rajani Kanth, 'Against Eurocentred Epistemologies: A Critique of Science, Realism and Economics' in Steve Fleetwood (ed), *Critical realism in economics: Development and debate*, vol 12 (Routledge 1999).

<sup>65</sup> Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective' (n 30) 255.

<sup>66</sup> Marcuse, 'Industrialisation and Capitalism in the Work of Max Weber' (n 40) 223; Habermas (n 40) 81; Feenberg, 'Subversive Rationalization' (n 40) 318.

<sup>67</sup> John Law, 'Actor Network Theory and Material Semiotics' [2009] *The new Blackwell companion to social theory* 141, 141.

Callon's concept of ANT, or 'theory of translation' is a useful analytical tool for examining how these hybrid assemblages (including financial market ideas, technologies and practices), stabilize, organise and convert other actors, become durable, enrol others into their own programmes, bestow qualities and motivations on other actors, simplify complexity, and become functionally indispensable.<sup>68</sup> It enables the exploration of how 'relatively autonomous' ideas and technological practices contribute to the reproduction of regulatory neoliberalism.

Performativity Theory, on the other hand, while drawing heavily on insights of ANT, is used to demonstrate how neoclassical economic, legal and technological ideas and concepts do not merely describe economy, society and technology, but actively intervene by bringing up or raising economies, markets, technological organizations, and societies in their theoretical and ideological images. The performativity theory literature employed include: Callon's theory of economic performativity;<sup>69</sup> Cutler, Lang and Birla's ideas on the constitutive or performative role of law<sup>70</sup>; and Law & Singleton, and Callon & Muniesa's theories on the performativity of technologies and related practices.<sup>71</sup>

This eclectic approach demonstrates the insights that TWAIL can levy from ANT, Performativity Theory, and the ideology critiques of neoclassical economics and technology. These insights include the agential, ideological and performative role of ideas, discourses, texts, metrics, artefacts, and computing technologies within financial markets, and their role in making durable the power structures produced by legal and economic ideologies.

### **Key Findings**

The key finding of this thesis is the significance of the ideological and performative power of neoliberal economic, legal and technological ideas and practices underpinning the cognitive infrastructure of the financial markets, in the reproduction of regulatory neoliberalism in transnational and Third World financial regulatory institutions. This is articulated in four related insights.

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<sup>68</sup> Michel Callon, 'Some Elements of a Sociology of Translation' [2007] *The Politics of Interventions* 57; Michel Callon, 'The Sociology of an Actor-Network: The Case of the Electric Vehicle', *Mapping the dynamics of science and technology* (Springer 1986).

<sup>69</sup> Callon, 'Introduction' (n 43) 2.

<sup>70</sup> Cutler, *Private Power and Global Authority* (n 54); Lang (n 45); Birla, 'Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power' (n 45).

<sup>71</sup> Muniesa, Millo and Callon (n 55); Law and Singleton (n 48).

## **Transformation of Neoliberal Hegemony in Financial Markets**

First, as discussed in Chapter 2, neoliberal hegemony in the transnational financial regulatory order continues to react dynamically to Third World contestation. It has metamorphosed and reinvented itself from brute force and coercive authority, to discursive, ideological and technological power. Neoliberal hegemony has diffused to unaccountable non-State institutions such as transnational corporations (TNCs), academia and media, while assimilating Third World hegemonic elites, and incorporating new centres of accumulation, including technological systems and practices.<sup>72</sup>

In addition, neoliberalism has also transformed from legal to material hegemony, where power has been redistributed through the material reorganization of the economy, as demonstrated by the financial markets' creation of synthetic financial assets that governments have been compelled to recognize, due to systemic risk concerns.<sup>73</sup> As demonstrated in Chapters 4 and 6, power has also been redistributed through the diffusion of financial technologies and practices such as macro-econometric models and credit information sharing technologies, in which neoliberal regulatory rationalities are embedded.

## **Agential Power of the Ideational Infrastructure of Financial Markets**

The second insight is the significant power of the ideational infrastructure underpinning the financial markets, which has been under-emphasized in contrast to the structural aspects of global hegemony, including the economic, military, and market power of the US and its developed economy allies such as Britain, France, and Germany.<sup>74</sup> As explored especially in Chapter 3, ideas and related practices underpinning financial market liberalization, including the Mckinnon-Shaw Hypothesis, and the New Institutional Economics theories, are over time decoupled from their originators. Consequently, they acquire the 'relatively-autonomous', neutral and apolitical nature of expertise, which is diffused and acts upon transnational and national bureaucrats' and market players' cognition, thereby shaping how they conceptualize problems and the available solutions.

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<sup>72</sup> Ian Taylor, *Global Governance and Transnationalizing Capitalist Hegemony: The Myth of the 'Emerging Powers'* (Routledge 2016) 6.

<sup>73</sup> Wigan (n 35) 118.

<sup>74</sup> See Lourdes Gouveia, 'Reopening Totalities: Venezuela's Restructuring and The Globalisation Debate' in David Goodman and Michael Watts (eds), *Globalising food: agrarian questions and global restructuring* (Routledge 1997) 226 Gouveia argues that structural factors of global hegemony are usually built into 'a totalizing and overly-deterministic theory of change'.

### **Co-constitutive Nature of Legal, Economic and Technological Ideas and Practices**

The third insight is the complex, co-constitutive, but not necessarily causal, relationships between legal formalism, neoclassical economic theories, technological ideas, and their related practices, which contribute to the resilience and durability of transnational regulatory neoliberalism. Chapter 5 demonstrates the co-constitutive relationship between the Rule of Law and New Institutional Economics, in articulating the essentialism of the institution of private property in economic and financial market development. Chapter 6 demonstrates the nature of credit information sharing technologies as hybrid assemblages of co-constitutive legal, economic and technological ideas and practices.

The inter-disciplinary nature of ideologies underpinning neoliberal regulatory discourse, their performance through practice, and further embedding in technologies and other materialities, reveals the need for the Third World to expand its focus in contesting legal norms, to include equally exigent economic and technological ideas, practices, and artefacts. This insight is therefore important for TWAIL practitioners' fashioning of relevant tools for praxis.

### **Emancipatory Potential of the Legitimizing and Performative Power of Ideas and Practices**

The fourth insight is the conceptual indeterminacy, inconsistency, and contradiction at the heart of the legal, economic and technological ideologies. This finding is relevant to the debate among TWAIL practitioners, on whether they should resist and contest the neoliberal transnational financial regulatory order from outside, reform it from within, or comply with the hegemonic ordering. It supports immanent critique's call to exploit the contradictions and indeterminacies of legal formalism, neoclassical economics, and technological ideas and related practices, in conceptually reorienting them to speak for the concerns of the Third World peoples, as was attempted, for example, through the New International Economic Order (NIEO). This finding of conceptual indeterminacy is also relevant to the harnessing of the ideological and performative power of economic and technological ideas and practices towards designing alternative economic and technological organizations.

The thesis concludes that the present Third World efforts aimed at contesting the regulatory neoliberalism at the heart of the transnational financial regulatory order should also focus on the ideological and performative power of the ideational infrastructure of the global financial markets. In doing so, TWAIL practitioners should of necessity adopt an interdisciplinary

approach in their reflection, conceptualization, articulation, dissemination and legal operationalization of an alternative international financial law praxis.

### **3. Methodology**

This research relies on secondary sources of information. The discussion undertakes an extensive, qualitative analysis of various data capturing the financial markets regulatory debate at the transnational and national (Kenyan) level. These include: the reports and regulatory standards of transnational regulators such as the IMF, the World Bank, the G20, the Basel Committee on Banking Supervision, and the Financial Stability Board (FSB); reports and regulatory policies and standards of US, EU and UK financial markets regulators; and reports, transcripts and documents capturing the regulatory debates between the Kenyan Central Bank, National Treasury, Parliament, judiciary, research institutions, think tanks and academic scholars. The nature of the material analysed include international law instruments, national (Kenyan) statutory and case law material; institutional reports, Parliamentary Hansards, government policy papers, civil society monitoring and evaluation reports, and regulatory impact assessment reports.

A few issues related to the limitation of the scope of the discussion, the limitations of the theoretical and conceptual frameworks adopted, and the choice of case studies require clarification.

#### **Ideology Critique as Immanent Critique**

First, the critical theoretical approach adopted in this thesis is one of immanent critique, rather than transcendental critique. The latter, entrenched in Kantian philosophy, is a totalizing style of critique, which entails the application of a “scientific” and thus objective, rational, natural and transcendental criteria for argument.<sup>75</sup> The problem with transcendental critique is its *a priori* assumption of the “out there” rationality, which conceals the historically, socially, and spatially contingent nature of ideas.<sup>76</sup> Immanent critique, Marks argues, “eschews the arrogance of [transcendental] criticism’s external standpoint, while also refusing the complicity of ideology’s internal self-understanding”, instead focusing on “how that self-understanding

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<sup>75</sup> Gert JJ Biesta and Geert Jan JM Stams, ‘Critical Thinking and the Question of Critique: Some Lessons from Deconstruction’ (2001) 20 *Studies in Philosophy and Education* 57, 62.

<sup>76</sup> *ibid.*

strains at its own limitations, points beyond itself".<sup>77</sup> Thus immanent critique seeks to reveal societal contradictions that can then be appropriated as determinate possibilities for emancipatory politics. It entails deconstructing the ideologically-legitimated social reality, while at the same time using historical context to question its own self-understanding.<sup>78</sup>

Thus, ideology critique of legal formalism and the rule of law, neoclassical economics, and technological ideas and practices in this thesis eschews nihilism and engages in immanent critique in four steps. First, it unravels the processes by which social inequalities are ideologically legitimated within the infrastructure of ideas, technologies and related practices, including the processes of universalization, reification, naturalization, rationalization, and narrativization.<sup>79</sup> For example, Chapter 2 explores how these processes have ideologically legitimated a Eurocentric conceptualization of international law in which Third World States are objects rather than subjects, as universal, objective, neutral, transcendental, and therefore unchangeable.

Second, immanent (ideology) critique focusses attention on the reality, contingency and historicity of these inequalities, and on the gap between them and the normative aspects of ideas underpinning social ordering, such as justice equity, and the rule of law.<sup>80</sup> Thus, for example, Chapter 3 examines the ideological construction of the 'Third World' and its subjugation in transnational financial regulatory institutions such as the BWIs, through the colonial encounter, and the gap between this historical reality and International Law's promise of universality, sovereign State equality, and egalitarianism.

Third, immanent critique emphasizes the indeterminacy and contradictions inherent in the ideologies and their related technologies and practices, thereby upsetting their cognitive hold underpinning power asymmetries, and stimulates reflection on the unrealized potential within the normative ideas. In this effort, Chapter 6, for example, discusses the indeterminacies and contradictions inherent in credit information sharing technologies that ideologically legitimate

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<sup>77</sup> Marks (n 38) 115.

<sup>78</sup> Robert J Antonio, 'Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought' (1981) 32 *The British Journal of Sociology* 330, 338.

<sup>79</sup> This framework is derived from Thompson's methodology, as adapted by Susan Marks. See Thompson (n 50) 58; See also Marks (n 38); See also Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2003).

<sup>80</sup> See Marks (n 38) 115; As argued by Besta and Stams, the deconstructive methodology of immanent critique departs from transcendental critique by its concern for securing justice. See Biesta and Stams (n 75) 67.



and constitute liberalized interest rate markets as efficient, and the possibility of establishing alternative technological arrangements within consumer credit markets.

Fourth, immanent critique inspires emancipatory (political) action. By emphasizing the indeterminate nature of the ideological and performative power of the ideational infrastructure of the global financial markets, the thesis invites States, social movements, and TWAIL practitioners to harness these powers in the contestation of global financialization and transnational regulatory neoliberalism.<sup>81</sup> This includes Chapter 5's discussion of the need for reconstituting of the legal concept of 'property', to recognise its social aspects and reliance on State regulation, and also the Chapter 6 recommendations on the need to re-code the technological algorithms that drive neoliberal economic rationality in the digital financial economy. Thus, while recognising the conceptual value of, for example, the Rule of Law, in financial markets, the discussion focuses not so much on the rationality of the mainstream discourses but rather their immanent critique.

### **Ideational Performativity as Political Praxis**

Second, the performativity of ideas, practices and technologies, especially with reference to economic theory, is applied with, on the one hand, an explicit recognition of the political context of its working, while, on the other hand, appreciating the indeterminate nature that makes any idea with a non-liberal orientation capable of performing its assertions. In other words, the argument for the performative power of neoclassical economics in global and national markets is not to endorse the discipline as necessarily 'sound' science that constructs perfect markets, but merely to recognize it as the mainstream theoretical paradigm of the moment. The thesis acknowledges the explicit and implicit political, economic and military efforts that have been deployed by States, transnational regulators, civil society, and market participants to mainstream neoclassical economics, and to enable its performativity.

Consequently, the thesis argues that other heterodox theoretical approaches to economics, law and technology have performative potential, especially when enrolled into the political resources that have historically sustained neoliberal hegemony. The thesis thus demonstrates the potential for assemblages between weaker versions of more politically-oriented

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<sup>81</sup> See Marks (n 38) 115; See also Antonio (n 78) 338. The authors argue that, by revealing the contradictions of ideology and reality, immanent critique seeks to transform legitimations into emancipatory weapons that can achieve the normative ideals aspired to.

structuralist (neo-Marxist) approaches and less politically-oriented post-structuralist (Actor-Network Theory) approaches to the study of globally-connected financial markets.

### **Collapsing the Global-Local Dichotomy in Financial Markets**

Third, the choice of the Kenya and IMF case studies reflects the intention to demonstrate the manifestation of ideational power at both the local level, as advocated by the Actor-Network Theory school in its 'network' metaphors, and the global level, as advocated by the structuralist/neo-Marxist schools that emphasize a 'superstructure'. Thus, a study of the Kenya's interest rate regulatory debate captures the local manifestation of the ideological and performative power of ideas in the domestic lending market, while the study of the Bretton Woods Institutions (BWIs) demonstrates the impact of the global on the local, and the local on the global. Collapsing this global-local distinction is important for demonstrating the potential of performative financial markets practices in Nairobi having global influence, as much as the neoliberal financial markets practices of Wall Street in the US are global.

### **Kenya as a Case Study Representation of the Third World**

Lastly, the choice of Kenya's financial markets as a case study on the role of economic, legal and technological ideas on the regulatory reform debate and process, is informed by the country's unique characteristics, as related to the research questions. Kenya is a Third World economy and a post-colonial State that has been subjected to Bretton Woods Institutions' Structural Adjustment Programs (SAPs), Poverty Reduction Strategy Programs (PRSPs) and other market liberalization reforms over the last 40 years.

Kenya is also a study in contradiction. On the one hand, its financial markets regulators, supervisors and policy makers have accepted and implemented the BWI market liberalization orthodoxy without much contestation. On the other hand, the country has, at least since the 2003 Ministerial meeting in Cancun, become an active member of Third World States' negotiation of the World Trade Organization's economic globalization agenda, including the liberalization of financial services under the General Agreement on Trade in Services (GATS) treaty.

As one of the emerging economic powers in Africa, and with a rapidly developing financial market, Kenya presents a relevant case study for the triumph of regulatory neoliberalism within financial markets, and at the same time, active political contestation of its domestic market liberalization, as demonstrated in the interest rate re-regulation case study. The limitation in

the choice of case study is that Kenya's historical, political, economic, and social dynamics do not necessarily represent the majority or all of the Third World countries, and therefore the relevance of some of the findings may be restricted to its context.

#### **4. Key Contributions**

The objective of this thesis is to contribute to the already rich academic literature on the power of ideas in global neoliberal hegemony.

First, the thesis demonstrates the ideological and performative role of the ideational infrastructure of financial markets in Kenya's credit market. It illustrates the co-constitutive role of the rule of law, macro-econometric modelling, and credit information sharing technology in deepening the power asymmetries between lenders and borrowers, and thus reproducing high interest rates and high indebtedness. More importantly, the thesis demonstrates the reproduction of regulatory neoliberalism in Kenya and other Third World countries through the ideational infrastructure of financial markets.

Second, the thesis maps out the theoretical and conceptual advantages and new insights generated from adopting an interdisciplinary approach to the study of international financial law and national regulation using TWAIL, Critical Theory, Actor-Network Theory and Performativity Theory. This includes, on the one hand, the structural, global, macro-level pillars of neoliberal hegemony, and on the other hand, the local, micro-level hybrid associations that form the building blocks that ensure durability of the global hegemonic structures. Critical Theory demonstrates the political economy of ideology, while ANT and performativity approaches demonstrate the power and mechanics of socio-technical assemblages.

Third, the thesis articulates the complex, co-constitutive, and reflexive relationship between neoclassical economic theory, doctrines of legal formalism, technological ideas, and their related practices and artefacts in contemporary financial markets. Understanding the integrated nature of the ideational infrastructure of regulatory neoliberalism sheds more light into the resilience of neoliberal regulatory philosophy, despite Third World contestation.

Fourth, the thesis contributes to the various studies on TWAIL, by suggesting how Third World contestation of transnational financial regulatory neoliberalism can harness the ideological and performative power of economic, legal and technological ideas, practices and artefacts, towards counter-hegemonic praxis. Third World contestation should encompass an integrated

approach that focusses not only on legal norms, but also economic and technological ideas and practices, considering the increasing embedding of contested ideologies in technological arrangements. TWAIL praxis should also encompass performative projects aimed at constituting alternative local and global financial markets and related regulatory structures that are based on Third World normative concerns, including equity, equality and justice.

## **5. Chapter Summaries**

The key contributions to the literature on Third World contestation of transnational regulatory neoliberalism are explored in more detail throughout the following six chapters

### **Third World Contestation of Transnational Financial Regulation and the Reproduction of Regulatory Neoliberalism**

Chapter 1 examines the economic, legal and technological ideas that were enrolled in successfully countering Third World contestation of the transnational financial regulatory order. The discussion demonstrates the various ways in which neoliberal hegemony has metamorphosed, reconstituted and reinvented itself in key revolutionary moments, and thus secured its continuity, especially in Third World countries. The discussion concludes that ideological and performative power of neoliberal philosophy and practice has been key to the resilience of regulatory neoliberalism, especially after the 2008 crisis, and recommends that TWAIL practitioners focus their attention on the power of ideas and technical practices in counter-hegemonic praxis in International Law.

### **Theorizing the Role of Legal, Economic and Technological Ideas and Practices in the Reproduction of Neoliberal Financial Markets**

Chapter 2 outlines the eclectic theoretical framework for articulating the ideological and performative power of economic, legal and technological ideas in reproducing regulatory neoliberalism in Third World countries. It demonstrates the theoretical possibilities of assemblages between Critical Theory's ideology critique of economics, law and technology, on the one hand, and Performativity Theory and Actor-Network Theory, on the other hand. The discussion demonstrates the co-constitutive nature of the various ideas, practices and materialities that underpin neoliberal philosophy, and International Law, thereby making a case for Third World contestation to focus not only on legal but also economic and technological norms and practices.

### **The Agency of Ideas and Practices within Bretton Woods Institutions**

Chapter 3 examines the ideological and performative role of economic, legal and technological ideas and practices in determining the IMF and World Bank's regulatory role in transnational finance. Departing from the conventional structuralist explanation of the BWIs' relationship with the Third World as determined by US structural power (the Treasury-Wall Street Complex), the discussion conceptualizes these international financial institutions as sites for active ideational and ideological contestation, legitimation, and diffusion to Third World States and markets. In this conceptualization, the discussion focusses on the role of ideas in producing and fixing meanings of social reality, producing identities and respective capacities that consequently enable and constrain the action of individuals, institutions, States and other actants in the global financial markets.

### **The Agency of Neoclassical Economics in the Constitution and Regulation of the Kenyan Interest Rates Markets**

Chapter 4 examines the ideological and performative role of neoclassical economic theories and related practices such as macroeconomic modelling in restricting how the phenomenon of high consumer lending rates should be described, and the feasible regulatory responses available to Kenyan legislators, regulators and policy makers.

The chapter examines neoclassical economics' ideological legitimation of Kenya's financial market liberalization under BWI SAPs, and its concealing of high interest rates as a consequence of the SAPs. It also examines the efforts of democratically-elected legislators to politicize high interest rates as a systemic flaw of unregulated financialized economies, and the oppositional efforts of regulatory technocrats and economists to frame and insulate it as a technical and economic issue to be responded to through the prescriptions of New Institutional Economics, that is, establishing lending market institutions such as credit reference bureaus and information-sharing.

### **The Agency of the Rule of Law in the Constitution and Regulation of the Kenyan Credit Market**

Chapter 5 examines the role of the 'Rule of Law' as legal ideology, and unpacks its concealed constitutive and performative power in the financial markets. The discussion explores the rule of law's entrenching of neoliberal transnational regulatory standards in the Kenyan financial sector, through various BWI loan conditionalities and reform programs. Even though the Rule of Law claims to be neutral and apolitical, it undergirds neoliberal assumptions and concepts

about nature, role and functioning of markets, and economic development. In addition, through its reifying and naturalising strategies, this ideology obfuscates the role of law in constituting market relations, shaping identities and respective capacities to act.

Consequently, the discussion demonstrates how the rule of law as a legal concept acts upon policy paradigms of financial market policy makers and regulators, legislators and other market stakeholders, thereby delineating, and restricting the possibilities for constructing (through regulation) fairer and affordable interest rate markets in Kenya. The rule of law indeed has a positive impact in the deepening of financial markets, and the provision of credit. However, it also has the potential to reproduce systemic inequalities in liberalised financial markets.

### **Credit Information Sharing Technologies as Neoliberal Socio-Technical *Agencements***

This chapter is the third instalment of the Kenya case study, and examines the technification of the interest rates market, that is, the enrolment, adoption or imposition of technical methods into the overarching process of economisation and juridification of the lending market. Technification has occurred in the adoption and operationalisation of credit scoring and credit reporting technologies and practices as a policy and regulatory response in addressing the problem of high interest rates and high consumer indebtedness in Kenya. The discussion demonstrates the nature of credit scoring and reporting (or Credit Information Sharing) technologies as Socio-Technical Assemblages or *Agencements* (STAs) of neoliberal deregulatory politics, neoclassical economic theories, formal-liberal legal norms, and technological rationalities and related practices. As STAs, these CIS technologies are material and discursive assemblages that have an agential power to intervene in the constitution and performance of the lending market.

The discussion demonstrates the neoliberal ideological scripting of CIS technologies in conceptualising 'credit default risk', and legitimating unduly high interest rates and high indebtedness as a private problem of financially imprudent, untrustworthy and unethical debt consumers, while prescribing interest rate deregulation and consumer credit information sharing as the best regulatory solutions. CIS ideologically conceals its deepening of power asymmetries between lenders and borrowers, and reproduction of high interest rates and inequalities in access to affordable credit in Kenya.

## **Conclusion**

This chapter summarises the main conclusions of the various chapters, and recommendations for future research. Echoing the call by TWAIL practitioners to engage in praxis, that is, the application of theories and philosophies of TWAIL, Third World States, and Social Movements, into practical social action, the thesis calls for the Third World to focus on actively conceptualizing and implementing alternative visions of the international and local economic order financial order. This includes not only actively challenging the neoliberal ideas underpinning the current hegemonic international order, but also conceptualizing, articulating and operationalizing feasible alternatives.

## CHAPTER ONE

### **Third World Contestation of The Transnational Financial Regulatory Order, Economic Crises, and the Reproduction of Regulatory Neoliberalism**

#### **1. Introduction**

This thesis seeks to examine how the transnational ideational infrastructure of global financial markets has impacted on the regulatory reforms within the transnational and Third World financial regulatory orders. It argues that this ideational infrastructure legitimates, constitutes and performs neoliberal market economies, and undergirds the related practices of regulatory neoliberalism, while concealing the possibilities available for constituting alternative global and local markets.

This chapter explores the first research sub-question: why has the Third World's historical contestation failed to radically transform the transnational financial regulatory order? Various reasons have been advanced for the resilience of regulatory neoliberalism and the globalization of financial markets, especially in Third World countries, despite the successive financial crises that have de-legitimated the logic of regulatory neoliberalism. They are roughly grouped into four related factors: the structural power of neoliberal hegemony; the material basis of neoliberal financial markets; Third World transnational capitalist class (TCC) interests; and the ideational power of neoliberalism.

This chapter provides a historical account of the successes and set-backs to Third World contestation, and outlines the key moments of rapture, crisis, reconstruction and neoliberal continuity. While also highlighting the other three related factors (structural power, materially embedded power, and Third World elite interests), the discussion focuses on some of the key ideas and technological practices that have been instrumental in the construction of transnational regulatory hegemony. The chapter argues that despite Third World contestation and the periodic financial crises, these relatively autonomous ideas and technological practices continue to exert ideological and performative power within global financial markets and related transnational regulatory institutions.

Section 2 examines Third World resistance across five key moments of rapture: establishment of the New International Economic Order; the 1973 oil crisis and collapse of the Bretton Woods system; the 1990 collapse of the Soviet Union; emerging market crisis and the new



international financial architecture; and the 2008 global financial crisis. It argues that regulatory neoliberalism's hegemony reconstituted and reinvented itself through discourses on the universality of International Law, economic theories of Comparative Advantage and division of labour, human rights, governance, the Rule of Law, market institutions, technological rationality, and macroprudential regulation. Section 3 takes stock of the reasons advanced for the failure of the post-2008 global financial regulatory reform process, and argues that the ideological and performative power of ideas has emerged as a key factor, alongside the other structural factors. Section 4 concludes by urging the Third World, including TWAIL, States, and social movements, to give adequate focus to the ideological and performative power of ideas, technologies and related practices, if it is to achieve a radical overhaul of the transnational financial regulatory order.

## **2. Third World Contestation of the Transnational Financial Regulatory Order**

The relationship between the Third World and the transnational financial regulatory order, since its 1944 establishment, continues to evolve. The 'Third World' has simultaneously been a subject and an object of international law, and also 'insurgent' within the transnational governance order.<sup>82</sup> The role of Third World resistance in the narrative of the International Law of Finance has been under-theorised, despite shaping the evolution and expansion of the transnational regulatory order, through the latter's opposition to, capitulation to, and co-option of, Third World demands.<sup>83</sup> This thesis adopts Rajagopal's conceptualization of the Third World as referring to post-colonial States, peasants, social movements, and their global allies<sup>84</sup>, and adapts it into a typology of three overlapping and inter-related modes of resistance of the transnational financial regulatory order: State contestation; TWAIL contestation; and Social Movements.

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<sup>82</sup> BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melb. J. Int'l L.* 499, 501. Chimni contends that the civilization/barbarian dichotomy at the heart of international law and its imperial origins, alienated it from the peoples of the Third World, making them and their territory objects rather than subjects of International Law. The moment the Third World became a subject of international law was at the point of complete subjugation, that is, surrendering sovereignty to colonial masters.

<sup>83</sup> Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (2000) 41 *Harvard International Law Journal* 529, 532. The author contends that the expansion and renewal of international institutions, and the architecture of contemporary international law, should be understood as constituted by the 'continuous evocation of and interaction with the category "Third World", which has included not only States, but these Social Movements'.

<sup>84</sup> *ibid* 533.

The first assemblage of 'State contestation' refers to the diplomatic efforts by Third World States and their related groups and State allies within the International Law system, to contest the hegemonic and neoliberal financial regulatory order through the institutional rules of International Law and related organizations. The second grouping, for which is conveniently appropriated the tag of TWAIL practitioners, refers to a diverse group of loosely-labelled international law practitioners (including lawyers, judges, academics, economists, and political scientists) who adopt a distinct Third World perspective to International Law. TWAIL practitioners engage in reflection, conceptualization, articulation, dissemination and legal operationalization of a Third World perspective of the imperial and exploitative relationship between International Law and Third World States, and a progressive vision of how this relationship can be reset for the benefit of the latter.<sup>85</sup>

While what is referred to as TWAIL I was at its beginning part and parcel of Third World State contestation, the succeeding TWAIL II resistance has distinguished itself from State contestation. As discussed more elaborately in Section 3, this careful distancing of TWAIL II from the Third World State is a result of the realization that the latter: is compromised by class, race, gender and other conflicts and tensions; frequently resorts to violence, authoritarian tendencies; and often sides with interests that are oppositional to those of its citizens.<sup>86</sup> In addition, State contestation of the international financial regulatory order is limited by: its being bound to the institutional and normative constraints as a State Party in international law; its ideological legitimization of international law and its institutions, e.g. through borrowing from the Bretton Woods institutions (BWIs)<sup>87</sup>; and the co-option of State elites into the neoliberal project. Consequently, TWAIL contestation of international law and its institutions comes from a recognition of its impact on the distribution of power between the Third World State and its citizens, and also that International Law should be interpreted and evaluated through 'the actualized experience of third world people, rather than Third World States'.<sup>88</sup>

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<sup>85</sup> Georges Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines?' (2016) 37 *Third World Quarterly* 1957, 1962.

<sup>86</sup> Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese J. int'l L.* 77, 82–83.

<sup>87</sup> Ngaire Woods, *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Cornell University Press 2006) 5. Woods argues that the persuasive influence of the Bretton Woods institutions is strongest when dealing with 'able and willing interlocutors in borrowing governments' who are sympathetic to the lenders' neoliberal policies, and who revel in the power and authority that comes with implementing the lenders' policies.

<sup>88</sup> Anghie and Chimni (n 86) 78.

Nevertheless, TWAIL contestation of the transnational financial order retains a strong linkage with the diplomatic initiatives of Third World States, as evidenced by the efforts of TWAIL I and Third World States to change the Sources Doctrine of International Law to include majority-backed United Nations General Assembly (UNGA) resolutions, by making the latter binding.<sup>89</sup> TWAIL II has criticised its predecessors' misplaced faith in the ability of international organizations such as the United Nations (UN) to usher in a just legal order, as this seemed to ignore, or failed to discern, the imperialist logic of international law institutions. Despite this criticism, TWAIL II recognises its role as not merely academic, but rather praxis, that is, the "willed action by which a theory or philosophy becomes practical social activity".<sup>90</sup>

TWAIL praxis therefore entails introducing new norms of international law in society, and transforming them into current practice of international law. The success of TWAIL's resistance to the transnational financial regulatory order therefore depends on its practitioners' engagement with Third World State and non-State contestation of International Law, including: litigating on behalf of Third World States or peoples; advising Third World States on diplomatic engagements; and participating as members of Third World State delegations and negotiating teams. In addition, it also entails engaging in international contestation as insiders of transnational financial institutions, e.g. employees, advisors, and consultants introducing new perspectives into the bureaucracies, and also as arbitrators, judges and members of international tribunals and courts, including the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), and the World Trade Organization (WTO) Appellate Body.<sup>91</sup>

The third assemblage of Third World resistance to international financial law and regulation is that of social movements. Rajagopal describes this group as including peasant rebellions, environmental and human rights movements, and their global allies, who participate in popular organizing as a result of their concerns as victims of the social and human costs of the policies, regulations and programs promoted and implemented by transnational financial institutions not only in Third World but also developed countries.<sup>92</sup> Both Old Social Movements (OSMs)

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<sup>89</sup> *ibid* 81.

<sup>90</sup> *Abi-Saab* (n 85) 1961.

<sup>91</sup> For example, in 2017, Obiora Okafor, a TWAIL founder, accepted an appointment as the chairperson of the UN Human Rights Council Advisory Committee. See York University, 'Professor Obiora Okafor Appointed Chairperson of UN Human Rights Council Advisory Committee' (*Osgoode Hall Law School*) <<https://www.osgoode.yorku.ca/news/professor-obi-ora-okafor-appointed-chairperson-un-human-rights-council-advisory-committee/>> accessed 8 January 2018.

<sup>92</sup> *Rajagopal*, 'From Resistance to Renewal' (n 83) 539.

concerned with the class implications of global capitalism on workers, and New Social Movements (NSMs) articulating new groups of oppression, e.g. gender and race, have engaged in popular resistance against transnational financial regulatory institutions and their State accomplices, and have, in the process, shaped the structure and normative content of transnational financial law and regulation, and its relationship with the Third World.<sup>93</sup>

As this very truncated historical account of Third World resistance against the transnational financial regulatory order below demonstrates, these three groups are actually three aspects of a Third World whole, but are also at the same time oppositional, with differentiated and conflicting paradigms, aims, interests, and methodologies. The account of Third World contestation, and the resultant successes, failures and impact on the hegemonic regulatory projects looks at five key moments of rapture, crisis, hegemonic reconstruction and both liberal and neoliberal continuity. These five phases are: the 1960s clamour for and ultimate establishment of the New International Economic Order; the 1973 Oil Crisis, establishment of floating exchange rates and advent of IMF conditionalities; the 1989 end of the Cold War and entrenchment of the Washington Consensus; the 1990s emerging markets' financial Crises and the establishment of the New International Financial Architecture; and the 2008 global financial crisis and the emergence of the macro-prudential regulatory agenda.

### **2.1. Establishment of the New International Economic Order (NIEO)**

The North-South debate over the establishment of a NIEO was at once a negotiation of State, institutional and geographical interests, a debate about the aspired structure of global economic relations, and (more significantly) a Third World challenge to liberalism's intellectual hegemony in international law and international trade relations.<sup>94</sup> The NIEO debate represents a struggle between Third World forces aiming to deconstruct, and Developed States' efforts to ideologically rejuvenate, at least two key ideologies: the universality of international law, and the rationality of liberal economic orthodoxy.

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<sup>93</sup> *ibid* 532–533. Rajagopal, for example, contends that the BWIs' concerns with poverty, the environment, and equity in international finance and its regulation, are a consequence of their simultaneous opposition and adaptation to the demands of the social movements.

<sup>94</sup> Robert W Cox, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature' (1979) 33 *International Organization* 257, 258–259; See also Craig N Murphy, 'What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology' (1983) 27 *International Studies Quarterly* 55 Murphy contends that Third World States consciously adopted an ideological strategy in the NIEO negotiations.

Third World States' contestation of the transnational financial regulatory order dates back to their 1960s dissatisfaction with the ideology of international legal order's putative, yet false, universality, and non-responsiveness to issues important to them, including global inequality and underdevelopment.<sup>95</sup> For example, the Third World countries advocated for the establishment of UNCTAD as an institutional counter-weight to the market-oriented General Agreement on Tariffs and Trade (GATT).<sup>96</sup> Consequently, in concert with UNCTAD, Third World States called for a NIEO, whose offspring was ultimately the International Law of Development (ILD), which established new norms including the right to development, and the duty on States to cooperate on promoting development.<sup>97</sup> The emergence of ILD changed the character of International Economic Law (IEL), and specifically International Financial Law in at least three key ways that nudged it towards actual universality. These included the shift from the law of co-existence to the law of cooperation; the practice of multilateral rather than only bilateral negotiations and agreements; and the use of consensus rather than majority voting, in the adoption of resolutions by International Institutions.<sup>98</sup>

Gamani Corea, a leading economist from the global South, who served as Secretary General of UNCTAD (1974-1984), actively institutionalized Third World misgivings about the ideological nature of International Law and liberal economic orthodoxy, especially the theories of Comparative Advantage, and the international division of labour between the raw commodity-exporting Third World, and the manufactured goods-exporting developed economies.<sup>99</sup> This resulted in UNCTAD's establishment of the Integrated Program for Commodities (Corea Plan), which was a mechanism for international intervention in international commodity trading and stabilization commodity prices, largely to the advantage of Third World economies. Reflecting the intellectual attitudes regarding the irrationality of any theories that departed from liberalism's credo of free globalized markets, this initiative was widely criticized in the economic orthodoxy circles, including by economist Harry Johnson, who derided the "economic illiteracy of the UNCTAD economic secretariat".<sup>100</sup>

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<sup>95</sup> See generally, Jagdish N Bhagwati, *The New International Economic Order: The North-South Debate* (National Advisory Council for Development Cooperation 1977).

<sup>96</sup> Krasner (n 11) 6.

<sup>97</sup> Garcia-Amador (n 12) 3.

<sup>98</sup> *ibid.*

<sup>99</sup> See generally Gamani Corea, *Taming Commodity Markets: Integrated Programme and the Common Fund in United Nations Conference on Trade and Development* (Manchester University Press 1992).

<sup>100</sup> Harry Johnson, in Jagdish N Bhagwati (ed), *The New International Economic Order: The North-South Debate* (MIT Press 1976) 244.

The NIEO demands and concerns in relation to the international monetary order were more specific. They questioned the role of the US structural hegemony, including the dollar's status as international reserve currency, in acute instability of the international monetary system, and the adverse impact that the resultant balance-of-payment deficits and international liquidity were having on Third World economies.<sup>101</sup> In addition, Third World States called for radical reforms to the structure, functioning, policy orientation, and actual operations of the IMF. They argued that it had become irrelevant to the mission of realizing an orderly international monetary system, and had become an instrument of the Group of Ten countries in the hegemonic domination of Third World countries.<sup>102</sup> They also contended that IMF policy orthodoxies of balance-of-payment adjustments through austerity measures (demand contraction, wage control and exchange-rate adjustment) did not recognize the structural differences between developed and developing countries, and thus not only limited the prospects for Third World economic development, but also frustrated the wider goals of the NIEO.<sup>103</sup>

These calls for a radical overhaul of the international financial system was met by politically-engaged intellectual efforts of networks of political, business and academic individuals and institutions. One faction, coalescing around the Trilateral Commission, engaged in an outright, realist-school defence of liberal hegemony, by focussing on 'efficiency' as an aspirational economic norm.<sup>104</sup> It also argued for governmental intervention only in support of the liberalized global markets, and supported hegemonic control of international financial institution by developed countries, as a useful bully pulpit to ensure compliance by developing countries.<sup>105</sup>

A less hawkish wing of these networks engaged in ideological manoeuvring, by expressing support for efforts to alleviate the underdevelopment and poverty in Third World countries, while essentially supporting the systemic status quo espoused by the Trilateralists.<sup>106</sup> This

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<sup>101</sup> Jorge Lozoya and AK Bhattacharya, 'Introduction' in Jorge Lozoya and AK Bhattacharya (eds), *The Financial Issues of the New International Economic Order: Pergamon Policy Studies on The New International Economic Order* (Elsevier 2014) xviii.

<sup>102</sup> *ibid.*

<sup>103</sup> Ervin Laszlo and others, 'Obstacles to International Finance', *The Obstacles to the New International Economic Order* (Pergamon Press 1980) 56–58.

<sup>104</sup> See Bhagwati (n 95) This volume of papers was the result of a symposium sponsored by the Trilateral Commission, and featured several prominent trilateralists.

<sup>105</sup> *ibid.*

<sup>106</sup> Cox (n 94) 261. Cox identifies the Club of Rome group, presided over by Jan Tinbergen, as one of the 'social democratic variants' of the status quo perspective.

ideological manoeuvring thus sought to defang the NIEO of its radical demands, by offering poverty reduction and economic growth programs, which were in fact later unveiled under IMF and World Bank lending programs, and which dramatically expanded these institutions' powers over Third World economies. This is discussed in greater detail in section 2.2 below, and in Chapter 3.

During this period, TWAIL I scholars, including RP Anand, Mohammed Bedjaoui, Georges Abi-Saab, S.P. Sinha, Negandra Singh and Christopher Weeramantry articulated the Third World's suspicions of International Law's claims to universality.<sup>107</sup> They indicted International law for legitimizing imperial and colonial oppression of the Third World, by denying them legal sovereignty, and upholding unequal treaties.<sup>108</sup> They also critiqued the Eurocentric nature of international law, and identified various legal and normative doctrines and principles within Third World legal systems and cultures, which could arguably enrich and make International Law more just.<sup>109</sup> By undertaking immanent critique of International Law, TWAIL I recognised the promise that the UN system held for the achievement of sovereign equality, non-intervention and economic liberation of the Third World States, as demonstrated by its articulation of, alongside diplomatic efforts, the NIEO.<sup>110</sup>

Nationalist, anti-authoritarian and anti-neoliberal protests in Third World States and abroad also provided a crucial political context for the legitimation of the novel demands of the NIEO within international institutions.<sup>111</sup> For example, the anti-colonial and apartheid movements of the 1960s and 1970s pushed the UN to give legal legitimacy to the Third World claims to sovereignty over national resources and foreign investments. Thus, even social movements recognized and converted international law and its related institutions into an arena of political

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<sup>107</sup> BS Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade, Law and Development 14, 18.

<sup>108</sup> See generally, Ram Prakash Anand, *International Law and the Developing Countries: Confrontation Or Cooperation?* (Martinus Nijhoff Publishers 1987).

<sup>109</sup> See generally, S Prakash Sinha, *Legal Polycentricity and International Law* (Carolina Academic Press 1996).

<sup>110</sup> See generally, Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers 1979).

<sup>111</sup> William G Martin, *South Africa and the World Economy: Remaking Race, State, and Region* (University Rochester Press 2013) 193. The author contends that anti-authoritarian and anti-neoliberal popular protest in South Africa and across the African continent could conceivably work to 'produce a quite different outcome marked by more equitable and cooperative international alliances'.<sup>112</sup> Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, 'Introduction' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008) 6.<sup>113</sup> Anghie and Chimni (n 86) 81.

struggle for equity, democratization, accountability, and actual universality, despite their imperial origins and operating logic.<sup>112</sup>

Within TWAIL, opinion remains divided on whether the NIEO was a success or failure. Abi-Saab notes that the NIEO legal blueprint remains unimplemented largely because Third World countries' attempts to include UNGA majority resolutions as binding sources of International Law were frustrated by developed countries' positivist arguments regarding sources of international law, and consent.<sup>113</sup> Sornarajah, nevertheless, contends that despite the declaration of the death of the NIEO project, its principles live on through important changes effected in the practice of States. He concedes, however, that the NIEO has been eclipsed and made dormant by the 1990s rise of neoliberalism in the Third World, though it could still be reactivated through hegemonic power shifts and the promotion of justice-based norms.<sup>114</sup>

## **2.2.The 1973 Oil Crisis, Establishment of Floating Exchange Rates, and Advent of IMF Conditionalities**

This period is characterized by the emergence of the political ideology of neoliberalism, and a new rationality of neoclassical economics, which emphasized the scientific nature of financial markets, and the need for an apolitical and technocratic approach to their regulation, ushering in the era of regulatory neoliberalism. This refers to idealized Anglo-American regulatory practices, including technocratic, apolitical, market-oriented and (politically) independent financial regulatory agencies.<sup>115</sup> This era was preceded by a series of successive events in the 1970s, which coincided to change the character of the international financial markets, transnational financial law, and their relationship to the Third World. The 1971 replacement of the Bretton Woods system of fixed exchange rates for floating exchange rates (the 'Nixon shock'), and the 1973 oil crisis occasioned by geopolitical conflicts between the West and Middle East, precipitated global financial market volatility. Consequently, this increased the vulnerability of Third World countries to market swings, as they suffered balance-of-payment and foreign exchange reserve deficits.

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<sup>112</sup> Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, 'Introduction' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008) 6.<sup>113</sup> Anghie and Chimni (n 86) 81.

<sup>113</sup> Anghie and Chimni (n 86) 81.

<sup>114</sup> M Sornarajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' (2016) 37 *Third World Quarterly* 1972, 1976.

<sup>115</sup> Walter (n 4) 1, 21, 27.



These events foregrounded the emergence of neoliberalism as a political ideology and neoclassical economic orthodoxy as economic policy in developed countries, with the 1979 and 1980 rise to power of Margaret Thatcher and Ronald Reagan in the UK and US, respectively, with the political mandate to curb trade unionism, deregulate the economy, and especially the national and global financial markets.<sup>116</sup> The IMF capitalised on the vulnerabilities wrought by financial market volatility to expand its mandate to lending to Third World countries suffering balance of payment deficits, thereby extending its institutional power through conditionalities, that is, lending on the condition that the borrower countries implemented packages of neoliberal economic reforms, informed by the neoclassical economic theories.

These policy reforms included domestic economic liberalization, and the roll-back of the developmental State model, which fundamentally closed off the Third World States' policy space and ability to respond to their citizens economic and political welfare concerns, while deepening the suffering of vulnerable citizens.<sup>117</sup> However, the ideology of the rationality of neoclassical economic theories, and a belief in the expertise of IMF technocrats, legitimated the necessity of these adverse impacts, if the Third World was to achieve poverty reduction and economic development. Third World bureaucrats uncritically accepted and implemented these policy proposals.

The IMF's switch to its new role as lender to Third World States had significant implications, since it was the basis for the production and reproduction of hegemonic power relations with its borrowers. For example, its mandate expanded to include economic growth as an objective. In addition, the loan conditionalities dramatically expanded the IMF's Article IV surveillance role, to the extent that the transnational regulator embedded its own technocrats within Third World countries' civil service bureaucracies, and also intensified the reporting mechanisms. Its programmatic interests in good governance also meant that the IMF's mandate expanded to broad areas of non-economic issues, including poverty alleviation, income distribution, environmental protection, anti-corruption campaigns, and reduction of military expenditure.<sup>118</sup>

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<sup>116</sup> Harvey (n 3) 1.

<sup>117</sup> See generally, Mkandawire (n 13); See also J Barry Riddell, 'Things Fall Apart Again: Structural Adjustment Programmes in Sub-Saharan Africa' (1992) 30 *The Journal of Modern African Studies* 53.

<sup>118</sup> Balakrishnan Rajagopal, 'From Resistance to Renewal: Bretton Woods Institutions and the Emergence of the "New" Development Agenda', *International law from below: development, social movements, and Third World resistance* (Cambridge University Press 2003) 128.

Thus, in light of this increasingly political nature of the involvement of Bretton Woods Institutions (BWIs) in Third World economies, the democratic reform and accountability of these institutions, and the opposition to the neoliberal loan conditionalities became exigent aspects of Third World States' resistance to the transnational financial regulatory order. Third World States specifically contested the replacement of conventional loan collateral with policy conditionalities, the inadequate amount of financial resources provided by the BWIs to these poor countries. In addition, Third World countries questioned the distribution of institutional decision-making power between them developed economies, within the governance organs of the lender.<sup>119</sup> However, the diffusing ideologically-legitimated infrastructure of neoclassical economic rationality and neoliberal politics was not confronted by the Third World States.

In the case of the IMF, Third World countries registered some modest, albeit not radical, successes, including: the increase in allocation of Special Drawing Rights (SDRs) to Least Developed Countries (LDCs) from 14% to 28%; an increase in the allocation of voting power of LDCs from 22% in 1947 to 35.8 in the 1980s; an increase in the number of Third World executive directors from 5/13 in 1947 to 11/22 in 1983; and the appointment of the 1972 Committee of Twenty, to study reform of the international monetary system (consisting of 9 Third World members) in place of the earlier Committee of Ten (exclusively from developed countries).<sup>120</sup> Nevertheless, despite these changes, the developed economies still retained significant control of the IMF, and the latter retained a significant influence over Third World States through its lending conditionalities.

The 1980s implementation of the IMF-sanctioned neoliberal reform packages in Third World economies, in the form of Structural Adjustment Programs (SAPs), represented the operationalization of regulatory neoliberalism, and had a severe impact on the poor and vulnerable citizens forming the majority of the respective countries.<sup>121</sup> This was primarily due to the Third World State withdrawal from or reduced engagement in the provision and funding of essential public services such as health, education, and agriculture.<sup>122</sup> This resulted in popular agitation by citizens against their respective governments' SAPs, and also global campaigns against the BWIs loan conditionalities, which were critiqued for ignoring the social

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<sup>119</sup> Krasner (n 11) 130–131.

<sup>120</sup> *ibid* 138–139.

<sup>121</sup> See for example, Mkandawire (n 13).

<sup>122</sup> For a discussion of IMF SAPs in Kenya, see Centre for Economic Governance and Aids in Africa, 'The IMF in Kenya: Implications for Health and Development' (Centre for Economic Governance and Aids in Africa 2009).

dimensions of economic development.<sup>123</sup> The IMF and the World Bank responded to these social movements' agitation by embracing and adopting social concerns, including poverty alleviation, protection of human rights and the environment, as part of their mandates.<sup>124</sup>

The response of TWAIL I practitioners to the establishment of the floating exchange rate era, and the era of global inflation and market volatility in Third World, was initially to articulate the claims under the NIEO, through their academic praxis. TWAIL I therefore welcomed the economic growth project of the BWIs, especially its extension of financial assistance to Third World States. When the harsh social impacts of the loan conditionalities became apparent, TWAIL I practitioners articulated the concerns of the vulnerable members of the Third World, by agitating for the refocusing of efforts by the BWIs to the promotion of 'development' and the protection of the human rights of the Third World peoples.

With the benefit of historical reflection, TWAIL II has critiqued this stance adopted by TWAIL I. Rajagopal, for example, contends that TWAIL I ignored or failed to realize the manner in which the concepts of 'development' and 'human rights' extended the colonial logics of international law, in the management of the Third World by the First World, including racial hierarchy and settler rights, respectively.<sup>125</sup> Chimni also argues that they lacked a deeper understanding of the imperial nature of the BWIs' development role, and believed the language of 'development' and 'human rights' to be neutral. In addition, he argued, TWAIL I scholars failed to examine the ideological and legitimating role of the BWIs, and uncritically trusted and endorsed international institutions' support for the Third World State's nation-building project, without realizing the latter's inherent conflicts and tensions, including oppression of their own Third World citizens.<sup>126</sup>

The rationality of neoclassical economics as the ideational infrastructure for economic and financial markets reforms, and the legitimacy of the discourses of 'development' and 'human rights' that were presented as linctus for the social upheavals that the new economic orthodoxy left in its wake, therefore further entrenched the global North's hegemony within global financial markets, and regulatory neoliberalism within the transnational regulators.

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<sup>123</sup> Rajagopal, 'From Resistance to Renewal: Bretton Woods Institutions and the Emergence of the "New" Development Agenda' (n 118) 129.

<sup>124</sup> *ibid.*

<sup>125</sup> Balakrishnan Rajagopal, 'International Law and the Development Encounter: Violence and Resistance at the Margins Violence' (1999) 93 *American Society of International Law Proceedings* 16, 21.

<sup>126</sup> Chimni, 'The World of TWAIL' (n 107) 19.

### **2.3. The 1989 End of the Cold War and Entrenchment of the Washington Consensus**

During this period, the BWIs discourses of ‘governance’, the ‘Rule of Law’, and New Institutional Economics theories on the role of ‘institutions’ in the development of financial markets, played key ideological and performative roles in the continued entrenchment of regulatory neoliberalism within transnational and Third World financial markets (the Chapter 5 case study discusses in greater depth the ideological and constitutive effect of the Rule of Law in Kenya’s financial markets).

The end of the Cold War between 1989 and 1990 had significant implications on Third World contestation of the transnational financial regulatory structure and neoliberal norms. During the Cold War, Third World States formed the non-Aligned Movement, which was actively courted by the West and the Soviet bloc, enabling them to assert influence in the shaping of international law norms related to justice.<sup>127</sup> The end of the Cold War therefore saw the watering down of Third World States’ influence, and the ascendance of the UN Security Council as a powerful organ in international law and politics. It also led to the ideological ascendancy of neoliberal politics and neoclassical economic theory, and the belief that capitalism had triumphed over socialism, aptly captured by Francis Fukuyama’s declaration of ‘the end of history’.<sup>128</sup> Thus, within transnational financial law and regulation, the neoliberal policy conditionalities touted by the BWIs were canonised as the Washington Consensus, a set of ten economic policy prescriptions recommended as reform packages for crisis-prone developing economies, including: macro-economic stability; trade and financial liberalization; privatization and roll-back of the State; and legal protection of property rights.<sup>129</sup>

In this context, the IMF and the World Bank doubled down on their policy interventions in developing countries, increasing their power over these countries through the deployment of economic theories such as New Institutional Economics (NIE), and legal and constitutional

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<sup>127</sup> M Sornarajah, ‘Power and Justice: Third World Resistance in International Law’ (2006) 10 *Singapore Year Book of International Law* 19, 19–20.

<sup>128</sup> Francis Fukuyama, ‘The End of History?’ [1989] *The National Interest* 3, 3 Fukuyama argued that the fall of the Soviet Union represented the ‘unabashed victory of economic and political liberalism’ over absolutism, bolshevism, fascism and updated Marxism that ‘threatened to lead to the ultimate apocalypse of nuclear war’.

<sup>129</sup> See generally, John Williamson, ‘The Washington Consensus as Policy Prescription for Development’ (Institute for International Economics 2004) The author coined the term ‘Washington Consensus’ to refer to a summary of ten key policy proposals that the IMF, World Bank, and the US Treasury agreed upon as necessary for developing economies to implement.

discourses and ideologies such as the World Bank's 'governance' and 'Rule of Law' agenda.<sup>130</sup> Developed by Douglas North and Robert Coase, NIE theorised that well-functioning markets required institutions, that is, "humanly devised constraints that structure political, economic and social interaction".<sup>131</sup> It argued that institutions provide the incentive structure for economic growth by creating order, reducing uncertainty, defining choice sets, determining transaction and production costs, and the profitability and feasibility of engaging in economic activity.<sup>132</sup>

This new economic rationality opened the door for the World Bank's 'good governance' and 'Rule of Law' agenda, as it argued that the connection of the rule of law with efficient use of resources and productive investment, is the aspect most important to economic development, and hence to World Bank assistance.<sup>133</sup> This was partly a response to Third World criticisms of the neoclassical economic basis of the neoliberal SAPs, which had failed to stimulate economic development in developing countries, and had in fact increased the economic suffering of the poor.<sup>134</sup> As discussed in greater depth in Chapter 5, these theories were ideological, as they ignored evidence from the economic growth registered experience of the Asian countries such as China, which proved that various institutions alternative to the Rule of Law could spur economic development.<sup>135</sup>

During this period, Third World countries uncritically bought into the financial market liberalization reforms prescribed by the BWIs, believing that these policies would indeed lead to the deepening of financial markets and economic development. Indeed, this cooperative perspective towards regulatory neoliberalism was exhibited in the expansion of the international investment law (IIL) sector, where the number of bilateral investment treaties

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<sup>130</sup> For a discussion of New Institutional Economics, see Douglass C North, 'Institutions' (1991) 5 *The Journal of Economic Perspectives* 97; For the World Bank's policy statement on the role of the Rule of Law in economic development, see World Bank, 'Governance and Development' (The World Bank 1992) 10650.

<sup>131</sup> North (n 130) 97.

<sup>132</sup> *ibid.*

<sup>133</sup> World Bank, 'Governance and Development' (n 130) 28–30. The report also acknowledged that a fairer legal system is, in a general sense, conducive to balanced development that facilitates growth and responds to needs of the poor. However, it endorsed the formalistic conception of the rule of law, which emphasizes the efficiency of the legal system rather than its content.

<sup>134</sup> Tor Krever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model' (2011) 52 *Harvard International Law Journal* 287, 305. In response to the criticisms of the failure of their neoliberal policy reform prescriptions in developing countries, the BWIs argued that the failures of the SAPs were due to the absence of proper governance structures, including the rule of law, in these countries.

<sup>135</sup> See generally Dani Rodrik, 'After Neoliberalism, What?', *Remarks at the BNDES seminar on New Paths of Development, Rio de Janeiro, September* (2002).

entered into to secure the flow of foreign direct investment (FDI) from the developed to the developing countries ballooned from about 500 in 1990 to nearly 3,000 a decade later.<sup>136</sup>

These bilateral treaties were actively promoted by the BWIs through various means. One was ideological persuasion of legal and economic orthodoxy, especially after the fall of the Soviet Union; neoliberalism had emerged as an uncontested economic and political philosophy, and New Institutional Economics, 'good governance' and the 'Rule of Law' were the new regulatory rationality.<sup>137</sup> The second was market persuasion e.g. through BWIs' publication of authoritative metrics such as the Doing Business series and Rule of Law indexes, popular with investors, which, Perry-Kessaris argues, construct legitimacy in and through orthodox economic rationalities.<sup>138</sup> Lastly, the BWIs employed the tactic of economic coercion through loan conditionalities.<sup>139</sup>

The normative tenets of the bilateral investment treaties entered into between developed and Third World countries fundamentally rolled back the normative gains secured under the NIEO. First, the investment treaty regimes leveraged formalist legal norms of 'the internationalized contract' and 'international property rights' to wrestle from States control over natural resources, in the name of 'investment protection'.<sup>140</sup> Second, Third World States' regulatory policy space was severely constricted by the narrow construction of the defence of necessity, as would be seen in the Argentina cases relating to regulatory steps taken during the financial

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<sup>136</sup> M Sornarajah, 'Resistance and Change in International Investment Law', *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 396.

<sup>137</sup> *ibid* 411.

<sup>138</sup> See Amanda Perry-Kessaris, 'The Re-Co-Construction of Legitimacy of/through the Doing Business Indicators' (2017) 13 *International Journal of Law in Context* 498, 502; See also Amanda Perry-Kessaris, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development' (2011) 7 *International Journal of Law in Context* 401, 403. Perry-Kessaris argues that the deployment of Doing Business indicators is a form of 'economics imperialism', that is, the colonisation by economics of 'the subject matter of other social sciences', to the extent that there is an emphasis on 'marketisation, mathematisation and quantification, which are respectively the normative, analytical and empirical approaches of choice in mainstream economics'.

<sup>139</sup> See, for example, Daniel Kalderimis, 'IMF Conditionality as Investment Regulation: A Theoretical Analysis' (2004) 13 *Social & Legal Studies* 103, 105. The author argues that through loan conditionalities, the IMF has made international investment regulation one of its main areas of operation, despite lacking the legal jurisdiction.

<sup>140</sup> See AFM Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12 *European Journal of International Law* 309 The author critically examines how the theory of internationalization of State contracts over-rides express contractual clauses regarding applicable law, and the dispute resolution forum, in favour of international law choices. See also Vicki Been and Joel C Beauvais, 'The Global Fifth Amendment - NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine' (2003) 78 *New York University Law Review* 30 The authors examine the internationalization of the US Constitution's 5th Amendment right to compensation for direct and indirect State expropriation of property rights in International Investments Law.

crisis.<sup>141</sup> Third, the removal of jurisdiction over investment disputes from the national courts to international arbitration tribunals such as the World Bank's ICSID further vested regulatory power on transnational corporations (TNCs) to whom the dispute resolution system was biased.<sup>142</sup> Fourth, an expansionist orientation to interpretation of International Investments Law and related investments agreements shifted international law-making power from international organizations with State membership, to democratically unaccountable and opaque international arbitrators.<sup>143</sup>

These biases of the international investment regime towards transnational capital soon triggered Third World backlash. State contestation of these investment treaties was noticeably weak during the 1990s. Earlier Third World attempts at diluting the international arbitrators' norm expansion through vigorous assertions of competing norms via General Assembly resolutions were dismissed by the arbitration fraternity as lacking legal legitimacy as sources of international law.<sup>144</sup> This weak State resistance is also explained by: State bureaucrats belief in the economic orthodoxy of financial liberalization, foreign direct investments, and increased economic development; the common interests between TNCs and State elites, who in most instances formed joint ventures; and BWI pressure in the form of loan conditionalities.<sup>145</sup>

Social movements, in the form of popular protests organized by NGOs played a big role in pushing back against the international investments regime during this period. For example, the Multilateral Agreement on Investments (MAI), which was proposed in 1996 by the Organization for Economic Cooperation and Development (OECD) as a multilateral investments law among rich countries, was disrupted and abandoned as a result of global protests demanding the

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<sup>141</sup> See LF Castillo Argañarás, 'The State of Necessity as International Defense Raised by a State Undergoing a Financial Crisis. A Case Study' (2007) 4 *Transnational Dispute Management (TDM)*; See also August Reinisch, 'Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases - Comments on CMS v. Argentina and LG&E v. Argentina' (2007) 8 *Journal of World Investment & Trade* 191.

<sup>142</sup> Howard Mann, 'ISDS: Who Wins More, Investors or States?' (International Institute for Sustainable Development 2015) 2. Mann contends that, despite the misinterpretation of UNCTAD's data to the effect that States win more often than they lose, it is the investors that have actually won most of the time: 72% of the decisions on jurisdiction, and 60% of the cases decided on merit. See generally United Nations Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance* (25 edition, United Nations Publications 2015).

<sup>143</sup> See generally Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1998) The authors detail how an elite group of transnational lawyers constructed an autonomous legal field that has given them a central and powerful role in the global marketplace.

<sup>144</sup> Sornarajah, 'Power and Justice' (n 127) 31. The author points out the irony in the inability of the collective wishes of States in the form of UNGA resolutions to create International Law, while uncontested arbitral awards of a few scholars could create International Law.

<sup>145</sup> *ibid* 31.

inclusion of non-elite interests.<sup>146</sup> While these protests succeeded without of State support, the latter's contestation also turned out to be instrumental, when in 1998 the EU attempted to bring the MAI agenda under the auspices of the WTO. A coalition of Third World countries, led by Brazil, India and China (BRICs) rejected this proposal on the basis that it did not address the issue of corporate responsibility and other duties of TNCs.<sup>147</sup>

This period also provided a vital context in which the second phase of ideology-critique and deconstruction of the neoliberal transnational financial order emerged, in the form of TWAIL II. Building on the lessons on the successes and failures of TWAIL I and related State and Social Movement contestation, TWAIL II sought to establish a systematic engagement with the academic discipline and practice of international law, to rival the mainstream approaches to International Law. James Gathii, a founding member of TWAIL II, has recounted the series of conversations and conferences, starting from 1996, that sought to systematize and mainstream TWAIL II as a recognised academic approach to, and practice of International Law.<sup>148</sup> This came from the recognition that successful contestation of the universalized Eurocentric ideational infrastructure and practice of international law depended on the extent to which TWAIL II reflections could be: disseminated through international law journal publications, law school and political science curricula in universities; implemented as new normative structures within national and international policy and legal systems; and entrenched in international law and institutions through State practice.

These developments represented TWAIL's systematization of a praxis that acknowledged the power of the ideational infrastructure of neoliberalism in sustaining and reproducing not only neoliberal hegemony, generally, but also regulatory neoliberalism in global financial markets. This is reflected in TWAIL II's critique of International Law's normative foundations undergirding the liberalized global financial markets, and the engagement between transnational financial regulatory institutions and Third World countries. This included questioning the BWIs version of globalization, its contradictory demands on Third World

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<sup>146</sup> For a narrative on the global engagement of NGOs in resisting the MAI, see Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' [2000] UN Vision Project on Global Public Policy Networks.

<sup>147</sup> Sornarajah, 'Resistance and Change in International Investment Law' (n 136) 308.

<sup>148</sup> James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade L. & Dev. 26.



countries, and the closing down of the latter's policy space to alleviate the harsh effects of globalization on their citizens.<sup>149</sup>

In addition, TWAIL II critically interrogated not only the role of globalization in the corporatization of International Human Rights Law<sup>150</sup>, but also the role of the discourse of universal human rights in entrenching regulatory neoliberalism in Third World economies.<sup>151</sup> The discourses of 'development' and 'economic growth' also came under critical review, as technologies of 'governing from a distance'. TWAIL II questioned the increasing de-territorialisation of national currencies, the BWIs insistence on capital account convertibility, and the loss by Third World States of monetary sovereignty in an increasingly volatile global financial market.<sup>152</sup>

#### **2.4.The 1990s Emerging Markets' Financial Crises and the New International Financial Architecture**

Despite the State, popular and TWAIL II resistance outlined in the previous sub-section, the hegemonic hold of regulatory neoliberalism in the international financial order remained strong, as the ideational fundamentals of the Washington Consensus, New Institutional Economics, good governance and the Rule of Law, remained in place. In addition, increasing techno-innovation and the diffusion of computing technology in the 1990s also spurred the computerization of finance and related market infrastructure. This was key to the application of neoclassical economic theories and related practices to finance, including mathematical modelling and other 'closed-system' methodologies that aided the prediction of market trends.<sup>153</sup>

This 'technification' reinforced the ideology of finance as a techno-scientific practice, and by validating the neoclassical economic theories underpinning efficiency of the markets, enabled financial innovation, and increased faith in financial market liberalization. In fact, financial technologies powered the process of financialization, by enabling the trading of complex, risky

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<sup>149</sup> Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (1999) 32 *New York University Journal of International Law and Politics* 243, 244.

<sup>150</sup> *ibid.*

<sup>151</sup> See Makau Wa Mutua, 'The Ideology of Human Rights' (1995) 36 *Virginia Journal of International Law* 589; See also, Makau W Mutua, '(Book Review) Exporting American Dreams: Thurgood Marshall's African Journey by Mary L. Dudziak' (2009) 31 *Human Rights Quarterly* 1146.

<sup>152</sup> BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *Int'l Comm. L. Rev.* 3.

<sup>153</sup> Donald Mackenzie, *An Engine, Not a Camera: How Financial Models Shape Markets* (MIT Press 2008) 20. The author notes that computers were needed to apply finance theory to trading, and also to test the models against market data, a process which added to the credibility of financial economics.

financial products.<sup>154</sup> Consequently, these trends spurred the development of self-regulatory financial technologies, including credit risk management technologies, which were argued to be technically and rationally sound, and superior to public regulation of the financial markets.<sup>155</sup> The global diffusion of these credit risk management technologies, and the increased power of Credit Rating Agencies (CRAs) in self-regulation of liberalized financial markets, therefore established technological rationality as an ideology and practice that reinforced regulatory neoliberalism.

These ideas underpinning regulatory neoliberalism would come into question after the series of regional financial crises that swept through emerging market economies, including Mexico in 1994, East Asia in 1997, Brazil and the Russian Federation in 1999, and Argentina and Uruguay in 2002.<sup>156</sup> Critical accounts of the causes of these crises identified the rapid IMF-prescribed financial market liberalization programs that were implemented in these regions in the 1980s and 1990s, without proper sequencing, and in the absence of strong market and macro-prudential regulatory institutions. The financial liberalization programs made these Third World countries vulnerable to financial market volatility and macroeconomic instability.<sup>157</sup> In addition, the failure of Long Term Capital Management (LTCM), the largest hedge fund in the world, also revealed the misplaced faith in the computer-enabled calculability of risks underlying the complex techno-financial innovations, including derivatives. The limits of computing models, and the biased nature of some of their underlying

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<sup>154</sup> Luiz Carlos Bresser-Pereira, 'The 2008 Financial Crisis and Neoclassical Economics' (2010) 30 *Brazilian Journal of Political Economy* 03, 9.

<sup>155</sup> *ibid* 9. The author contends that computing technology allowed complicated risk calculations that gave market players the illusion that their financial transactions were prudent. See also Alexandros-Andreas Kyrtis, 'Introduction: Financial Deregulation and Technological Change' in Alexandros-Andreas Kyrtis (ed), *Financial Markets and Organizational Technologies: System Architectures, Practices and Risks in the Era of Deregulation* (Springer 2010) 4.

<sup>156</sup> World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank Publications 2005) 238.

<sup>157</sup> Joseph E Stiglitz, 'Capital-Market Liberalization, Globalization, and the IMF' (2004) 20 *Oxford Review of Economic Policy* 57, 65. Stiglitz lays the origins of the crisis on IMF liberalization policies. He argues that capital market liberalization theories have been discredited even within the economics profession, and that the IMF, rather than coercing developing economies to liberalize, should instead work with developing countries in designing interventions that stabilize capital flows and the exchange rate and interest rate risks of global financial flows, rather than relying on ideologies of free markets. Reuven Glick, Ramon Moreno and Mark M Spiegel, 'Financial Crises in Emerging Markets: An Introductory Overview' in Reuven Glick, Ramon Moreno and Mark M Spiegel (eds), *Financial Crises in Emerging Markets* (Cambridge University Press 2001) 2. The authors note that the 1990s financial crises shared several features, including extensive financial markets liberalization, and significant capital inflow surges and abrupt ebbs and outflows.

assumptions, questioned the notion of the superiority of technological rationality over human supervision of markets.<sup>158</sup>

The post-crises debates questioned the wisdom of removing capital controls and maintaining current account convertibility. In South-East Asia, while affected countries including Thailand, Indonesia and South Korea accepted IMF bailouts and maintained the same discredited financial market liberalization policies, similarly affected countries such as Malaysia and the Philippines not only rejected the IMF bailouts, but also instituted capital controls to arrest the crisis, revolting against the BWI economic orthodoxy.<sup>159</sup> This move has been credited for arresting the deepening of the financial crisis in Malaysia.<sup>160</sup> In addition, discontent with what was deemed the role of the IMF in precipitating the financial crisis, and its restrictive post-crisis bailout conditionalities, prompted parallel initiatives among the Association of South East Asian Nations (ASEAN) countries, aimed at regional financial cooperation, establishing a self-help mechanism for prevention and management of financial crisis, and reducing reliance on IMF crisis management infrastructure.<sup>161</sup> One of the proposals put forward by Japan at the G7-IMF September 1997 meeting was the establishment of the Asian Monetary Fund (AMF). Japan's incentive was to rival the IMF's neoliberal regulatory hegemony over Asian economies, and replace its preferred model of regulatory neoliberalism with State-led economic development, predominant in Asia.<sup>162</sup> The proposal was strongly opposed by the G7 countries, China and the IMF, forcing Japan to drop the proposal. The ASEAN countries instead launched the Chiang Mai

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<sup>158</sup> See Dimitris N Chorafas, *Risk Management Technology in Financial Services: Risk Control, Stress Testing, Models, and IT Systems and Structures* (Elsevier 2011) 92–95. The authors note that too much faith was put in the models, and too little interest was placed on the need for human supervision. In addition, lust and greed tainted some of the assumptions underlying the models, with bias. See also Charles G Leathers and J Patrick Raines, 'The Schumpeterian Role of Financial Innovations in the New Economy's Business Cycle' (2004) 28 *Cambridge Journal of Economics* 667, 675. The authors note that LTCM traded derivatives so complicated that even the experts in the fund did not understand them.

<sup>159</sup> Suthiphand Chirathivat, 'Ten Years after the Asian Crisis: Toward Economic Sustainability in Southeast Asia' (Friedrich-Ebert-Stiftung 2007) 8.

<sup>160</sup> Stiglitz, 'Capital-Market Liberalization, Globalization, and the IMF' (n 157) 58–63. Stiglitz notes the significance of the Malaysian Prime Minister, rather than his Finance Minister, standing up to the IMF and adopting capital controls, which prevented the deepening of the financial crisis. In addition, Stiglitz notes that Malaysia was able to avoid imposing the high interest rates, which were mandated under the IMF bailouts, and which not only deepened the crisis in the recipient countries, but also led to more bankruptcies.

<sup>161</sup> Chirathivat (n 159) 10. In Asia, the financial crisis was referred to as 'the IMF crisis', underscoring the blame assigned to the international regulator.

<sup>162</sup> See generally Yong Wook Lee, 'Japan and the Asian Monetary Fund: An Identity–Intention Approach' (2006) 50 *International Studies Quarterly* 339.

Initiative (CMI), a regional financing arrangement enabling currency swaps, to provide liquidity support.<sup>163</sup>

After these regional financial crises, and in the context of this fresh resistance to regulatory neoliberalism of the transnational financial regulatory order, the G7 in its 1999 Cologne summit (at the behest of the US) co-opted the calls for further institutional reform, in the establishment of the New International Financial Architecture (NIFA), but only as a bid to preserve the regulatory and market status quo.<sup>164</sup> The NIFA entailed the establishment of the Group of 20 (G20), the Financial Stability Forum (FSF), and a surveillance mechanism for 11 new financial regulatory standards and codes, known as the Reports on Observance of Standards and Codes (ROSCs).<sup>165</sup>

The G20 is an informal State-State contact group consisting of the G7 countries (Canada, France, Germany, Italy, Japan, the United Kingdom and the United States), international financial institutions (the IMF, World Bank and European Union), and emerging market States deemed 'systematically important' (including Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Saudi Arabia, South Africa, South Korea and Turkey).<sup>166</sup>

Porter notes that, curiously, there is no evidence that the establishment of NIFA was precipitated by Third World negotiation or advocacy for institutional reform, immediately after the crisis.<sup>167</sup> This is because the reform process was initiated and championed by the G7. However, while it may have seemed to the emerging market States that their co-option into the G20 was meant to democratise the transnational financial regulatory order, the actual objective was to legitimate the neoliberal financial regulatory standards of developed economies (fashioned as ROSCs), facilitate their adoption by Third World countries, and

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<sup>163</sup> Chalongphob Sussangkarn, 'The Chiang Mai Initiative Multilateralization: Origin, Development and Outlook' (Asian Development Bank Institute 2010) Working Paper 230 6.

<sup>164</sup> Susanne Soederberg, 'On the Contradictions of the New International Financial Architecture: Another Procrustean Bed for Emerging Markets?' (2002) 23 *Third World Quarterly* 607, 614.

<sup>165</sup> *ibid* 607.

<sup>166</sup> See generally Peter I Hajnal, *The G8 System and the G20: Evolution, Role and Documentation* (Ashgate Publishing, Ltd 2013) 152. The G20's inaugural communiqué states that the group "was established to provide a new mechanism for informal dialogue in the framework of the Bretton Woods institutional system, to broaden the discussions on key economic and financial policy issues among systemically significant economies and promote co-operation to achieve stable and sustainable world economic growth that benefits all".

<sup>167</sup> Tony Porter, 'The G-7, the Financial Stability Forum, the G-20, and the Politics of International Financial Regulation' (The International Studies Association Annual Meeting, Los Angeles, CA, 15 March 2000) 2.

preserve the G7's control of these governance institutions.<sup>168</sup> In fact, rather than examine the role of financial market liberalization in the crisis, the US blamed emerging markets for the contagion. Thus, the regulatory neoliberalism paradigm of developed economies was ideologically legitimated into ostensibly neutral, technical, apolitical, and scientific standards, which necessitated adoption by the emerging market and developing economies, to arrest future financial crises.

The FSF was established as an informal, political, surveillance body consisting of 40 national financial regulators and supervisors from G7 and other developed countries, and the International Financial Institutions, and tasked with coordinating the efforts of its members to promote international financial stability, improve the functioning of markets, and reduce systemic risk.<sup>169</sup> While the G7 lauded the creation of the FSF as necessary for regulatory cooperation and surveillance among both the developed and developing economies, more critical accounts such as Moschella's countered that the FSB was created by the G7 to help them in collecting systemic risk information from emerging market and developing economies (EMDEs) more efficiently, and to protect the developed economies from contagion emanating from emerging economies.<sup>170</sup>

The FSF's main contribution to the NIFA was its 2000 compilation of a Compendium of up to 64 financial standards formulated by the various transnational financial regulatory institutions and standard-setting bodies (e.g. the BCBS, International Organization of Securities Commission (IOSCO), International Association of Insurance Supervisors (IAIS), International Federation of Accountants (IFAC), Committee on Payment and Settlement Systems (CPSS), Financial Action Task Force, and the OECD), and which were later streamlined into 12 core standards for promotion worldwide.<sup>171</sup> The task of promoting and assessing the implementation of the standards worldwide was assigned to the IMF and World Bank, through their voluntary

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<sup>168</sup> Soederberg (n 164) 607; Porter (n 167) 2–3 Porter quotes the Canadian Prime Minister's observation that sovereign governments can only 'buy into' proposed transnational regulatory reforms if they feel a sense of participation, as a basis for the legitimating role of Third World inclusion into the G20.

<sup>169</sup> Jason Liberi, 'The Financial Stability Forum: A Step in the Right Direction...Not Far Enough' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 549, 553 The membership of the FSF was limited to Australia, Canada, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Singapore, the United Kingdom and the United States.

<sup>170</sup> Manuela Moschella, 'Designing the Financial Stability Board: A Theoretical Investigation of Mandate, Discretion, and Membership' (2013) 16 *Journal of International Relations and Development* 380, 386.

<sup>171</sup> Financial Stability Forum, 'Issue Paper of the Task Force on Implementation of Standards' (Financial Stability Forum 2000) 22. The core policy areas included: monetary and financial policy transparency; fiscal policy transparency; data dissemination; insolvency; corporate governance; accounting; auditing; payment and settlement; market integrity; bank supervision; securities regulation; and insurance supervision.

Financial Sector Assessment Programs (FSAPs) and ROSCs.<sup>172</sup> The Compendium of Standards did not have a significant effect on transnational financial regulation, due to a number of shortcomings, including: inconsistencies between the standards; lack of transparency in their formulation; and absence of a strong national implementation and enforcement mechanism.<sup>173</sup>

In addition to the FSF Compendium of Standards, NIFA delivered another set of transnational regulatory standards and codes, which were a set of 12 core areas that the IMF and World Bank recognised as crucial to their operational work in international financial governance. These fell onto four broad policy areas: policy transparency; financial sector regulation and supervision; and institutional and market infrastructure.<sup>174</sup> Countries have submitted to voluntary assessment of their implementation of these 12 standards, through the BWIs' collaborative preparation of ROSCs.

Soederberg has argued that the NIFA represented the ideological and policy continuation of regulatory neoliberalism of the Washington Consensus, as a basis for structuring global financial markets in three ways. First, the post-crisis reforms were informed by the rationale that the financial market volatility was precipitated by weak corporate governance structures in emerging market economies, rather than SAPs implemented by their respective governments.<sup>175</sup> Hence the regulatory reform focussed on corporate transparency, accountability, etc, rather than volatility of capital inflows. Second, since the emerging markets were to blame, the international financial markets did not contribute to the crisis, and therefore did not require structural reform, such as the introduction of universal capital controls.<sup>176</sup> Third, by including developing countries in the decision-making forums of the G20 and the BWIs, the Western States actually legitimised the status quo reform proposals, and

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<sup>172</sup> Eric Helleiner, 'Multilateralism Reborn? International Cooperation and the Global Financial Crisis' in Nancy Bermeo and Jonas Pontusson (eds), *Coping with Crisis* (Russell Sage Foundation 2012) 78.

<sup>173</sup> Enrique R Carrasco, 'The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body' (2010) 19 *Transnat'l L. & Contemp. Probs.* 203, 207–208; Rolf H Weber and Douglas W Arner, 'Toward a New Design for International Financial Regulation' (2007) 29 *University of Pennsylvania Journal of International Economic Law* 391, 416–417; See also, George Walker, 'A New International Architecture and the Financial Stability Forum' in Rosa M Lastra (ed), *The Reform of the International Financial Architecture* (Kluwer Law International 2000) 430.

<sup>174</sup> International Monetary Fund and The World Bank, 'Assessing the Implementation of Standards: A Review of Experience and Next Steps' (International Monetary Fund 2001) 5–6 <<http://www.imf.org/external/np/pdr/sac/2001/eng/review.htm>>.

<sup>175</sup> Soederberg (n 164) 614.

<sup>176</sup> *ibid.*

reigned in the more radical proposals for reforming global finance, thus preserving the neoliberal structure of global finance.<sup>177</sup>

The normative impact of the various financial regulatory standards focusing on corporate governance, promulgated by various transnational regulatory institutions and promoted and enforced by the BWIs, was the further entrenchment of the market mechanism as the main regulator of global finance, and further diffusion of transnational regulatory power to non-State, market actors. For example, the revision of bank capital adequacy standards under the auspices of the Basel Committee on Banking Supervision (BCBS) in the formulation of Basel II, shifted regulatory power from national banking supervisors to financial institutions and private credit rating agencies.<sup>178</sup> Through their industry representatives, including the IIF and the G30, the international banks lobbied the BCBS to reduce the originally proposed capital adequacy levels, and adopting market-based supervisory and market disclosure models, as opposed to regulator-based supervision.<sup>179</sup> The adoption of complex, market-based automated risk-management systems of banks and credit rating agencies ultimately tilted the competition in favour of international banks headquartered in predominantly G7 countries, and to the disadvantage of smaller banks and micro-finance institutions based in EMDEs.

However, these risk-management systems were calibrated with erroneous neoclassical economic orthodoxy of efficient markets, the allocative efficiency of markets, and rational individual economic actors, and rational markets, which underpin regulatory neoliberalism.<sup>180</sup> The adoption of market-based risk-management regulatory mechanisms would thus play a key role in the collapse of too-big-to-fail financial institutions in the UK and the US, which ‘national’

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<sup>177</sup> *ibid.*

<sup>178</sup> See generally, Basel Committee on Banking Supervision, ‘International Convergence of Capital Measurement and Capital Standards: A Revised Framework’ (Bank for International Settlements 2006) Basel II attempted to deal with the shortcomings of Basel I by introducing new requirements to enhance capital adequacy requirements to cover credit risk, market risk and operational risk, under Pillar I. The Accord introduced a Pillar II, which introduced risk management and supervisory review standards, and a Pillar III that enhanced market discipline mechanisms such as enhanced disclosure requirements for banks. Due to the deep engagement of IIF and G30 in the formulation process, Basel II was largely market friendly, and adopted the neoliberal regulatory logics for policing financial markets.

<sup>179</sup> Andrew Baker, ‘Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance’ (2010) 86 *International Affairs* 647; Eleni Tsingou, ‘Transnational Private Governance and the Basel Process: Banking Regulation and Supervision, Private Interests and Basel II’ in Jean-Christophe Graz and Andreas Nölke (eds), *Transnational Private Governance and its Limits* (Routledge 2008).

<sup>180</sup> Financial Services Authority (n 25) 39.

crises would snowball into a global financial crisis, as a result of the global interconnectedness of financial institutions and markets.<sup>181</sup>

In the wake of the emerging markets' financial crises, Third World State contestation of global regulatory neoliberalism took various forms. As mentioned earlier above, East Asian States such as Malaysia rejected IMF interventions so as to claw back domestic policy space, and instituted capital controls.<sup>182</sup> In Latin America, Chile instituted a tax on financial transactions, while other countries prescribed a fixed period of stay for foreign financial inflows, before departure, in a bid to arrest the effects of capital flight. At the geopolitical level, the ASEAN bloc strengthened its regional monetary cooperation. In September 2006, the foreign ministers of Brazil, Russia, India and China had their first informal meeting at the margins of the UN General Assembly meeting, which precipitated the 2008 establishment of the BRICS geopolitical bloc. Opining then (in 2006), Sornarajah hoped that this 2006 meeting signalled that "an alternative International Law is in formation", and that the BRICs would contribute to this "new alternative international law in opposition to the law created by the hegemonic power and its pliant allies".<sup>183</sup>

In the area of International Investment Law, Third World contestation took the form of creative litigation strategies in which developed countries such as the US and Canada found themselves as respondents in arbitration cases, forcing them to aggressively defend the rights of States to regulate domestic investments.<sup>184</sup> In addition, Latin American States filed cases against foreign investment companies, using litigation as bargaining chips in treaty re-negotiations.<sup>185</sup> These cases developed the law of international investments in favour of Third World positions, and paved way for the reformulation of the State defence of 'necessity', and the designing of 'balanced treaties' that preserved the role of the regulatory State.<sup>186</sup> In addition, Latin

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<sup>181</sup> Tsingou (n 179); Eleni Tsingou, 'Regulatory Reactions to the Global Credit Crisis: Analyzing a Policy Community under Stress' [2010] *Global Finance in Crisis. The Politics of International Regulatory Change*. London and New York: Routledge 21; Daniel E Ho, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?' (2002) 5 *Journal of International Economic Law* 647.

<sup>182</sup> Stiglitz, 'Capital-Market Liberalization, Globalization, and the IMF' (n 157) 58–63.

<sup>183</sup> Sornarajah, 'Power and Justice' (n 127) 25.

<sup>184</sup> Sornarajah, 'Resistance and Change in International Investment Law' (n 136) 396.

<sup>185</sup> For example, in the 2008 case of *Nicaragua v Barcelo*, Nicaragua sued Barcelo, a Spanish company, for non-compliance with yearly payments owed to the government under an investment project. See Katia Fach Gomez, 'Latin America and ICSID: David versus Goliath' (2011) 17 *Law and Business Review of the Americas* 195, 199.

<sup>186</sup> Sornarajah, 'Resistance and Change in International Investment Law' (n 136) 402.



American and other States re-adopted the Calvo Doctrine.<sup>187</sup> In April 2007, Nicaragua, Bolivia, Venezuela, Cuba and Ecuador announced their withdrawal from ICSID in order to preserve their sovereign rights to regulate foreign investments in their economies.<sup>188</sup>

TWAIL II contestation of the international monetary and financial law during the NIFA era doubled down on the pre-crisis criticisms of the use of ideas, discourses and concepts in the globalisation of regulatory neoliberalism. Anghie, for example, focused on the use of expert discourse and concepts such as individual human rights economic growth, and development, in the expansion of BWI authority and role of transnational corporations in international law making and regulation of Third World economies.<sup>189</sup> Okafor also underscored the deployment of a discourse of “newness” of crises, including post-9/11 global terrorism, to ideologically legitimate otherwise untenable reforms to the international legal order, which entrench the hegemony on the powerful developed countries.<sup>190</sup>

## **2.5.The 2008 Global Financial Crisis and the Emergence of the Macro-Prudential Regulatory Agenda**

The continuity in regulatory neoliberalism as embedded in the logic of the NIFA unravelled when the global financial markets experienced turmoil that originated in the 2007 US subprime housing market crisis, spread to Europe, and led to a global banking crisis and a credit crunch. The liquidity problems ultimately led to the insolvency and collapse of a number of systemically-important global financial institutions, including Lehman Brothers and AIG Group in the US, and Northern Rock Building Society in the UK. Since the collapse of these institutions threatened the entire global financial system, US and UK governments extended taxpayer-funded bailouts to these financial institutions. The global financial crisis extended to 2009, but was followed by a global economic downturn, dubbed the ‘Great Recession’, and a long-drawn

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<sup>187</sup> The Calvo doctrine states that foreign investment disputes are to be settled by domestic courts, that the applicable law is the domestic law of the host State, and that the investor may not apply to its home State for diplomatic protection. Catharine Titi, ‘Investment Arbitration in Latin America: The Uncertain Veracity of Pre-Conceived Ideas’ (2014) 30 *Arbitration International* 357, 360–362. Titi notes that, since the mid-2000s, international arbitration started losing legitimacy in Latin America, alongside a resurgence of the Calvo doctrine.

<sup>188</sup> Ignacio A Vincentelli, ‘The Uncertain Future of ICSID in Latin America’ (2010) 16 *Law and Business Review of the Americas* 409, 421–422.

<sup>189</sup> Anghie, ‘Time Present and Time Past’ (n 149) 254 The author warned that the language of human rights was being appropriated and distorted by powerful global economic actors, to justify and legitimize their own goals of profit and ‘a problematic form of economic development’.

<sup>190</sup> Obiora Chinedu Okafor, ‘Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective’ (2005) 43 *Osgoode Hall Law Journal* 171, 173.

debt crisis in the Eurozone, all of which had dire economic consequences for emerging market and developing economies that had come to depend on foreign capital inflows for economic growth.

At the height of the 2008 global financial crisis, regulatory technocrats and politicians were forced to rethink the adequacy of the regulatory model for global finance. A series of high-level inquiries, including at the FSF<sup>191</sup>, the IMF<sup>192</sup>, the US President's Working Group on Financial Markets<sup>193</sup>, the Jacques de Larosiere High Level Group on Financial Supervision in the EU<sup>194</sup>, and the UK's Turner Review<sup>195</sup>, seemed to build consensus on the failure of the market-based regulatory mechanism underpinning the NIFA. These inquiries agreed on a number of causes of the global financial crisis, including: global macro-imbalances; the low interest rates and credit booms especially in the US and UK; housing market asset bubbles and busts; increased financial innovation in complex and opaque financial instruments; increased opaqueness in the financial markets; and consequent failure of credit rating agency (CRA) and risk management methodologies to adequately price risks.

Other causes included: the failure of corporate governance mechanisms; perverse incentives driving the CRA-based regulatory mechanisms; poor regulation of cross-border banks; and increased international financial integration. The UK Turner report was perhaps more explicit in attacking the neoclassical economic orthodoxy of efficient markets, market rationality, the allocative efficiency of markets, and rational individual economic actors, and rational markets, which underpin the light-touch regulatory approach to national and global financial markets.<sup>196</sup> The findings of these reports, and the comments of US, UK and EU policy makers and regulators, convinced commentators that the 2008 crisis had finally dealt a fatal blow to regulatory neoliberalism in national and international financial markets, and that the ensuing

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<sup>191</sup> Financial Stability Forum (n 25).

<sup>192</sup> International Monetary Fund, 'The Recent Financial Turmoil—Initial Assessment, Policy Lessons, and Implications for Fund Surveillance' (International Monetary Fund 2008).

<sup>193</sup> The President's Working Group on Financial Markets, 'Policy Statement on Financial Market Developments' (United States Department of the Treasury 2008).

<sup>194</sup> The de Larosière Group, 'Report of the High-Level Group on Financial Supervision in the EU' (European Commission 2009) 7–12.

<sup>195</sup> Financial Services Authority (n 25) 11.

<sup>196</sup> *ibid* 39.

reforms to transnational institutional structures and international regulatory standards reforms would signal the final burial rights to this regulator paradigm.<sup>197</sup>

The institutional reforms precipitated by the 2008 crisis were aimed at reforming supervisory structures to facilitate regulatory cooperation and crisis management.<sup>198</sup> They included the replacement of the G8 with the G20 as the agenda-setting apex of the transnational financial regulatory order, tasked with originating and spearheading the international financial regulatory agenda, especially the regulation of systemic risk and the restoring global financial stability.<sup>199</sup> The G20 was subsequently expanded to include the IMF, World Bank, and the Financial Stability Forum as ex-officio members.<sup>200</sup>

The IMF also underwent two rounds of institutional reforms. In April 2008, 54 of its members received an increase in their quotas - with China, Korea, India, Brazil, and Mexico as the largest beneficiaries, while another 135 members, including low-income countries, saw an increase in their voting power as a result of the increase in basic votes.<sup>201</sup> In December 15, 2010, the IMF Board approved a doubling of quotas, with a more than a 6% point shift in quota share to dynamic emerging market and developing countries while protecting the voting shares of the poorest member countries. There was also a shift to a more representative, fully elected Executive Board, including a commitment by developed countries to relinquish two board positions.<sup>202</sup> The IMF was also vested with a new mandate in: conducting macro-prudential supervision of countries; conducting a strengthened FSAP for all developed economies; and conducting an early-warning exercise in conjunction with the Financial Stability Board (FSB).<sup>203</sup>

Another significant institutional reform was the restructuring of the informal FSF into the more formally structured FSB, in line with the G20 November 2008 declaration. The new FSB was

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<sup>197</sup> See generally, David M Kotz, 'The Financial and Economic Crisis of 2008: A Systemic Crisis of Neoliberal Capitalism' (2009) 41 *Review of Radical Political Economics* 305 Kotz argued that the global financial crisis was the start of a systemic crisis of neoliberal capitalism, and that major economic restructuring was likely to follow. Eric Helleiner, 'A Bretton Woods Moment? The 2007–2008 Crisis and the Future of Global Finance' (2010) 86 *International Affairs* 619, 620. The author contends that the global financial crisis is not a Bretton Woods moment, as the creation of a new international financial system is the outcome of a more extended historical process.

<sup>198</sup> Emiliios Avgouleas, *Governance of Global Financial Markets: The Law, the Economics, the Politics* (Cambridge University Press 2012) 204.

<sup>199</sup> *ibid*; See also, Hajnal (n 166) 20.

<sup>200</sup> Colin I Bradford and Wonhyuk Lim (eds), *Global Leadership in Transition: Making the G20 More Effective and Responsive* (Korea Development Institute ; Brookings Institution Press 2011).

<sup>201</sup> International Monetary Fund, 'The IMF's Response to the Global Economic Crisis' (International Monetary Fund 2016) Factsheet 4.

<sup>202</sup> *ibid*.

<sup>203</sup> Avgouleas (n 198) 206.

expanded to include emerging market economies represented in the G20, including Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Russia, Saudi Arabia and South Africa. In addition, the FSB admitted into its membership all the major transnational financial institutions and standard-setting bodies, including the IMF, World Bank, Bank for International Settlements (BIS), the BCBS, Committee on the Global Financial System (CGFS), Committee on Payments and Market Infrastructure (CPMI), International Association of Insurance Supervisors (IAIS), International Accounting Standards Board (IASB), and International Organization of Securities Commissions (IOSCO).

Acknowledging that the main regulatory failure was the fragmented international standard-setting and regulation, the G20 mandated the FSB to be the central technical regulatory authority that would coordinate regulatory efforts among all the other international regulators and standard-setters.<sup>204</sup> The main functions of the FBS are to provide a central forum for formulation of international financial standards, and also the coordination of standard-setting functions of other international regulatory bodies. In addition, the FSB has a greater role in monitoring, supervision and peer review of the implementation of international financial standards, by both members and non-members. The FSB undertakes “persuasive” or “peer-pressure” enforcement of its standards among the member and non-member countries.<sup>205</sup>

A significant role of the FSB underpinned by the lessons from the crisis, is its risk-based approach to regulation. According to its charter, the FSB is tasked with taking a pre-emptive approach to “address vulnerabilities affecting financial systems in the interests of global financial stability.”<sup>206</sup> The FSB has also implemented the G20’s November 2008 call to “set up supervisory colleges for all major cross-border financial institutions, as part of efforts to strengthen the surveillance of cross-border firms”. The supervisory colleges are working groups of national financial regulators and supervisors, which engage in the supervision of transnational financial institutions, to close the regulatory gap in their cross-country operations, and to contain contagion witnessed in 2008.<sup>207</sup>

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<sup>204</sup> Avgouleas (n 198).

<sup>205</sup> Eilís Ferran and others (eds), *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012).

<sup>206</sup> Rolf Weber and Dominic Staiger, ‘Financial Stability Board: Mandate and Implementation of Its Systemic Risks Standards’ (2014) 2 *International Journal of Financial Studies* 82.

<sup>207</sup> Avgouleas (n 198) 209–210.

Another significant institutional restructuring mandated by the G20's 2008 summit was the 2009 and 2014 expansion of the BCBS to include systematically important emerging market economies such as Argentina, Australia, Brazil, China, Hong Kong SAR, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, South Africa, and Turkey.<sup>208</sup> This was an important step in the inclusion and representation of the interests of EMDEs in transnational regulatory standard setting, even though the interests of "systemically insignificant" financial economies have been entrusted to major emerging market economies, especially the BRICS, whose interests may not necessarily be aligned with the rest of the EMDEs.

There have been numerous reforms to the transnational financial regulatory standards, and the issuance of new standards, including: the Basel III capital adequacy framework; regulatory frameworks for global systemically-important banks (G-SIBs). In December 2010, the BCBS issued the new Basel III framework, which included higher global minimum capital adequacy standards for commercial banks.<sup>209</sup> Pillar I of the new framework: increased the quality and quantity of regulatory capital; strengthened the risk coverage of securitizations, trading books, counterparty credit risk and central counterparty exposures; and introduced non-risk based leverage ratio requirement to contain leveraging.

Pillar II of the framework strengthened corporate governance and risk management and supervision requirements of financial institutions, including off-balance sheet exposures, incentive structures and compensation practices, valuation practices, stress-testing, accounting standards, and supervisory colleges. Pillar III also enhanced disclosure requirements to augment the market discipline mechanism. Basel III also introduced new global liquidity standards such as the liquidity coverage ratio (LCR), and the net stable funding ratio (NSFR), and supervisory monitoring principles.<sup>210</sup> Lastly, Basel III introduced a higher loss-absorbency capacity requirement for G-SIBs.

These reforms represent the 'macro-prudential' regulatory approach that has emerged after the 2008 crisis, an approach aimed at mitigating risk to the global financial system (systemic risk). However, as discussed in section 3 below, this macro-prudential approach has not

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<sup>208</sup> Bradford and Lim (n 200).

<sup>209</sup> Basel Committee on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (Bank for International Settlements 2010).

<sup>210</sup> Basel Committee on Banking Supervision, *Basel III: The Liquidity Coverage Ratio and Liquidity Risk Monitoring Tools* (Bank for International Settlements 2013); Basel Committee on Banking Supervision, *Basel III: The Net Stable Funding Ratio* (Bank for International Settlements 2014).

fundamentally transformed either the structure or ideational infrastructure of the global financial system. These reforms merely strengthened the market-based mechanisms of regulation, while preserving both the ideational and technical infrastructure in which discredited practices of regulatory neoliberalism continue to be embedded. This includes the use of credit rating agencies, and their related risk calculation technologies which had failed to detect the sub-prime housing crisis in the US.

Despite the revolutionary context presented by the 2008 global financial crisis and its aftermath, Third World State contestation of the transnational financial regulatory order has been disappointingly ambivalent, considering the dire economic and social consequences on emerging market and developing economies. On the one hand, Helleiner notes that Third World challenge to Anglo-American hegemony turned out to be less significant than anticipated, as countries such as China, newly admitted into the transnational regulatory institutions, played a low-key role in the reform deliberations, perhaps due to their inferior market power.<sup>211</sup> While they generally supported the tighter international standards and macroprudential approaches, their main objections were geared towards protecting capital controls as macroprudential tools.

However, their stances were sometimes contradictory, such as when some Third World countries opposed the 2010 international Financial Transactions Tax (FTT) initiative proposed by the EU, due to their concerns that the tax would be diverted to help the Eurozone countries, rather than poor countries.<sup>212</sup> In fact, the policy preferences of major emerging market economies such as China were instrumental in maintaining the status quo of regulatory neoliberalism, such as their preferences for export-oriented growth strategies.<sup>213</sup> The ideational infrastructure of the global financial markets thus remained intact, despite their de-legitimation by the 2008 crisis.

On the other hand, emerging market and developing economies have undertaken some notable moves outside the transnational regulatory order, which have attempted to challenge Anglo-American hegemony. The BRICS (including South Africa, since 2010) coalition of emerging market economies has flexed its geopolitical weight, and formalizing its engagements

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<sup>211</sup> Helleiner, 'Was the Market-Friendly Nature of International Financial Standards Overturned?' (n 27) 92.

<sup>212</sup> Lesley Wroughton, 'G20 Fails to Endorse Financial Transaction Tax' *Reuters* (4 November 2011) <<https://www.reuters.com/article/g20-tax/g20-fails-to-endorse-financial-transaction-tax-idUSN1E7A302520111104>> accessed 14 January 2018.

<sup>213</sup> Helleiner, 'Introduction and Overview' (n 28) 18.

as the 'BRICS Forum', emerging as a geopolitical rival to the G8. Some of the significant financial regulatory initiatives challenging the status quo order include the BRICS (New) Development Bank (NDB), the BRICS Contingent Reserve Arrangement (CRA) and the BRICS Payment System.

The NDB is a multilateral development bank, formed by the BRICS in July 2014, "to support public or private projects through loans, guarantees, equity participation and other financial instruments" and to "cooperate with international organizations and other financial entities, and provide technical assistance for projects to be supported by the Bank."<sup>214</sup> The NDB has been touted as a not very significant challenge to the hegemony of the IMF and World Bank, as its US\$ 100 Billion initial capital pales in comparison to the IMF's US\$ 750 Billion liquidity, the World Bank's US\$ 200 Billion, and the Asian Development Bank's US\$ 165 Billion lending capacity, respectively.<sup>215</sup> More importantly, other than promising cheaper and faster loans, the NDB has not indicated an ideational shift from the BWIs policy orthodoxy.

The CRA, also formed by the BRICS in July 2014, is a "self-managed contingent reserve arrangement to forestall short-term balance of payments pressures, provide mutual support and further strengthen financial stability". Recognising the liquidity pressures faced by EMDEs that have undergone rapid liberalization under the BWI policies, the CRA is a framework for providing liquidity and other support against global financial market pressures, and is largely seen as a challenge to the jurisdiction of the IMF.<sup>216</sup> The CRA, however, has also been criticized for not representing any significant shift from the BWI policy orthodoxy of neoliberal financial globalization.<sup>217</sup>

The BRICS Payment System was mooted at the 2015 BRICS summit in Russia, as an alternative to the SWIFT payment system: "a transnational multilateral payment system that would provide greater independence, would create a definite guarantee for BRICS". Russia has promoted the establishment of a rival to SWIFT as its banks and politically-connected

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<sup>214</sup> New Development Bank, 'Agreement on the New Development Bank' (New Development Bank 2014).

<sup>215</sup> See generally, Chris Dixon, 'The New BRICS Bank: Challenging the International Financial Order?' (London Metropolitan University 2015) Global Policy Institute Policy Paper 28.

<sup>216</sup> Nicolette Cattaneo, Mayamiko Bizwick and David Fryer, 'The BRICS Contingent Reserve Arrangement and Its Position in the Emerging Global Financial Architecture' (South African Institute of International Affairs 2015) SAIIA Policy Insights 10 The CRA, according to the authors, could signal emerging market economies' independence from the IMF.

<sup>217</sup> Mayamiko Bizwick, Nicolette Cattaneo and David Fryer, 'The Rationale for and Potential Role of the BRICS Contingent Reserve Arrangement' (2015) 22 South African Journal of International Affairs 307, 320.

individuals have increasingly become targets of US financial sanctions. This therefore represents a structural, rather than ideational challenge to US neoliberal hegemony.

In late 2014, China originated other multilateral monetary partnerships to challenge BWI hegemony, including the Silk Road Infrastructure Fund (SRIF) and the Asian Infrastructure Investment Bank (AIIB). The SRIF is a State-owned investment fund of the Chinese government, which aims to promote infrastructure and linkages within Central and Southern Asia. The AIIB, with a membership of 56 States, is a multilateral development bank that aims to support the building of infrastructure in the Asia-Pacific region. It has attracted the membership of emerging market and developing countries in Asia, and also developed countries such as the UK, Germany, France, Italy, Australia and South Korea, against the protestations of the US, which has argued that the AIIB will not operate to the high standards of the BWIs. In April 2015, Larry Summers, a former US Treasury Secretary, remarked that “this past month may be remembered as the moment the United States lost its role as the underwriter of the global economic system”.<sup>218</sup>

Despite not necessarily challenging the ideational foundations of BWI hegemony, these initiatives have challenged the structural dominance of the US and BWIs in transnational finance, to the extent that they have signalled a multipolar evolution of financial markets power. Other Third World State challenges to US structural power in global financial regulation have also included bilateral currency swap arrangements between countries, especially with China and Russia, as a challenge to the dominance of the US dollar in international finance.

Third World countries have also made symbolic challenges to the post-crisis domination of the regulatory reform debate by the G20/BWI axis, which has discursively omitted radical proposals to the reform of the transnational financial regulatory order. For example, in 2009, the G77 and China managed to push through a Resolution of the UNGA, asserting the legal and political competence, jurisdiction and legitimacy of the UN to discuss and make recommendations on the 2008 financial crisis and international regulatory reforms.<sup>219</sup> This effort was made against

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<sup>218</sup> Lawrence H Summers, ‘Time US Leadership Woke Up to New Economic Era’ <<http://larrysummers.com/2015/04/05/time-us-leadership-woke-up-to-new-economic-era/>> accessed 11 January 2018.

<sup>219</sup> United Nations General Assembly, ‘Res 63/277 on Organization of a United Nations Conference at the Highest Level on the World Financial and Economic Crisis and Its Impact on Development (9 April 2009) UN Doc A/RES/63/277’; See also United Nations General Assembly, ‘Res 63/303 on Outcome of the Conference of the World Financial and Economic Crisis and Its Impact on Development (9 July 2009) UN Doc A/RES/63/303’.



objections of the US and other developed countries, who argued that the UN lacked the expertise or mandate to undertake such deliberations.<sup>220</sup>

The significance of the UN review, and the qualms of the US and its allies to the process, were evident in the conceptual tangent of the report authored by the Stiglitz Commission, and adopted by the Assembly. The report reframed the 2008 crisis as not merely financial but also social, and also as exhibiting the inherent nature of the global financial system, rather than the failure of regulatory design, and as a product of the deliberate choice of regulators and policy makers. In addition, the report noted the side-lining of fundamental aspects of the neoliberal financial market structure e.g. market failure, economic externalities, public goods and social equity, as “incidental rather than fundamental issues of economic management” to be dealt with in the post-crisis reform program.<sup>221</sup> In this effort, Third World countries sought to reorient the discursive and ideational tangent of transnational financial regulation, and the 2008 crisis.

Third World countries have also used the UNCTAD, an international organization that has traditionally espoused the Third World’s sensibilities on its relationship with International Law, to reframe the discourse of the 2008 crisis. In its 2015 Trade and Development Report, which discusses how the international financial architecture can work for development, UNCTAD critiqued the increasing financialization of the global and national economies, and the resultant shrinking of States’ regulatory space and policy instruments.

The report also questions the development impact of BWIs’ policy orthodoxy of prioritizing foreign capital inflows into developing economies. The report also takes issue with the growing disconnect between the real and financial economies, and the prominence of speculative capital over entrepreneurial capital, emphasizing the need for finance to serve the needs of the real economy and society.<sup>222</sup> The Stiglitz Commission and UNCTAD 2015 reports are indeed important intellectual challenges to the ideational infrastructure of transnational financial regulation.

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<sup>220</sup> United Nations (n 24) 9.

<sup>221</sup> See United Nations (n 24).

<sup>222</sup> United Nations Conference on Trade and Development, ‘Financial Regulatory Reform after the Crisis’ (n 29) v–xviii.

### 3. Resilience of Regulatory Neoliberalism after the 2008 Global Financial Crisis

#### 3.1. The Post-Crisis Resilience of Neoliberalism

According to Helleiner, the 2008 global financial crisis was interpreted by many as a revolutionary moment spelling the death knell of regulatory neoliberalism, and there was wide expectation that the ensuing reforms to transnational and national financial markets and attendant regulations would be fundamentally restructured.<sup>223</sup> However, a consensus is emerging that, like previous moments of rapture in the international financial order, regulatory neoliberalism has proven its resilience against the crisis. Chimni argues that market-driven regulation of global markets remains the leading view of regulators and policy makers, as exhibited by Third World countries' continued deregulation of financial markets and maintenance of capital account convertibility.<sup>224</sup> Porter also observes that the three-decade trend of transnational interdependence in financial transactions and governance is increasing rather than reversing.<sup>225</sup>

Herr also contends that the post-crisis transnational financial regulatory reforms have not fundamentally changed the global financial system. They retain the logic of financialization, and a faith in the role of efficient capital markets and unregulated financial innovation in economic growth, while leaving unchallenged the interest rate regimes, international capital flows and current account imbalances that were the causes of financial instability in global markets.<sup>226</sup>

This view of the reforms is also shared by UNCTAD, which in its 2015 Trade and Development report, further argues that the post-crisis transnational financial reforms are designed to preserve the status quo of regulatory neoliberalism.<sup>227</sup> In the International Investments Law regime, Perrone also contends that the 'balancing regime' has preserved the legal techniques that TNCs invoke to control local resources, e.g. contractualization of foreign investment

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<sup>223</sup> Helleiner, 'Was the Market-Friendly Nature of International Financial Standards Overturned?' (n 27) Helleiner states that this expectation was based on the combination of: political weakening of private financial interests, lost credibility of free market ideas; challenge to Anglo-American leadership.

<sup>224</sup> Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TMAIL) Perspective' (n 30) 261.

<sup>225</sup> Porter (n 31) 5.

<sup>226</sup> Hansjörg (n 32) 16.

<sup>227</sup> United Nations Conference on Trade and Development, 'Financial Regulatory Reform after the Crisis' (n 29) 111.

relations, and fails to deal with the rising inequality and excessive power of MNCs thereby preserving the logic of neoliberal legality.<sup>228</sup>

### **3.2. Neoliberal Regulatory Continuity in the Third World**

Abi-Saab notes that despite originating from, and largely manifesting in the US and the UK, the 2008 financial crisis was significant for Third World historical resistance to transnational regulatory neoliberalism in finance, as it exposed the fundamental failings, inequality and inherently speculative nature of the financialized global economy, and gave fresh impetus to calls for deep restructuring that would reign in its abuses and manipulations.<sup>229</sup> Chimni also called for a class approach that would examine the impact of the global financial system on the lives of ordinary people, rather than markets, international financial institutions, and States.<sup>230</sup>

UNCTAD also identified the taming of speculative international capital movements, especially from foreign banks with EMDE subsidiaries as a priority area for regulatory reform.<sup>231</sup> As observed by Sornarajah, neoliberalism has lingered on, particularly in international law, ensuring the domination of Third World economies by developed country economies, and preservation of the status quo.<sup>232</sup> Taylor also argues that, despite their touted rise, the BRICS and other powerful emerging market economies are unlikely to challenge the transnationalization of global finance.<sup>233</sup> In fact, more significant is Chimni's observation that the liberal international economic order continues to receive the support of powerful developing economy States.<sup>234</sup>

Various TWAIL and non-TWAIL scholars have provided different reasons for the resilience of regulatory neoliberalism and the globalization of financial markets, especially in Third World countries, despite the successive financial crises that have delegitimated neoliberal regulatory logic. They are roughly grouped into four related factors: the structural power of neoliberal

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<sup>228</sup> Nicolas M Perrone, 'The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity' (2016) 23 *Indiana Journal of Global Legal Studies* 603, 603–604.

<sup>229</sup> Abi-Saab (n 85) 1961.

<sup>230</sup> BS Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21 *European Journal of International Law* 57, 58.

<sup>231</sup> United Nations Conference on Trade and Development, 'Financial Regulatory Reform after the Crisis' (n 29) 104.

<sup>232</sup> Sornarajah, 'On Fighting for Global Justice' (n 114) 1977.

<sup>233</sup> Taylor (n 72) 6.

<sup>234</sup> Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective' (n 30) 270–271.

hegemony; the material basis of neoliberal financial markets; Third World transnational capitalist class (TCC) interests; and the ideational power of neoliberalism.

### **3.2.1. Structural Power of Neoliberal Hegemony**

Helleiner argues that US structural power in the global economy is the main determinant of the post-crisis status quo financial regulatory outcomes, and is in fact more significant than transnational elite dominance or neoliberal hegemony. This structural power emanates from the dollar's global role as the main transacting and reserve currency in international trade and finance.<sup>235</sup> In addition, the attractiveness of the US financial markets, its strength as an export market, its geopolitical strength, and control of transnational financial regulatory institutions, has ensured that the debate on transnational financial regulation mirrors the preferences of the 'Wall Street-Treasury Complex'.<sup>236</sup>

However, Baker argues that the role of the Wall-Street Treasury complex in dictating emerging markets economies' reforms, whether directly or through BWIs, is grossly over-estimated, and constraints on them under-estimated, and that the relationship between the US Treasury and transnational regulators can be explained more by a shared world-view of neoliberal ideas and intellectual prejudices.<sup>237</sup> Thus, this project argues that while Third World contestation of US structural power through BRICS multilateral monetary cooperation initiatives such as the NDB, the CRA and the AIIB are important steps, they do not significantly challenge the neoliberal globalization of financial markets, unless they adopt a radically different ideational infrastructure and State practice that focuses on issues of justice, equity and equality in financial market relations, in favour of Third World peoples, as called for by Sornarajah.<sup>238</sup>

### **3.2.2. Neoliberal Materiality in the Global Financial Markets**

The theory of the US structural power as a unipolar, hegemonic force in international financial regulation has also been questioned by Stephen, who argues that the emergence of the BRICS will not challenge economic globalization, or transnational economic regulation, as "global

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<sup>235</sup> Helleiner, 'Introduction and Overview' (n 28) 15–16.

<sup>236</sup> *ibid*; The term 'Wall Street-Treasury complex' was first coined by Bhagwati in Jagdish Bhagwati, 'The Capital Myth - The Difference between Trade in Widgets and Dollars' (1998) 77 *Foreign Affairs* 7, 7.

<sup>237</sup> Andrew Baker, 'Financial Crises and US Treasury Policy: The Institutional and Ideational Basis of American Capability' in J Robertson (ed), *Power and Politics After Financial Crises: Rethinking Foreign Opportunism in Emerging Markets* (Palgrave Macmillan 2008) 49–50.

<sup>238</sup> Sornarajah, 'On Fighting for Global Justice' (n 114) 1976. Sornarajah calls for TWAIL lawyers to advocate strongly for a desired norm on the basis of justice, and to marshal support for it from the academic community and from State practice.

networks of production and exchange are underpinned not by a unipolar distribution of international power, but by the material reorganization of the global economy”.<sup>239</sup> This neoliberal materiality is exhibited in the embedding or underwriting of market integration and economic denationalization by “technological and structural trends endogenous to world capitalism”.<sup>240</sup> This perhaps explains the status quo nature of the BRICS multilateral financial arrangements, such as the NDB and the CRA discussed earlier above. Relying on Stephen’s thesis, Taylor argues that neoliberalism has emerged more resilient from the crisis, having incorporated new centres of accumulation, and assimilated hegemonic classes from the emerging market economies.<sup>241</sup>

Wigan has expounded on the material embedding of neoliberalism in examining what he calls the “exorbitant privilege of financial production”.<sup>242</sup> He argues that since financial innovation exhibited in contemporary financial markets has broken the limits of traditional financial production, it has forced governments to recognize (through practices of bailouts and asset swaps) these synthetic or artificial financial assets as global money, out of a concern for global systemic stability. Consequently, this recognition, legitimation and legalizing of these material products of private financial innovation has shifted power to private actors in financial markets.<sup>243</sup> This material reorganization of the global financial markets has stripped States and transnational regulators of the ability to structure the financial system, and allowed market actors to continue to define the nature of the problems and possible solutions in the global economy, thereby sustaining the status quo.<sup>244</sup>

The implication of this material reorganization of neoliberal hegemony is that neoliberal transnational regulatory standards are no longer embedded in international law texts and regulatory standards, but rather an assemblage of ideas, texts, financial innovations, technologies, artefacts, routines and practices that form part of the everyday life of global,

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<sup>239</sup> Stephen (n 17) 930.

<sup>240</sup> *ibid* 930. Stephen argues that the integration of BRICS into the historical structure of global capitalism has reduced traditional sources of great power conflict, and made them heavily dependent on the existing institutional framework established by the liberal West. This facilitates their integration into the existing neoliberal governance order.

<sup>241</sup> Taylor (n 72) 6.

<sup>242</sup> Wigan (n 35) 118.

<sup>243</sup> *ibid*.

<sup>244</sup> Edward S Cohen, ‘Assessing the Impact of the Global Financial Crisis on Transnational Regulatory Governance: The Case of Public-Private Hybrid Regulatory Networks’, *Third Biennial Conference of the ECPR Standing Group on Regulatory Governance, University College, Dublin* (2010) 18 <<http://www.regulation.upf.edu/dublin-10-papers/4H3.pdf>> accessed 17 September 2017.

including Third World peoples. This neoliberal materiality is recognized in TWAIL's shift of focus on the operation of international law and regulation, from the international plane of transnational regulatory institutions, to the local sites in the Third World, where International Law is performed in quotidian economic life. These include what Eslava and Pahuja have termed "the sites and objects in which international law operates today...[including] administrative procedures, subject formations, spaces and artefacts, that are usually identified as expressions of other normative orders, social spheres, or simply innocuous technical or commercial things".<sup>245</sup>

This thesis explores this neoliberal materialism in financial technologies and related practices, including credit information sharing technology, discussed in the Chapter 6 Kenya case study.

### **3.2.3. Third World Transnational Capitalist Class (TCC) Interests**

Another reason for the resilience of regulatory neoliberalism, and the status quo outcomes of regulatory reforms, is the commonality of interests between Third World and global neoliberalism. Chimni argues that there has emerged globally, an 'imperial social formation' in the form of a transnational capitalist class (TCC), wherein the interests of particular classes in emerging economies have coincided with those of their counterparts in the developed countries, as they both gain from financial globalization and regulatory neoliberalism.<sup>246</sup>

This TCC is described by Sklair as consisting of: TNCs and their local affiliates (the corporate faction); the globalizing State and inter-State bureaucrats and politicians (the State faction); globalizing professionals (the technical faction); and merchants and media (the consumerist faction)<sup>247</sup> Thus, the various factions of this TCC within Third World countries, including financial markets actors, financial markets policy makers and regulators, technocrats and professionals such as lawyers and economists, and market consumers, such as bank customers and currency traders, are more likely to champion the status quo of a globalized financial markets, as it serves their particular interests well.

This argument is reflected in Chimni's observation that the powerful emerging market and developing economies have abandoned their pursuit for "traditional, anti-imperialist policies" and for the retrieval of critical policy space from international economic institutions, and have

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<sup>245</sup> Eslava and Pahuja (n 14) 109.

<sup>246</sup> Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective' (n 30) 270–271.

<sup>247</sup> Leslie Sklair, *Globalization: Capitalism and Its Alternatives* (3rd edn, Oxford University Press 2002) 99.

instead opted to implement neoliberal regulatory reforms so as to “facilitate the entry of capital, goods and services from the industrialized world”.<sup>248</sup> Ikenberry also argues that the BRICS have no interest in contesting the transnational financial regulatory order, as they wish to gain more authority and leadership within it, thus a deep interest to preserve the system.<sup>249</sup> Taylor has also argued that the hegemonic classes from emerging economies have been assimilated into the neoliberal ideological project.<sup>250</sup>

#### **3.2.4. Ideational and Ideological Power of Neoliberalism**

A key reason for the post-crisis resilience of regulatory neoliberalism (and which this thesis argues, accounts for the structural power and materiality of financial neoliberalism, and shapes the interests of the Third World in financial globalization) is the ideological and performative power of neoliberalism. UNCTAD blames ideological obstacles (the view that an unregulated private sector optimally allocates financial resources remains embedded in national and international policy circles) as one of the reasons for regulatory reform failure.<sup>251</sup> The conceptual power of neoliberalism is evident in Sornarajah’s argument that the post-crisis neoliberal regulatory paradigm has been strengthened by conceptual links to altruism and universal standards of civilization, through ideas such as universal norms of governance, the autonomy and technocracy of international investment tribunals, the rule of law, and global administrative law.<sup>252</sup> Cohen also sees the resilience of the transnational governance system as rooted in the logic of financialization in contemporary global capitalism, and as being preserved by an intact transnational epistemic community which continues to define the nature of the crisis and potential solutions and regulatory responses.<sup>253</sup>

Thus, at the national level, Engelen et al argue, the implications of an embedded ideational infrastructure of neoliberal legal, economic, and technological ideas and practices, is that democratically elected politicians who sought to ‘politicize’ financial markets and their regulation, were soon marginalized by regulatory technocrats whose mission was to preserve

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<sup>248</sup> Chimni, ‘Capitalism, Imperialism, and International Law in the Twenty-First Century’ (n 63) 35.

<sup>249</sup> G John Ikenberry, ‘The Future of the Liberal World Order: Internationalism After America’ (2011) 90 *Foreign Affairs* 56, 56–57.

<sup>250</sup> Taylor (n 72) 6.

<sup>251</sup> United Nations Conference on Trade and Development, ‘Financial Regulatory Reform after the Crisis’ (n 29) 111.

<sup>252</sup> Sornarajah, ‘On Fighting for Global Justice’ (n 114) 1978–1981.

<sup>253</sup> Cohen (n 244) 18.

the ideational regulatory paradigm.<sup>254</sup> At the transnational level, Chimni argues that the transnational capitalist class used its ideological primacy to shape the foreign economic policy of emerging powers, explaining their support for structures of global capitalism, despite their imperialistic and exploitative nature.<sup>255</sup>

One example of the ideational power of neoliberalism to preserve the status quo in global finance is the emergence of macroprudential regulation (the mitigation of systemic risk) as a regulatory response to global systemic risk. While the concept of macroprudential regulation challenged neoliberal ideas of deregulation and justified more stringent regulation of financial markets, it excluded the more radical reform proposals that could have addressed the systemic flaws of global capitalism.<sup>256</sup> For example, because the concept of ‘systemic risk’ remains rather vague and hard to define, its meaning and policy significance has also remained unclear, giving cover to minimalist versions of macroprudential regulation that constrain markets only in so far as they threaten market stability, thereby leaving unaddressed more significant distributional issues, such as the role of financial markets in the real economy, and increasing inequality.<sup>257</sup> Thus UNCTAD, for example, has labelled prudential regulation insufficient, and called for structural reforms that would focus both on financial stability and on development and social objectives.<sup>258</sup>

Helleiner has therefore contended that the 2008 crisis does not represent a Bretton Woods moment. He argues that, similar to the lull between the 1933 Great Depression and the 1944 establishment of the Bretton Woods system, it will take years for old neoliberal regulatory ideas and practices to lose their legitimacy, and for new ideas and practices to emerge and replace them.<sup>259</sup>

#### **4. Conclusion**

This chapter has explored the first research sub-question: why has the Third World’s historical contestation failed to radically transform the transnational financial regulatory order? The

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<sup>254</sup> Ewald Engelen and others, ‘The Limits of Expertise: The United Kingdom as an Unhappy Family’, *After the Great Complacency: Financial Crisis and the Politics of Reform* (Oxford University Press 2011) 188.

<sup>255</sup> Chimni, ‘Capitalism, Imperialism, and International Law in the Twenty-First Century’ (n 63) 34–35.

<sup>256</sup> Helleiner, ‘Was the Market-Friendly Nature of International Financial Standards Overturned?’ (n 27) 27–36.

<sup>257</sup> *ibid.*

<sup>258</sup> United Nations Conference on Trade and Development, *Trade and Development Report 2015: Making the International Financial Architecture Work for Trade and Development* (United Nations Publications 2015) xii.

<sup>259</sup> Helleiner, ‘A Bretton Woods Moment?’ (n 197) 624.



discussion has provided a historical account of the successes and set-backs to Third World contestation, and outlines the key moments of rapture, crisis, reconstruction and neoliberal continuity. While also highlighting the structural power of neoliberal hegemony, the material basis of neoliberal financial markets, and Third World transnational capitalist class (TCC), the discussion has focused on some of the key ideas and technological practices that have been instrumental in the construction of transnational regulatory hegemony.

Section 2 of the chapter has explored the ideas and technological practices across five phases of Third World contestation of transnational financial regulation: the establishment of the NIEO; the 1973 Oil Crisis, establishment of floating exchange rates and advent of IMF conditionalities; the 1989 end of the Cold War and entrenchment of the Washington Consensus; the 1990s emerging markets' financial Crises and the establishment of the NIFA; and the 2008 global financial crisis and the emergence of the macro-prudential regulatory agenda. The debate on the establishment of the NIEO was an ideological struggle, to the extent that the Third World sought to deconstruct, while the developed States sought to re-legitimate, key ideas underpinning the post-WW2 liberal economic order, including the universality of international law, and the economic orthodoxies of Comparative Advantage, and the international division of labour. The resilience of these ideas sabotaged the reform agenda of the NIEO.

The era succeeding the 1973 oil crisis and floating exchange rates was marked by the ascendancy of the political ideology of neoliberalism, and a new rationality of neoclassical economics, which emphasized the scientific nature of financial markets, and the need for an apolitical and technocratic approach to their regulation, ushering in the era of regulatory neoliberalism. These ideas undergirded the IMF and World Bank expansion of their regulatory role over Third World States, through loan conditionalities and Structural adjustment programs, which emphasized the rationality of financial markets liberalization policies, and the expertise of BWI bureaucrats in managing Third World economies. In addition, in response to Third World contestation of these SAPs, the BWIs appropriated the discourses of 'development', 'poverty', 'environment', and 'human rights' to further expand the scope of their management of Third World economies.

The 1989 end of the Cold war witnessed the consolidation of neoliberal hegemony, as neoliberalism emerged the ideological victor, and further legitimated the set of financial markets liberalization policies contained in the Washington Consensus. Key ideas to emerge

from the BWIs during this era included discourses of 'governance', the 'Rule of Law', and New Institutional Economics theories on the role of 'institutions' in the development of financial markets. These ideas, embedded in BWIs' loan conditionalities, and various investment climate indicators, including the World Bank's Doing Business indicators, and the Rule of Law indexes, were key to the further liberalization of Third World financial markets, as evidenced by the explosion of bilateral investment treaties signed with developed countries.

The 1990s emerging markets financial crises demonstrated the hegemonic hold of regulatory neoliberalism in the international financial order. The ideational fundamentals of the Washington Consensus, New Institutional Economics, good governance and the Rule of Law, remained in place within the NIFA, despite coming into question as a result of the emerging markets' financial crises. This included the policy of liberalizing capital controls, championed by the IMF. The failure in Third World contestation was reflected in NIFA's adoption of largely corporate governance-related international standards, rather than a radical overhaul of the regulatory neoliberalism underpinning the transnational financial markets.

The 2008 global financial crisis, at least while it lasted, once again shook the foundations of regulatory neoliberalism, and promised to finally provide a context for the radical overhaul of the transnational financial regulatory order. However, ten years later, it is clear that the champions of the status quo neoliberal hegemony have triumphed over those calling for radical reforms. In place of fundamental change, the former have offered a discourse of macroprudential regulation that all but addresses the foundations of the periodic global and regional financial crises, which favour the financialization of the global economy over other social goals.

Both TWAIL and non-TWAIL scholars have underscored the various factors reproducing neoliberal regulatory hegemony in global financial markets, including: the structural power of (especially) the US and other developed countries; materially-embedded nature of regulatory neoliberalism; the emergence of a transnational capitalist class that assimilates Third World hegemony; and the ideational and ideological power of neoliberal discourse and philosophies. The discussion has therefore demonstrated the Chapter's argument that despite the periodic financial crises, legal, economic and technological ideas and technological practices continue to exert ideological and performative power that reproduces and sustains regulatory neoliberalism within the global financial markets and related transnational regulatory institutions.

The power of the ideational and technological infrastructure of the financial markets has been key to the resilience of regulatory neoliberalism, especially after the 2008 crisis. It is therefore crucial that TWAIL and other Third World practitioners give adequate focus to the ideological and performative power of legal, economic and technological ideas and related practices in counter-hegemonic praxis. In addition, this praxis should engage not only International Law but also national (Third World) regulation of financial markets. The next Chapter explores the power of neoclassical economic ideas, doctrines of legal formalism, technological ideas, and their related practices, within the BWIs, and how this power shapes the latter's relationship with Third World countries.

## CHAPTER TWO

### Theorizing the Role of Legal, Economic and Technological Ideas and Practices in Reproducing Neoliberal Financial Markets

#### 1. Introduction

This chapter outlines the theoretical framework for articulating the role of legal, economic, and technological ideas and their related practices in the regulation and reproduction of neoliberal financial markets in Third World countries. This ideational role is key to unravelling the failure of the Third World to successfully contest and reform the neoliberal regulatory paradigms in transnational and national financial regulatory orders. Chapter 1 has discussed some of the factors that have contributed to the Third World's failure to significantly reform the neoliberal transnational financial regulatory order to reflect its peoples' interests. These include: US structural power; neoliberal materiality in the global financial markets; transnational capitalist class interests in the Third World; and the ideational power of neoliberalism. The thesis focuses on the last factor - the neoliberal hegemony constituted by legal formalism, neoclassical economic theory, and technological ideas, and their related practices and institutions which, it is argued, also reproduces neoliberal financial markets and regulatory neoliberalism in Third World countries.

The main argument explored in this study is that the ideational infrastructure of the financial markets legitimates, constitutes and performs neoliberal financial markets and regulatory neoliberalism, within the transnational and national financial regulatory institutions. This ideational infrastructure ideologically legitimates and performs regulatory neoliberalism as the only rational regulatory paradigm, while concealing their reproduction of inequality and power asymmetries. It also restricts the regulatory possibilities available to Third World policy makers and regulators for addressing the externalities of neoliberal financial markets, including, as explored in the Kenya case studies, high interest rates and high indebtedness.

Based on this broader argument, this chapter discusses the second research sub-question: to what extent can interdisciplinary ideology-critique and performativity theory form theoretical assemblages within TWAIL praxis of resetting the international financial regulatory order to speak for Third World concerns? The chapter argues that the nature of neoliberal hegemony in global financial markets has transformed from an essentially structural, unipolar, power of the

United States, to a multipolar hegemony augmented by ideas and technological materialities. This necessitates the appreciation of the ideological and performative power of distinct ideational disciplines and related practices in financial markets, thus calling for an interdisciplinary theoretical approach beyond traditional TWAIL frameworks.

Exploring the co-constitutive ideological and performative nature of legal, economic and technological ideas and practices (normally pigeonholed in distinct disciplines and theoretical approaches), necessitates an eclectic theoretical approach that draws from Critical Theory (including Critical Legal Studies, Critical Realism, and Critical Theory of Technology), Actor-Network Theory (ANT), and Economic Performativity Theory. This eclectic approach demonstrates the insights that traditional theoretical frameworks deployed in analysis and critique of transnational financial regulatory institutions from a Third World perspective, including Marxist Approaches to International Law, and TWAIL, can levy from ANT and Economic Performativity. These insights include the agential and performative power of ideas, discourses, texts, metrics, artefacts, and computing technologies within financial markets, and their role in making durable the power structures produced by legal and economic ideologies.

The chapter is organized into six other sections. Section 2 outlines the ideational infrastructure of financial markets as including legal, economic and technology ideas and practices, and argues for an inter-disciplinary approach to theorising its ideological and performative power. Section 3 underscores the critical context of the study, as Third World contestation of neoliberal hegemony in the transnational financial regulatory order. It argues that TWAIL theorists and scholars have recognised the ideological and performative power of ideas, practices, and technologies, and their role in sustaining Western hegemony in International Law.

Section 4 explores ideology critique as critical theory for analysing the neoliberal ideational infrastructure of financial markets. It argues that ideas underpinning legal formalism, neoclassical economic theory, and technological determinism and autonomy, are ideological to the extent that they legitimate neoliberal capitalism and regulatory neoliberalism as the neutral, rational, and natural, while concealing their establishment and exacerbation of inequalities and relations of domination.<sup>260</sup> Section 5 discusses Performativity Theory, and its

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<sup>260</sup> The thesis uses the terms 'neoliberalism' and 'neoliberal capitalism' interchangeably, to refer to free-market capitalism, where market forces and market relations are given a predominant role in the economy, while the State plays a restrained, minimalist role. See Kotz (n 3) 2, 8–9.

articulation of the power of ideas in constituting financial markets. It articulates the power of legal, economic and technological ideas and practices beyond mere ideological legitimation, to actual constitution or performance of those ideologies, within financial markets.

Section 6 examines how neoliberal financial markets are ideologically and performatively co-constituted by the composite ideational infrastructure, through five key strategies: universalization, reification, naturalization, rationalization, and narrativization. Section 7 concludes by restating the potential of an assemblage between ideology critique and performativity theory in the TWAIL praxis of not only deconstructing neoliberal capitalism and regulatory neoliberalism, but also constituting diverse economies and regulatory paradigms.

## **2. The Ideational Infrastructure of Financial Markets**

Theoretical approaches that explain individuals' cognition of the society, economy and markets, and their subsequent action, traditionally take two main (by no means exhaustive) conceptual trajectories. The first is the mainstream economics approach, which assumes the individual – homo economicus - as the only economic actor, with inherent capacities for rational, individualistic, utility-maximising economic action.<sup>261</sup> The second is economic sociology, which theorizes an actor-in-society – the *homo sociologicus* – as a complex, variable, cultural, expressive, with fluid preferences not necessarily informed by personal gain, and who is engaged in both individual and collective, economic and non-economic action.<sup>262</sup>

Even though economic sociology has evolved into a valuable critique of mainstream economic theory's hegemonic description of economy, society and markets, both approaches maintain an anthropocentric view of agency, which disregards or gives less emphasis on the role of non-human elements, including ideas, discourses, texts, artefacts and technologies, in the constitution of meaning, and the enabling and restriction of reflexive action. This anthropocentric theoretical disposition is not inconsequential: this instrumental conceptualization of these non-human elements ignores their ability to construct meaning, allocate identities, interests and capacities, and also enable and constrain action. Consequently, theories of international law and regulation, and international relations, have

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<sup>261</sup> Paul Hirsch, Stuart Michaels and Ray Friedman, 'Dirty Hands' versus "clean Models": Is Sociology in Danger of Being Seduced by Economics?' (1987) 16 *Theory and society* 317, 322.

<sup>262</sup> *ibid*; Alex Preda, 'The Sociological Approach to Financial Markets' (2007) 21 *Journal of economic surveys* 506, 508. Preda argues that since homo sociologicus is not rational, and is aware of his limitations, he forms networks to gather information and enhance his agency.

focused on human agency in the exercise of power in transnational and national financial market regulation.

Recent work in Science and Technology Studies (STS), Social Studies of Finance (SSF) and ANT have explored the agential role of non-humans in social life, including in market construction and performance.<sup>263</sup> Following this queue, the theoretical framework adopted in this discussion to analyse financial markets expands the scope of agency within financial markets to include ideas, technologies, metrics, texts, and practices, which play a significant role in the operation of markets. As cognitive infrastructure for market activity, they constitute the paradigms of market actors, including traders, consumers, regulators and policy makers, and consequently construct meaning, and enable or constrain certain types of action.

Therefore, the vocabulary of the 'ideational infrastructure' of financial markets is adopted, to conceptualize legal doctrines, economic theories, technological ideas, artefacts and their related practices, as not merely functional tools of human economic action, but rather economic agents that co-constitute economic action. 'Co-constitution' means that, despite their inanimate nature, these ideas and artefacts have a capacity to act, but only within a specifically-configured assemblage of other human and non-human 'actants', wherein agency is distributed in relative degrees.<sup>264</sup> In addition, the unifying vocabulary stresses the complex co-constitutive relationship between legal, economic, technological and other ideas and practices. This is explored more explicitly in the discussion of ideology critique and performativity theory in sections 4 and 5 below.

The ideational infrastructure of financial markets is thus conceptualized as entailing at least three key ideational disciplines with complex, co-constitutive, but not necessarily causal, relationships, due to their roles and prevalence in contemporary financial markets. First, as noted by Callon and Lang, the dominant branch of economics – neoclassical (financial) economics – is the main "calculative" framework which equips financial markets players with causal models for interpreting the consequences of various trends and courses of action in the financial markets.<sup>265</sup> Second, as argued by Eslava, Cutler, Pistor, and Edelman & Stryker, legal

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<sup>263</sup> See generally Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press 2005); Michel Callon, 'Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay' (1984) 32 *The Sociological Review* 196; Preda (n 55).

<sup>264</sup> Jane Bennett, 'Edible Matter' (2007) 45 *New Left Review* 133–134.

<sup>265</sup> Lang (n 45) 165. Lang discusses how the practice of trading in foreign exchange markets requires a causal model to assess the likely consequences of different actions. Callon, 'Actor-Network Theory—the Market Test' (n 53) 192. Callon argues that economic theory serves as a frame of reference for market calculation.

norms – originating from Lex Mercatoria, and now embedded in international and national law – also play not only a regulatory but also a constitutive role. They create cognitive possibilities for bringing into existence various legal institutions in financial markets, including juridical persons, property, and contract.<sup>266</sup> Third, as argued by Callon & Muniesa, and Preda, technological artefacts and practices, prevalent in contemporary financial markets, play ideological, constitutive, deliberative and representational roles in market transactions and their regulation.<sup>267</sup>

### **3. Third World Contestation of Transnational Financial Regulatory Neoliberalism**

As discussed in the introduction Chapter and also Chapter 1, this study aims to contribute to the body of academic and political projects that critically examine the relationship between, on the one hand, Third World countries and, on the other hand, International Law, and the transnational financial regulatory order. These projects have historically contested the neoliberal bias of transnational law and regulation, and its negative impact on Third World countries, through the related theoretical prisms of TWAIL and Marxist approaches to International Law.

TWAIL (which includes MAIL, critical, feminist, post-modern, post-colonial theory, literal theory, modernist, Marxist theory, and critical race theory as theoretical frameworks) has traditionally been concerned with how international law can be used by the Third World to advance their own interests within the globalized economy.<sup>268</sup> Recognising the duplicity of international law, as a result of the political, cultural and economic biases embedded within it, giving it both an oppressive and alienating and at the same time an emancipatory potential, TWAIL scholars are concerned with calibrating or resetting International Law in favour of the

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<sup>266</sup> Eslava (n 54) xvi. Eslava argues that International Law is both ideological and constitutive, to the extent that it ‘forms and reshapes our surrounding realities to such an extent that it actually becomes impossible to conceive of international law as existing and operating except through the very things and bodies it creates’. Cutler, *Private Power and Global Authority* (n 54) 6. Cutler argues that the law is not a neutral objective force ‘out there’, but is ‘in here’, both constituting and constituted by social, economic and political forces. Deakin and others (n 54) 192–193. The authors argue, for example, that law constitutes the institution of property through legal definition, and through setting up systems of State accreditation, legitimation and enforcement of property rights. See also Edelman and Stryker (n 52) 540.

<sup>267</sup> Preda (n 55) 221. Preda argues that five features constitute agential aspects of financial technologies, in which these technologies constitute the markets: temporal structures, visualization modes, representational and interpretive languages, cognitive tools and categories, and group boundaries. See also Muniesa, Millo and Callon (n 55); See also Callon and Muniesa (n 55).

<sup>268</sup> Gathii (n 148) 37. Gathii notes that ‘TWAIL has a fluid architecture of many different individuals who mix, re-use, and recombine various TWAIL and non-TWAIL ideas and themes.’



“others” within it, that is, the global South.<sup>269</sup> TWAIL’s analysis of power in international law and international relations has conceptualized roughly four perspectives.

The first conception of power (part of TWAIL I) critically examined the international law-sanctioned brute force or coercive authority deployed in imperial, colonial and post-colonial conquests of the Third World.<sup>270</sup> The second conception of power (TWAIL II) entailed the discursive force of the language and practices of international law, including in concepts such as human rights, economic development, and democracy, which reigned in the radical reform demands by Third World States.<sup>271</sup> The third conception of power explored the emergence of non-State actors such as transnational corporations and standard-setting industry associations, which played a significant role in transnational regulation, yet were legally unrecognized, and thus unaccountable under international law.<sup>272</sup> The fourth conception of power has focused on the role of ideas, practices, and artefacts at the local, rather than international level, which translate international law into the everyday life of Third World citizens.<sup>273</sup>

TWAIL’s focus on the reassertion of ideational and technical agency is reflected in the shift to the operation of international law and regulation, from the international plane of international institutions such as the Bretton Woods Institutions (BWIs), to the local sites in the Third World, where International Law is performed in quotidian economic life. These include what Eslava and Pahuja have termed “the sites and objects in which international law operates today...[including] administrative procedures, subject formations, spaces and artefacts, that are usually identified as expressions of other normative orders, social spheres, or simply

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<sup>269</sup> Eslava and Pahuja (n 14) 104–105.

<sup>270</sup> Anghie and Chimni (n 86) 80 Anghie and Chimni note that TWAIL I ‘indicted colonial international law for legitimizing the subjugation and oppression of Third World peoples’ by legalising European conquest of non-European Sovereign societies.

<sup>271</sup> See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005) The author argues that the Bretton Woods institutions were discursively scripted and institutionally structured according to the Dual Mandate, that is, the civilizing mission of the League of Nations. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge University Press 2011) 2. The author examines how the discourses of development and economic growth, and their universality, were used to reign in the Third World calls for radical reform to International Law and its related institutions.

<sup>272</sup> Chimni, ‘Third World Approaches to International Law’ (n 152) 13. Chimni notes that globalization has broken the historical unity of law and State in international law, and decentered law-making processes. In this context, the transnational corporation has emerged as ‘the principal moving force in decentralized law-making’, despite its lack of democratic accountability.

<sup>273</sup> Eslava (n 54) xiv. Eslava explores how international law, when working with norms, discourses, bodies, artefacts and institutions associated with the idea of development, expands covertly into multiple realms of social and material life, at the local rather than international level.

innocuous technical or commercial things”.<sup>274</sup> Nevertheless, there remains scope for explicit recognition, within TWAIL, of the agential role of non-humans in, for example, economic action, the constitution of markets, the construction of meaning, allocation of interests, and the enabling and restriction of courses of economic action.

As explored in the next sections, this study therefore explores the agential power of the ideational infrastructure of financial markets using ideology critique and performativity theory, to build on TWAIL’s academic and political project of resetting and channelling the discursive and technological elements of International law, to speak for the Third World.

#### **4. The Ideological Turn: Ideology Critique of Ideas, Technologies and Practices**

##### **4.1. Ideology Critique: The Relationship between Meaning and Power**

Despite its roots in Marxist ideology, the critical conception of ideology employed in this study is markedly different. A number of Marxist-inspired analyses of ideology have used the term in various ways, three of which need to be discounted first, before articulating this study’s conception. First is the reference to ‘Ideology’ as a systematic and totalising world-view or framework of beliefs about life held by a particular social group which, though existent, are rare and exceptional.<sup>275</sup> Second is the reference to ideology as “false consciousness”, a lack of awareness of one’s own true situation, usually resultant from structures of domination.<sup>276</sup> The problem with false consciousness is its implication that a third party may have privileged access to the truth of a deluded person’s position, and the problematic assumptions about the relationship between objective reality and the knowledge of the experience of that reality.<sup>277</sup> The third use of ideology is as systems of belief of groups or classes.<sup>278</sup> This conception is equally problematic as the existence of distinct classes with distinct interests should be identified empirically rather than assumed conceptually.<sup>279</sup>

This study uses the concept of ideology to articulate the relationship between meaning and power. Ideology is used to refer to “the ways in which meaning serves to establish and sustain

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<sup>274</sup> Eslava and Pahuja (n 14) 109.

<sup>275</sup> Hunt (n 57) 13; Marks (n 38) 110.

<sup>276</sup> Marks (n 38) 110; Austin Sarat and others, ‘From the Special Issue Editors’ (1988) 22 *Law & Society Review* 629, 629.

<sup>277</sup> Marks (n 38) 110, 112; Hunt (n 57) 13.

<sup>278</sup> Sarat and others (n 276) 629.

<sup>279</sup> Hunt (n 57) 13.

relations of domination”,<sup>280</sup> and also to articulate the relationship between ideas and structures of power, and, importantly, “the ways in which meaning can be used as a political tool”.<sup>281</sup> Understood in a critical rather than a neutral sense, ideology is therefore associated with ideas that maintain domination by one group over others. To the extent that this analysis of ideology calls for change, it engages in critique.<sup>282</sup> The power of ideology is located in its ability to connect and combine diverse mental elements (including concepts and ideas) into combinations that influence and structure the perception and cognition of social agents, and create a basis for action or inaction.<sup>283</sup>

While different ideologies are inherent in various ideational systems, and are products of how meaning is produced, diffused, understood and used in different contexts, they employ a few general strategies. Marks identifies five (by no means exhaustive) closely-related strategies that will be explored in the rest of the study: universalisation, reification, naturalization, rationalisation, and narrativization.<sup>284</sup> Universalization involves presenting legal, economic, social and political institutions as objective, impartial, and inclusive, thus creating an illusory unity that masks power asymmetries. The second, reification, entails the conversion of products of human action into transcendental essences, which then dominate their creators; domains of action are converted into fixed and unchangeable, and sometimes, fetishized, phenomena.

The third strategy, naturalization, makes contested arrangements appear obvious and self-evident, and are separate from domains of social action (despite being proxies for normative arrangements), thus foreclosing the imagination of alternatives.<sup>285</sup> The fourth strategy, rationalization, involves “the construction of a chain of reasoning of which the status quo is the logical conclusion...[where] it may be made to seem as if there are good reasons why things are as they are.”<sup>286</sup> Consequently, imagining a change in the status quo is deemed irrational. The fifth strategy, narrativization, involves the historicizing of particular developments through

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<sup>280</sup> Thompson (n 50) 56.

<sup>281</sup> Scott (n 38) 318.

<sup>282</sup> Marks (n 38) 111; Trubek, ‘Where the Action Is’ (n 61) 591.

<sup>283</sup> Scott (n 38) 318; Hunt (n 57) 16.

<sup>284</sup> Marks (n 38) 112 This typology is adapted from Thompson’s original classification of five strategies: legitimation, dissimulation, unification, fragmentation, and reification. See Thompson (n 50) 60.

<sup>285</sup> Victoria Nourse, ‘Law’s Constitution: A Relational Critique’ (2002) 17 *Wisconsin Women’s Law Journal* 23, 24.

<sup>286</sup> Marks (n 38) 112.

particular narratives that endow respectability on particular practices and institutions, and legitimises their perpetuation as progressive.<sup>287</sup>

The ideological nature of the ideational infrastructure of financial markets - that is, its capacity to constitute meaning and thereby influence and structure the perception and cognition of social agents, and to create a basis for action or inaction – is examined below through ideology critique of mainstream legal doctrine, economic theory, technological ideas and related practices.

## **4.2. Ideology Critique of Formal-Liberal Legal Doctrine**

### **Law as Ideology**

Ideology critique of law is one of the core aspects of the Critical Legal Studies (CLS) approach, and which explores the production of ideological images of law, and how these images influence social relations. The core objective of this approach is critique: to not only lay bare the relationship between the understanding of legal concepts and domination in capitalist societies, but also to alter that understanding and those relationships, so as to engage in progressive politics.<sup>288</sup> How legal ideology defines the way social relations are lived and experienced, and also the process of identification and resolution of social and political conflicts, is central to understanding the law's reproduction of neoliberal hegemony in liberal-democratic States.<sup>289</sup>

### **Legal Formalism as Ideology**

Legal positivism, or legal formalism, is ideological as far as its four core claims. The first and most significant aspect is the autonomy of law – “the absolute, unqualified autonomy of the legal order from society”.<sup>290</sup> The claim of law as self-evident, “self-contained system of norms that is ‘there’, identifiable without any reference to the content, aim and development of the rules that compose it...”, ideologically conceals its social and historical origins.<sup>291</sup> The second aspect of law, a consequence of its autonomy, is its ostensible separation from other varieties of social control. These include morality, politics, the economy, and, generally the social, which

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<sup>287</sup> *ibid.*

<sup>288</sup> Hunt (n 57) 11; Trubek, ‘Where the Action Is’ (n 61) 590–591.

<sup>289</sup> N Sargent, ‘Law, Ideology and Corporate Crime: A Critique of Instrumentalism’ (1989) 4 *Canadian Journal of Law and Society* 39, 45.

<sup>290</sup> Balbus (n 7) 572.

<sup>291</sup> Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964) 80.

are deemed impurities that can only contaminate the rationality of legality. A third related aspect is the rendering of law as “distinct, unified and internally coherent”, and also as determinate and predictable in their rendering of outcomes of the juridical process.<sup>292</sup> Because of its autonomy, purity and predictability, legal formalism makes a fourth claim of the law as an objective and legitimate normative mechanism.

Legal formalism’s ideological reproduction of neoliberal financial markets and practices of regulatory neoliberalism is evident in its claims. First, the role of law in formalist ideology is gleaned from what Gordon calls “evolutionary functionalism”, which holds that “the natural and proper evolution of a [progressive] society is towards the type of liberal capitalism seen in the advanced Western nations (especially the US) and that the natural and proper function of a legal system is to facilitate such an evolution.”<sup>293</sup> Second, formal equality under the law ideologically abstracts qualitatively distinct individuals into equal legal subjects able to engage in political and market exchange, while masking and concealing class and social inequalities, and depoliticising capitalist property relations through the separation of the economic and the political spheres. In this way, law neutralises, depoliticises, and maintains coercive, exploitative, and inherently political capitalist relations.<sup>294</sup> The commodity form theory of law articulates the abstracting nature of legal ideology, by originating it in the imperatives of commodity exchange in capitalist economic relations.<sup>295</sup>

Cutler characterises legal formalism as an ideology because “it depicts the world, not as it is, but as it ought to be...a world of objective and autonomous legality in the hopes of creating an autonomous analytical legal science by purging law of historical, political and moral content”.<sup>296</sup> Legal autonomy weakens the links between the law, society, economy, and the political, and fetishizes the law, which then “take(s) on the character of active, productive subjects, whilst social relations take on the character of things”, and undermines efforts at theorising and

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<sup>292</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 2002) 3; Alan Hunt, ‘The Theory of Critical Legal Studies’ (1986) 6 *Oxford Journal of Legal Studies* 1, 4.

<sup>293</sup> Gordon (n 6) 60–65.

<sup>294</sup> A Claire Cutler, ‘Gramsci, Law, and the Culture of Global Capitalism’ (2005) 8 *Critical Review of International Social and Political Philosophy* 527, 532.

<sup>295</sup> It holds that just as the commodity form creates the appearance that all products are equal, the legal form creates an appearance of equality between peoples as legal subjects, while masking and concealing class and social inequalities, and depoliticising capitalist property relations through the separation of the economic and the political spheres. In this way, law neutralises, depoliticises, and maintains coercive, exploitative, and inherently political capitalist relations. Balbus (n 7) 576.; See also Cutler, ‘Gramsci, Law, and the Culture of Global Capitalism’ (n 294) 527–532.; See also China Miéville, ‘The Commodity-Form Theory of International Law: An Introduction’ (2004) 17 *Leiden Journal of International Law* 271, 271.

<sup>296</sup> Cutler, *Private Power and Global Authority* (n 54) 81.

understanding law as not only a historically contingent, ideological social construct, but also as constitutive of social and economic relations.<sup>297</sup>

CLS therefore engages in an ideology critique of legal formalism, questioning the ability of the ostensibly “objective rules within a framework of procedural justice” to resolve social conflict, since the mediating role of law can only achieve at best “a set of results which reflect the unequal distribution of power and resources whilst claiming to act in the name of a set of universal social values”.<sup>298</sup> Since legal doctrine merely masks ideological forces, it cannot be objective, and therefore cannot resolve dilemmas, since it “mirrors and reinforces them through its rhetorical structure.”<sup>299</sup> Formalism is therefore deemed an ideological perpetuation of the myth of rational, neutral and objective rule-based governance. Chapter 5, for example, examines the failure of the formalist conception of the Rule of Law to address the inequality and high indebtedness caused by the liberalization of interest rates in Kenya, due to its imperative to safeguard neoliberal conceptions of contract, property and individual rights. The autonomy and neutrality of legal reasoning and rationality, used by legal specialists to apply doctrine to concrete cases, to reach outcomes independent of ethical and political biases, is rejected by CLS.

#### **4.3. Ideology Critique of Neoclassical Economics**

Neoclassical Economics (NE) has come to dominate the economics discipline, and consequently, its application has spread outside academia to all aspects of economic, social and political life, including, for the interests of this discussion, the financial markets.<sup>300</sup> NE commands the language of science and objectivity, despite the inappropriateness and contradictions inherent in using the methods of natural science in social structures and processes, and has commanded hegemonic control over the discourse employed in economic, social and political life.<sup>301</sup> According to NE, the central economic problem is the scarcity of resources, and how they can be optimally allocated.

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<sup>297</sup> *ibid* 73.

<sup>298</sup> Hunt (n 292) 5, 6.

<sup>299</sup> Robert J Beck, Anthony C Arend and Robert D Vander Lugt, *International Rules Approaches From International Law and International Relations* (Oxford University Press 1996) 229.

<sup>300</sup> Jamie Morgan, ‘Introduction’ in Jamie Morgan (ed), *What is Neoclassical Economics?: Debating the origins, meaning and significance* (Routledge 2015) 1.

<sup>301</sup> For a critical view of this universalisation of the neoclassical methodology, see Morgan (n 300); For a celebratory discussion of the universality of economics, see Robert Heilbroner, ‘Economics as Universal Science’ (2004) 71 *Social Research* 615.

This theoretical endeavour is informed by a number of ontological assumptions: methodological individualism, methodological instrumentalism/individual rationality, the price mechanism and equilibrium. Methodological individualism (MI) posits that “the exclusive motor of history and social dynamics are the individuals, whose actions produce intentional and unintentional effects”.<sup>302</sup> In other words, social phenomena are explained in terms of unconnected individuals and their interactions.<sup>303</sup> Methodological instrumentalism/rationality, on the other hand, posits that individuals as economic agents are rational, and that they exhibit this rationality in the form of maximising the utility of scarce resources. Hence economic actors are only rational individuals, while economic action can only be economically rational action.<sup>304</sup> Neoclassical Economics also assumes that the individual economic actors interact only through the price mechanism, and that market prices always strive towards equilibrium.

These assumptions, however, require, or can only be realised in the context of a closed system, where the atomistic economic elements are connected among themselves, without a connection to externalities, rather than an open system. This enables the elements to follow deterministic and probabilistic laws. It is this assumption of closed systems that enables macro-economic governability, that is, the deployment of neoclassical economics in predicting and precisely measuring the interactions of economic agents using theories that mirror natural laws of physics, and consequently making targeted State interventions on the economy.

In addition, this has enabled the mathematization of neoclassical economics and the economy, and also the steering of the economy through macro-econometric modelling.<sup>305</sup> Neoclassical Economics has developed and adapted various economic theories within the sub-field of financial economics, including the General Equilibrium Theory (GET)<sup>306</sup>, the Efficient Markets

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<sup>302</sup> F Di Iorio, ‘Is Methodological Individualism a Reductionist Approach?’ [2013] Department of Economics New York University 1.

<sup>303</sup> Lars Udehn, *Methodological Individualism: Background, History and Meaning* (Routledge 2001) 1.

<sup>304</sup> For a discussion and critique of rationalism of economic actor and action, see Mark Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481.

<sup>305</sup> On macro-economic governability, see Benjamin Braun, ‘Why Models Matter: The Making and Unmaking of Governability in Macroeconomic Discourse’ (2014) 7 *Journal of Critical Globalisation Studies* 48, 48. Braun argues that because of the power of macroeconomic theory to produce a sense of understanding and practical control of the economy, its associated macroeconomic models become embedded in the ideational infrastructure of the economy. Consequently, macroeconomic models make possible the interpretation of past data and prediction of future economic trends.

<sup>306</sup> See Frank Ackerman and Alejandro Nadal, ‘Introduction: Underneath the Flawed Assumptions’ in Frank Ackerman, Alejandro Nadal and Kevin P Gallagher (eds), *The Flawed Foundations of General Equilibrium Theory: Critical Essays on Economic Theory* (Routledge 2004) 1–2. General Equilibrium Theory posits that the uninterrupted interaction of all prices with the supply and demand for all commodities always leads to a market equilibrium at which supply equals demand, and the market price is optimal. The theory argues that

Hypothesis (EMH), and the Capital Asset Pricing Model (CAPM), which have provided backing to the neoliberal politics and neoclassical regulatory rationalities of deregulation, privatization, and also increasing trends in financialization.<sup>307</sup>

Neoclassical economics is conceptualised as ideology due to at least three attributes. First, its theoretical and methodological approaches have been uncritically accepted and legitimated as the predominant cognitive infrastructure for individuals in capitalist societies despite their various partial perspectives, inaccurate assumptions, contradictions, and policy failures.<sup>308</sup> For example, Guerrien credits the persistent belief in market efficiency in the face of market failures, on its ideological nature: “intuitive beliefs which render them blind”.<sup>309</sup> Callon and Çalışkan refer to this hegemonic hold of neoclassical economics on social life as ‘economization’, that is, the controversial qualification, constitution or establishment of activities, behaviours and spheres or fields as being ‘economic’.<sup>310</sup>

Second, neoclassical economics is ideological due to its successful appropriation of assumptions, approaches and methodologies of the natural sciences, and their application to open rather than closed systems, thereby “package[ing] bourgeois ideology as rigorous science”.<sup>311</sup> It has consequently laid claim to attributes of natural science, including autonomy of its laws of motion, value-neutrality, objectivity, and rationality, thereby concealing its social and political values.<sup>312</sup> Reiter, and O’boyle and McDonough, for example, draw a pattern between the utility-based radical individualism of neoclassical economics, on the one hand, and the political and intellectual revolutions against authoritarian monarchies and established religions, and the development of the social philosophies of Adam Smith’s invisible hand and Laissez Faire market-led economic systems, and a social structure systematically blind to exploitation.<sup>313</sup> The misplaced autonomy of neoclassical economics has promoted an

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a general equilibrium is always an optimum outcome that cannot be improved upon for anyone without worsening the outcome for someone else. Thus, if unregulated market competition leads to an ideal, equilibrium result, then State interference in the form of regulation or any other initiative can only make things worse. The theory thus supports deregulation of financial and other markets.

<sup>307</sup> George M Frankfurter and Elton G McGoun, ‘Ideology and the Theory of Financial Economics’ (1999) 39 *Journal of Economic Behavior & Organization* 159, 160.

<sup>308</sup> Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge university press 1990) 23.

<sup>309</sup> Bernard Guerrien, ‘Irrelevance and Ideology’ [2004] *Post-Autistic Economic Review* 15.

<sup>310</sup> Koray Çalışkan and Michel Callon, ‘Economization, Part 1: Shifting Attention from the Economy towards Processes of Economization’ (2009) 38 *Economy and Society* 369, 370.

<sup>311</sup> O’Boyle and McDonough (n 39) 216.

<sup>312</sup> Sara Ann Reiter, ‘Economic Imperialism and the Crisis in Financial Accounting Research’ (1998) 9 *Critical Perspectives on Accounting* 143, 153.

<sup>313</sup> *ibid.*



unwarranted presumption of methodological and epistemological superiority over other disciplinary approaches such as economic sociology, perpetuating a totalising discourse that marginalises other voices, and brands as irrational any critiques of its method.<sup>314</sup>

This leads to a third aspect of ideology, whereby the analytical apparatuses of neoclassical economics conceal, and at worst, legitimate and sustain socially constructed and systematised relations of domination within neoliberal market economies.<sup>315</sup> Lawson, for example, argues that practice of mathematical modelling “serves to deflect criticism from the status quo at the level of the economy and thereby work to sustain it (and would do so whatever that status quo happened to be)”.<sup>316</sup> In addition, its assumptions (including closed systems and atomistic individuals) disregard, mask or trivialize notions of social relationality, and related issues of power asymmetries, domination, conflict and socio-scientific categories of discrimination, thereby sustaining and reproducing the status quo.<sup>317</sup>

The Chapter 4 Kenya case study discusses how financial market liberalization theories such as the Mckinnon-Shaw Hypotheses have concealed and deepened lender-creditor power asymmetries in interest rate markets in Kenya.

#### **4.4. Ideology Critique of Technology**

##### **Technology as Ideology**

In the narrative of modernity, science and technology has discredited and substituted ‘pre-modern’ superstition, mythic consciousness, religion and feudal social practices, for what Habermas refers to as ‘purposive-rational action’, in the increasing rationalisation of social life.<sup>318</sup> This narrative embraces an instrumentalist view of technologies and related practices as mere tools implicated in the service of modernisation, and the progressive march towards a better life for humanity; technology is neutral, apolitical, and universal.<sup>319</sup> In this context, technological progress, and its increasing enrolment in the mediation of all aspects of social life (including the financial markets), is deemed a universal good; conversely, any negative impacts

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<sup>314</sup> *ibid* 154; See also Morgan (n 300) 1–3.

<sup>315</sup> O’Boyle and McDonough (n 64) 13. The authors argue that by relying on a ‘curious juxtaposition of positivism and utilitarianism to throw a spurious veil of scientificity’, neoclassical economics becomes an ideological apology for capitalist inequality. ’.

<sup>316</sup> Lawson (n 64) 17.

<sup>317</sup> *ibid* 17–18; See also O’Boyle and McDonough (n 64) 15.

<sup>318</sup> Habermas (n 40) 81.

<sup>319</sup> Andrew Feenberg, *Transforming Technology: A Critical Theory Revisited* (Oxford University Press 2002) 5–6.

of technification are referred to as inefficiencies that can still be resolved using new technological innovations.<sup>320</sup>

A Critical Theory of Technology has progressively emerged from the works Marcuse, Habermas, Feenberg, Callon and the science and technological studies (STS). Social constructivist theories of Technology emphasize the social contingency of technological development, and seek to deconstruct technological autonomy and determinism by originating technological rationality in social processes and interests. Social constructivism also opens the door to exploration of the progressive potential of technological rationality and related practices, especially when subjected to political processes such as democratisation. One analytical approach to this end has been the interpretation of technological rationalisation and related practices as both an ideology (technological rationality) and a practice (technification). It is this approach that is applied to the analysis of financial technologies and their role in co-constituting legal and economic ideologies, reproducing liberal markets, and restricting possibilities for economic reforms in the Third World.

### **Technological Rationality as Ideology**

Technology takes on the conceptual form of ideology when cognisance is taken of its extensive role in mediating social life. This extensive reliance on technology has ontological and epistemological implications: the socially, historically, and geographically contingent becomes necessary; the particular becomes universal; the occasional, artificial and contingent historical experience becomes natural; and what ought to be a part is experienced as a whole; and so on.<sup>321</sup> Marcuse, for example, saw the concept of technical reason as domination in the form of methodical, scientific, calculated, calculating control, and therefore an ideology of technical rationality. He argued that specific purposes and interests of domination were not foisted upon technology subsequently, and from the outside; they entered the very construction of the technical apparatus. Hence, technology, as a historical-social project, constituted “what a society and its ruling interests intend to do with men and things”.<sup>322</sup>

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<sup>320</sup> Mireille Hildebrandt, ‘Intricate Entanglements of Law and Technology’, *Smart technologies and the end (s) of law: Novel entanglements of law and technology* (Edward Elgar Publishing 2015) 106.

<sup>321</sup> Robert B Pippin, ‘On the Notion of Technology as Ideology: Prospects’ in Yaron Ezrahi, Everett Mendelsohn and Howard P Segal (eds), *Technology, Pessimism, and Postmodernism* (Univ of Massachusetts Press 1994) 96.

<sup>322</sup> Marcuse, ‘Industrialisation and Capitalism in the Work of Max Weber’ (n 40) 223.

Feenberg, who has also critiqued and modified the critical theories of Marcuse, adopts the idea of technological rationality as an ideology. He argues that the ideas that ‘technical necessity dictates the path of development’, and that ‘the pursuit of efficiency provides a basis for identifying that path’, are false, and are in fact “ideologies employed to justify restrictions on opportunities to participate in the institution of industrial society”.<sup>323</sup> Feenberg’s design theory of technology employed here unites, on the one hand, the historical context of technological design, the social interests of the groups, the prevailing economic relations within the contest, and the outcome of political struggles between various groups, with, on the other hand, the efficiency imperatives of technological rationality, in articulating the ideological biases embedded in technological design. Therefore, according to the design theory, technological design, including its related process and product, is an articulation of both an efficiency-oriented technical rationality, and the historically contingent interests and normative preferences of dominant social groups behind the technological design.

Financial technologies have emerged in the context of financial globalization, financialization, economic developmental disparities, the digital divide, and related technology transfer. Hence, according to the design theory critique of technology, the interests of global and local capital, including managerialism and financialization, control and are incorporated in the design of technology.<sup>324</sup> Since these financial technologies are normatively and discursively scripted with a neoliberal bias, they are not merely neutral tools of economic progress, but rather are cognitive infrastructure for neoliberal financial markets. They shape economic, social life, thereby reproducing neoliberal financial market relations. Chapter 6 examines the embedding of neoclassical economic theories, doctrines of legal formalism and technological rationalities in the design of Credit Information Sharing (CIS) systems, and their reproduction of neoliberal credit markets.

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<sup>323</sup> Feenberg, ‘Subversive Rationalization’ (n 40) 318.

<sup>324</sup> Feenberg, *Transforming Technology: A Critical Theory Revisited* (n 319) 75–76. Feenberg argues that in industrial societies, strategies of domination consist primarily in embedding managerialism in technical procedures, standards and artefacts in order to establish a framework in which day-to-day technical activity serves the interests of capital.

## 5. The Performative Turn: Performativity of Ideas, Technologies and Practices

### 5.1. Performativity Theory: The Constitutive Power of Ideas and Practices

Performativity Theory was first articulated by JL Austin in his Speech Act Theory, where he articulates ‘how to do things with words’.<sup>325</sup> Though it has traditionally explored the exercising of power or ‘doing of things’ in the transnational legal order through discourses and concepts such as ‘public-private dichotomy’, ‘development’, ‘property’ and ‘individual liberties’, TWAIL has not, until recently, adopted the conceptual language of performativity theory. However, the doing of things and the creation of social reality through articulation of ideas and technical practices is gaining recognition in global political economy studies.

The performative turn in TWAIL studies is evident in the recent work of David Kennedy, a TWAIL founding member, which stresses “the performative dimension of expert practice: expert work constituting the space of its own expertise”.<sup>326</sup> Kennedy goes on to argue that “expertise governs when their articulations are performative: when what is articulated comes to pass.”<sup>327</sup> The implication of the performativity of the ideas of ‘experts’ in contesting and building a new vision of global governance is captured in his observation that:

“Generating a common vision of a world to be governed is both a communicative and performative work of the imagination and a technical institutional project. Seeing a world, people build institutions that seem suited to it, design tools to act within it, empower leaders to address the problems they think it has. In doing so, they bring that world into being and make it visible. With those tools, from that institution, this world can be seen. This double-edged activity is a kind of reasoning, a way at once of comprehending and shaping the world.”<sup>328</sup>

The performative turn thus deepens the insights of ideology critique, in not only elucidating the constitutive power of expert advice and common-place ideas that are accepted as ‘fact’ in social life, but also providing the conceptual tools for harnessing the power of ideas, practices and their material expressions, in building normatively distinct transnational regulatory

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<sup>325</sup> Austin (n 41) Austin distinguishes between two kinds of speech acts: illocutionary and perlocutionary. The illocutionary act is one in which, in saying something, one is at the same time doing something, e.g. a Judge saying ‘I sentence you’. Perlocutionary acts, on the other hand, are those utterances that initiate a set of consequences...[that] are not the same as the act of speech.

<sup>326</sup> Kennedy, *A World of Struggle* (n 47) 4.

<sup>327</sup> *ibid* 9.

<sup>328</sup> *ibid* 90.

institutions. It is therefore pertinent for Third World resistance to transnational regulatory neoliberalism to appreciate and harness the performative power of economic, legal and technological ideas and practices.

## **5.2. Economic Performativity Theory: Economic Construction of Markets**

The ideology-critique of neoclassical economics outlined above has demonstrated how the process of ‘economization’ - that is, the qualification of the domain of certain social relationships as ‘economic’ – occurs. Economization privileges the deployment of analytical apparatuses, language rationalities, institutions and descriptions based on or emanating from the (mainstream) economics discipline, above other analytical paradigms.<sup>329</sup> While this observation is made within the Economic Performativity theory, its interlocutors (Callon and Çalışkan) make an important objection to ideology-critique of neoclassical economics, which must be distinguished. They argue that Social Constructivism (which asserts that markets are socially constructed) engages in social reductionism, that is, making social relationships the principal explanatory element, and also seeks to “grant itself the monopoly of true discourse”.<sup>330</sup> It sees mainstream economics and related practices as ideological endeavours and false science, and in the process, under-rates and devalues the reflexive and theoretical activity that is increasingly involved in market construction. Consequently, ideology critique’s appreciation of the power of economic ideas is limited to its impact on human cognition, that is, how individuals perceive the market or the economy.

However, the power of neoclassical economic ideas is not restricted to cognitive and normative effects on market participants. Neoclassicism also exhibits material and institutional effects on the economy, in the sense that it creates ‘social fact’. This alludes to the constitutive power of economics on market relations, which power has been explored in previous literature, but was only in 1998 systematised by Michel Callon into a theory of the ‘performativity of economics’.<sup>331</sup> Callon, in his introductory thesis, argued that the body of knowledge or ideas

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<sup>329</sup> Çalışkan and Callon (n 310) 369, 370.

<sup>330</sup> Koray Çalışkan and Michel Callon, ‘Economization, Part 2: A Research Programme for the Study of Markets’ (2010) 39 *Economy and Society* 1, 4–5.

<sup>331</sup> See, for example Peter Miller, ‘Accounting as Social and Institutional Practice: An Introduction’ in Anthony G Hopwood and Peter Miller (eds), *Accounting as social and institutional practice*, vol 24 (Cambridge University Press 1994) 4. Miller argues that accounting is a calculative social and institutional practice which constitutes and reconstitutes the economic domain through the calculative practices that provide a knowledge of it. See also Peter Miller, ‘Calculating Economic Life’ (2008) 1 *Journal of Cultural Economy* 51 Miller reviews the various contributions to the focus on the constitutive or performative role of calculative practices, and their role in the formation of markets and market relations.

known as economics (which includes neoclassical theory, accounting techniques, and marketing), does not merely describe but actually “performs, shapes and formats the economy, rather than observing how it functions.”<sup>332</sup> The performativity thesis therefore transcends the passive role of neoclassical economics and its related practices in merely describing an ‘external’ economic reality; economists, their ideas, theories, models, measurements and computing artefacts are, part of the (capitalist) economy, reproducing it with every attempt at conceptualising, measuring, predicting, and steering economic variables.<sup>333</sup>

Building on Callon’s theoretical work, Mackenzie has proposed four different types of economic performativity: generic, effective, Barnesian and counter-performativity. Generic performativity is the weakest level of performativity, and is exhibited when economic theories are merely used or implemented in the financial markets, by market participants e.g. traders and intermediaries, policy makers, financial market regulators, and any other stakeholder that interacts with the financial markets using economic knowledge. At this level, economics is seen to shape or influence the conduct of market actors (whether human or non-human).<sup>334</sup>

Effective performativity, on the other hand, admits Mackenzie, is more complicated conceptually and empirically. It refers to the instance where the use or implementation of economic theories by market participants, exhibited by their conduct, has an effect on the economic process in question. In other words, the use of an economic theory must make a difference to the state of the market or process, which effect would not be realized if the theory was not used. Mackenzie remarks that this effective performativity cannot merely be observed, but must be carefully examined by studying the actual causality of the action. Otherwise, there is a danger of attributing false ‘effective performativity’ to remote processes with no causal link.<sup>335</sup> An example of this false causality has been pointed out by Mirowski and Nik-Khah in their critique of the study of the performativity of game theory in US spectrum auctions.<sup>336</sup>

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<sup>332</sup> Callon, ‘Introduction’ (n 43) 2.

<sup>333</sup> Brett Christophers, *Banking across Boundaries: Placing Finance in Capitalism* (John Wiley & Sons 2013) 9.

<sup>334</sup> Mackenzie (n 153) 16–17.

<sup>335</sup> *ibid* 18.

<sup>336</sup> See Philip Mirowski and Edward Nik-Khah, ‘Markets Made Flesh: Performativity, and a Problem in Science Studies, Augmented with Consideration of the FCC Auctions’ in Donald A MacKenzie, Fabian Muniesa and Lucia Siu (eds), *Do Economists Make Markets?: On the Performativity of Economics* (Princeton University Press 2007). The authors critique the case study on the spectrum auctions undertaken by the US Federal Communications Commission (FCC), in which Callon and Guala demonstrate how game theory was used by economists to construct the spectrum auction market. Mirowski and Nik-Khah argue that other influential elements, including the interests of, and the tensions and contradictions that ensued between, the various

The third variety of performativity is labelled 'Barnesian performativity' which embodies not only generic and effective performativity, but also the ability of economics to alter economic or market processes to conform or correspond to the respective economic model in question.<sup>337</sup> This type of performativity relies on self-validating feedback loops, a concept traced to the work of Barry Barnes, hence the label 'Barnesian performativity.'<sup>338</sup> However, this stronger sense of Barnesian performativity in which the use of the respective economic model or theory makes it 'more true' also opens up the possibility of the opposite of Barnesian performativity: counter-performativity. This is where the practical use of an economic theory or model alters economic or market processes to conform less well to the theory or model.<sup>339</sup>

This continuum of degrees of performativity has bolstered Callon's original thesis, which had previously been criticized as impractical, due to the high improbability of Barnesian performativity occurring in the market.<sup>340</sup>

Economic performativity theory makes key arguments related to the constitution of the *homo economicus*, markets, and the impact of economic ideas on them, which depart substantially from, or may be interpreted to enrich Social Constructivism and ideology-critique. First, *homo economicus* may as well exist, but not in a natural or a-historic state. He is "formatted, framed and equipped with prostheses which help him in his calculation, and which are, for the most part, produced by economists".<sup>341</sup>

Second, Economic performativity theory also rejects the economists' assertion that calculation arises from the individual's inherent self-interest, and the sociologists' argument that action flows from culturally-given values. Calculating is a 'complex collective practice' that involves far more than the capacities granted to economic agents by epistemologists and economists, and neither is it entirely in socio-cultural frames or institutions, but involves material artefacts such as figures, writing mediums, and inscriptions, which are critical to calculation. This includes

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stakeholders, including the government, the FCC, bidders, lawmakers, economists drafted by the and bidders, ultimately shaped the final structure of the spectrum auction adopted by the parties.

<sup>337</sup> Mackenzie (n 153) 18–20.

<sup>338</sup> See Barry Barnes, 'Social Life as Bootstrapped Induction' (1983) 17 *Sociology* 524, 524. Barnes contends that much of the references contained in social interaction are self-referencing, and that much inference is self-validating, because inductive inferences become permeated with feedback loops.

<sup>339</sup> Mackenzie (n 153) 19.

<sup>340</sup> AC Santos and J Rodrigues, 'Economics as Social Engineering? Questioning the Performativity Thesis' (2009) 33 *Cambridge Journal of Economics* 985, 985.

<sup>341</sup> Callon, 'Introduction' (n 43) 51.

economic theories and related practices and artefacts.<sup>342</sup> Economic performativity theory rejects the economists' notion that market laws are inherent in human nature, waiting to be revealed, or the economic sociologists' notion of essential social embeddedness.

Third, on the nature of markets, Callon describes them as "collective devices for the calculation of goods, which calculation is possible only if goods can be calculated by calculating agencies whose encounters are organized and stabilized to a greater or lesser degree."<sup>343</sup> He further argues that the essential processes of disentanglement and framing, and rendering calculable, goods and services in capitalist markets, does not arise from the "intrinsic competencies of the agent but that of the equipment and devices...which give his or her actions a shape".<sup>344</sup>

The economic performativity thesis articulates the role of socio-technical *agencements* and calculative devices, including economic theories and their related models, financial technologies, legal norms, and institutions, as the "highly artificial stimulants" that have been combined to construct and frame markets according to neoclassical economic theories and models, and the rise of market society.<sup>345</sup>

### **5.3. Constitutive Power of Law: Legal Performativity?**

The economic performativity thesis has also influenced the exploration of law's constitutive role in the capitalist economy. Birla, for example, argues for the idea of 'law as economy': how the performative power of law institutes or enacts that abstract thing called the 'economy', and 'codes' what is referred to as rational economic practice.<sup>346</sup> The law, as a 'sealed, scripted juridical logic and sovereign performative', installs the market as an "abstract model for all social relationships", and produces the homo economicus, in the form of an autonomous, unmediated legal subject capable of contracting and willing into the future.<sup>347</sup> In this sense, law has the agency to appropriate established non-capitalist conventions, and to enact market-

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<sup>342</sup> *ibid* 4.

<sup>343</sup> Callon and Muniesa (n 55) 1245.

<sup>344</sup> Callon, 'Introduction' (n 43) 21.

<sup>345</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944) 57. Polanyi argued that 'the gearing of markets into a self-regulating system of tremendous power was not the result of any inherent tendency of market towards exorcism, but rather the effect of highly artificial stimulants administered to the body social in order to meet a situation which was created by the no less artificial phenomenon of the machine'.

<sup>346</sup> See generally Ritu Birla, 'Law as Economy: Convention, Corporation, Currency' (2011) 1 UC Irvine L. Rev. 1015.

<sup>347</sup> Birla, 'Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power' (n 45) 90, 100. Birla relies on the notion of performativity as first postulated by JL Austin, who explored how 'words do things'. See Austin (n 41).



centred economic relations.<sup>348</sup> Eslava, a TWAIL scholar, also contends that International Law consists of both ideological and constitutive aspects: “it forms and reshapes our surrounding realities to such an extent that it actually becomes impossible to conceive of international law as existing and operating except through the very things and bodies that it creates.”<sup>349</sup>

Constitutive theory recognises law as not simply a set of ideas or attitudes, but a constitutive power that forms and shapes social relationships and practices.<sup>350</sup> It is “not simply the armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped”.<sup>351</sup> Polanyi, for example, underscored the constitutive role of law and other institutions when he argued that the market “was not the result of any inherent tendency of market towards excrescence, but rather the effect of highly artificial stimulants administered to the body social in order to meet a situation which was created by the no less artificial phenomenon of the machine.”<sup>352</sup> Edelman and Stryker define law’s constitutive capacity as:

“consisting of concepts, definitional categories, labels and ideas that play a subtle and often invisible role in how economic actors, ... come into existence, organise their activities and relationships, and arrange their governance. Rather than providing procedural tools or substantive rules, the constitutive legal environment provides cognitive possibilities and values that influence the structure, form and strategies of organisations.”<sup>353</sup>

By ideologically legitimating psychological individualism, law constitutes and performs the legal subject in capitalist economy, including both the natural and artificial juridical persons, i.e. individuals and firms.<sup>354</sup> By constituting the juridical person, law defines bargaining power and related asymmetries by bestowing different capabilities on each party, thereby shaping the

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<sup>348</sup> Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (n 46) 33–66. The context of Birla’s discussion is the history of colonial liberalism, specifically the installation of the Rule of Law in Colonial India. She discusses the performativity of three commercial and financial legal forms: the Companies Act 1882, the Indian Income Tax Act 1886, and the Negotiable Instruments Act 1881.

<sup>349</sup> Eslava (n 54) xvi.

<sup>350</sup> Christine B Harrington and Sally Engle Merry, ‘Ideological Production: The Making of Community Mediation’ (1988) 22 *Law & Society Review* 709, 711.

<sup>351</sup> *ibid.*

<sup>352</sup> Polanyi (n 345) 57.

<sup>353</sup> Edelman and Stryker (n 52) 540.

<sup>354</sup> David Nelken, ‘Is There a Crisis in Law and Legal Ideology?’ (1982) 9 *Journal of Law and Society* 177, 180. This autonomous individual is contrasted to the pre-capitalism legal subject that was seen as a member of an organic community, and was dealt with in terms of their status and other fixed relationships, rather than as an isolated individual.

alternatives and the various strategies available for negotiation by each party.<sup>355</sup> Law therefore constitutes and performs market society through its doctrines of tort, contract, property, corporation law, and employment law, which allocates public resources to private corporations.<sup>356</sup>

Exchange and contractual relations are also essentially juridical relationships that rely on legal constitution. This realization is necessary for a more grounded approach to policy and legislative interventions in complex capitalist societies.<sup>357</sup> Hale, Cohen and others have also argued that market prices are legally constructed, to the extent that they represent the expected value stream of specific legal rights associated with the good or service subject to contractual exchange. Hence the ideology of rights is crucial to the valuation of goods or services exchanged.<sup>358</sup> This observation upends the ideological assertions of autonomous, free-market price mechanisms, the private-public dichotomy, and the minimalist role of the State.

Law's constitutive capacity also includes the shaping of social norms, values and preferences related to human agency, responsibility and accountability, fairness and the concepts of economic and legal rationality and efficiency, all of which provide the cognitive infrastructure for market behaviour.<sup>359</sup> This entails co-constitutive reflexive, and reciprocal meaning-attribution processes where legal and economic ideologies and actors interact with each other not only within spheres of law such as the court-rooms, but also within industrial set-ups, and engage in interpretation and compliance.

#### **5.4. Technological Performativity: Markets and Society as Socio-Technical *Agencements* (STAs)**

Ideology critique of technological ideas and practices, e.g. technological determinism, and technological rationality, have indeed made valuable insights about the social construction, design or coding of technologies and their processes. However, this application of social constructivism to technology has a downside: by over-emphasizing the contingency,

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<sup>355</sup> See Lang (n 45) 156; see generally Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470; see Robert L Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43 *Columbia Law Review* 603; see Robert L Hale, 'Force and the State: A Comparison of "Political" and "Economic" Compulsion' (1935) 35 *Columbia Law Review* 149.

<sup>356</sup> Lucy E Salyer, 'The Constitutive Nature of Law in American History' (1991) 15 *Legal Studies Forum* 61, 62. The author argues that the history of law is a good lens for reviewing the history of a people.

<sup>357</sup> Edelman and Stryker (n 52) 540.

<sup>358</sup> Lang (n 45) 156; Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8, 8.

<sup>359</sup> Edelman and Stryker (n 52) 542; Lang (n 45) 170; See generally Richard Lempert and Joseph Sanders, *An Introduction to Law and Social Science* (University of Pennsylvania Press 1986).

uncertainty, and social coding of technology, social constructivism spirals into cultural relativism and ignores the role of the natural world in shaping technological practice and belief.<sup>360</sup> In other words, social constructivism falls back to the anthropocentric view of (human) agency, and ignores the material agency of things, including technologies, and their interventions in social and economic life. Actor-Network Theory (ANT) and economic performativity theory, which are in their own right versions of social constructivism of technology, rescue the latter from this analytical shortcoming by introducing the notion of socio-technical *agencements* or assemblages (STAs), to articulate the agency of things, including technologies.<sup>361</sup> STAs are hybrid collectives (composed of humans, ideas, discourses, materials, technologies, texts, routines and practices) in which action (including its reflexive dimension which produces meaning) takes place.<sup>362</sup>

On the basis of this socio-technical agency of things, the concept of technological performativity thus extends the power of technological and other ideas and practices beyond ideology, in two main ways. First, contend Law and Singleton, the ideas, narratives or ideologies about technologies are not merely descriptive, but actually enact or perform those particular notions of the nature of technological organization. Ideas about technologies may affect, alter, or reinforce the existing arrangements of technological reality, despite the possibility of multiple technological realities. Technological performativity is therefore achieved when the narrativization and practical performance of particular (explicitly or implicitly political) technological ideas, brings into reality those specific technological arrangements.<sup>363</sup>

Second, as STAs, these technological artefacts, arrangements and practices are performative in the sense that they perform the other ideologies with which they are politically-encoded, including formal-liberal legal ideologies and neoclassical economic ideologies. Since technological ideologies and practices constitute and are constituted by other ideologies and related practices, they are also enrolled in the processes of economic performativity, and legal performativity or constitution of social and economic reality.

For example, the embedding of economic theories, rationalities, methods, routines and processes into technical apparatuses and methods such as financial technologies and

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<sup>360</sup> Edward W Constant, 'Reliable Knowledge and Unreliable Stuff: On the Practical Role of Rational Beliefs' (1999) 40 *Technology and Culture* 324, 325–326.

<sup>361</sup> Law and Singleton (n 48) 766.

<sup>362</sup> Çalışkan and Callon (n 330) 9.

<sup>363</sup> Law and Singleton (n 48) 768–769.

algorithms, add a further layer to the de-politicization of the 'economic' sphere.<sup>364</sup> As argued by Mackenzie, the economic rationalities incorporated in technical systems have effect even if those who use them are sceptical of the said rationalities, since the users are unaware of the details of the technical systems, and may even be ignorant of their very existence.<sup>365</sup> Latour also notes that "...no matter how controversial their history, how complex their inner workings, how large the commercial or academic networks that hold them in place, only their input and output count."<sup>366</sup>

As argued by Muniesa, Millo and Callon, technologies as material and discursive assemblages, intervene in the construction of markets, and are essential for the performance of economic calculation.<sup>367</sup> They render things more 'economic', and also render particular versions of what it is to be 'economic'.<sup>368</sup> Technological devices demonstrate their agential capacities in the "conception, production and circulation of goods, their valuation, construction and subsequent transfer of property rights through monetary mediation, exchange mechanisms, and a system of prices."<sup>369</sup>

## **6. Legal, Economic and Technological Co-Constitution of Financial Markets**

The discussions in Sections 4 and 5 above have demonstrated two key aspects of the role of the ideational infrastructure of financial markets. First, ideas are not merely ideological, but are also constitutive and performative of market and social reality in capitalist society. Second, legal, economic and technological ideologies constituted and are constituted by other ideologies and practices. The relationship between legal, economic and technological ideas and practices is one of inclusivity, co-constitution and reflexivity, which relationship is concealed when they are housed in separate conceptual silos. In fact, Scott contends that legal and other ideologies "overlap, compete, and clash, drown, or reinforce each other".<sup>370</sup> In addition, Hunt sees the power of ideology in its ability to "connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and

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<sup>364</sup> Barry and Slater (n 49) 286. Callon discusses how technologies can transform political conflicts in the market into technocratic questions.

<sup>365</sup> Mackenzie (n 153) 19.

<sup>366</sup> Bruno Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Harvard University Press 1988) 3.

<sup>367</sup> Barry and Slater (n 49) 286.

<sup>368</sup> Muniesa, Millo and Callon (n 55) 4.

<sup>369</sup> *ibid.*

<sup>370</sup> Scott (n 38) 319.

cognition of social agents...”<sup>371</sup>. Sumner also argues that the construction of a hegemony based on legal ideology “depends upon its ideological encapsulation of a consensus constructed outside of itself in other economic, political and cultural practices”.<sup>372</sup>

This ideological co-constitution is demonstrated by Cottier in *International Economic Law*, which, he argues, is shaped by classical economic theories, including David Ricardo’s theory of Comparative Advantage, and Adam Smith’s Theory of International Division of Labour.<sup>373</sup> In their exploration of the International Law on sea-bed resources, Koskenniemi and Lehto also demonstrate the dialectic between the legal form and the political-economic substance, arguing that international law expresses conflicting economic ideologies and political power, by transforming them into a shared language and institutional process.<sup>374</sup>

This section outlines how the ideological strategies of legal, economic and technological ideas and practices are implicated in the constitution and performance of neoliberal financial markets.

### **6.1. Universalization of Neoliberal Market Society**

The universality of neoliberal markets as institutions for organizing society, and their related transnational and national regulatory structures, are co-constituted and performed by a confluence of legal, economic and technological ideas and practices. The ideology of legal formalism asserts the universality of certain market concepts, including the rule of law, human rights, private property rights, and the freely-contracting legal subject, by presenting them as neutral, objective and inclusive. In similar fashion, the appropriation by neoclassical economics of closed-system, mechanical analogies of the natural laws of physics, presents its theories as autonomous, objective, neutral, and therefore universal.<sup>375</sup> Thus, the abstracted legal subject and the *homo economicus*, both representative of capitalist citizenship, and economic markets, are abstracted from social, historical and other contexts, and universalized as the models for social and economic action.

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<sup>371</sup> Hunt (n 57) 16.

<sup>372</sup> Sumner (n 58) 264.

<sup>373</sup> Cottier (n 59) 34.

<sup>374</sup> Koskenniemi and Lehto (n 60) 533.

<sup>375</sup> See Leon Walras, *Elements of Pure Economics* (Routledge 2013) 47. See also O’Boyle and McDonough (n 39) 213–214. The authors review the assertions of the scientific nature of economics by economists such as Walras.

This justifies the global application of neoliberal regulatory rationalities in global financial markets, including the efficient markets hypothesis (EMH) and the General Equilibrium Theory (GET), despite the objection of economists such as Keynes and Minsky, who argued that these theories were only valid in specific cases and contexts, and that economies do not always seek equilibrium, and are not self-sustaining.<sup>376</sup> For example, principles of market liberalism underpin the Bretton Woods regulatory system and its policy propositions, such as the abolition of currency and exchange controls, which have exacerbated market volatility and financial crises in Asia and Latin America.

The universality of legal and economic ideologies and practices is further co-constituted and performed by technological ideas and practices. This includes the ideology of technoutopianism: that technologies as neutral and objective tools can be applied to realise the progressive goal of a global utopia, which underpins technological globalization, e.g. social media and e-commerce. Technologies “shape the entire universe of discourse and action, intellectual and material culture” into “an omnipresent system which swallows up or repulses all alternatives”, a stabilized society where technical rationality becomes political rationality.<sup>377</sup> Technological rationality projects and universalises a particular historical understanding of the world, whereby reality becomes ‘one-dimensional’, as contradictions and potentials for social change are obscured.<sup>378</sup> This technological universality, inherent in various internet-based financial technologies, universalizes neoliberal legal and economic ideas, and in the process, “limit(s) the possibilities of change as much as the actions of any actor”.<sup>379</sup>

Financial markets technologies with a global reach perform legal and economic universality by mediating interactions between individuals globally, and shaping the meaning of concepts that capture the social reality of these individuals, including liquidity, financial flows, and the circulation of money.<sup>380</sup> Forex trading technologies, for example, embody intersubjective

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<sup>376</sup> David Slattery and others, ‘Neoclassical Economics: Science or Neoliberal Ideology?’ (2013) 10 *European Journal of Economics and Economic Policies* 313, 316–317. Slattery quotes Hyman P Minsky, ‘The Financial Instability Hypothesis: An Interpretation of Keynes and an Alternative to “Standard” Theory’ (1977) 20 *Challenge* 20. See also John Maynard Keynes, *General Theory of Employment, Interest and Money* (Atlantic Publishers & Dist 2016).

<sup>377</sup> Herbert Marcuse, *One-Dimensional Man: The Ideology of Advanced Industrial Society* (Sphere Books 1968) 6.

<sup>378</sup> Steve Garlick, *The Nature of Masculinity: Critical Theory, New Materialisms, and Technologies of Embodiment* (UBC Press 2016) 88.

<sup>379</sup> Michael Blowfield and Alan Murray, *Corporate Responsibility* (Oxford University Press 2014) 103.

<sup>380</sup> Mark Coeckelbergh, Quinn DuPont and Wessel Reijers, ‘Towards a Philosophy of Financial Technologies’ [2017] *Philosophy & Technology* 1, 4.

codifications and reflexive communication processes, which are not merely representative, but are constitutive of financial and market reality, and the formation of fictitious capital values.<sup>381</sup> These technologies decontextualize markets, including market actors, commodities and related economic relationships, stripping them of social meaning and presenting them as mere functional economic phenomena. In this way, the norms of neoliberal market capitalism, masked as technical codes are universalised and diffused globally, especially to Third World countries.

The contradiction masked by this ideological strategy is that the market economy and the *homo economicus* were not universalised in Third World countries as a result of the inherent and natural legal and neoclassical ontologies, but in fact entailed the use of violence and indoctrination, sometimes simultaneously. Rajagopal and Anghie both observe that local and global economic markets are constructed through overt and covert expressions of violence, through the imperial and colonial encounters, and subsequently through international law, and are therefore inherently political, rather than naturally occurring.<sup>382</sup>

## 6.2. Reification in Financial Markets

Reification as a general ideological strategy entails the conversion of products of human action with transcendental essences, which then dominate their creators. This entails presenting transitory, historical phenomena as natural, eternal, asocial and ahistorical.<sup>383</sup> Legal reification fetishizes the law as autonomous, asocial, apolitical, and even separate from the economy.<sup>384</sup> By concealing the social construction of law, legal ideology precludes it from the domain of social action, and the imagination of alternative legal forms or arrangements.<sup>385</sup> In both

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<sup>381</sup> P Thompson, 'Worlds Apart? The Political Economy of Communication, Information and Institutional Investor Media Usage in Global Financial Markets' (RMIT University 2010) 23–30 <<https://researchbank.rmit.edu.au/view/rmit:10303>> accessed 1 July 2015.

<sup>382</sup> Balakrishnan Rajagopal, *International Law from below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003) 10. The author notes that 'Traditional international law did not concern itself with the resistance of mass action unless it was directed at the creation of states in the form of movements that asserted the right to self-determination.'. See Antony Anghie, 'Universality and the Concept of Governance in International Law', *Legitimate governance in Africa: International and domestic legal perspectives* (Kluwer Law International 1999) 10. The author argues that international law legitimized the violence meted against Third World natives under the Mandate System, perpetrated under the guise of the 'civilising mission'.

<sup>383</sup> Thompson (n 50) 65–66.

<sup>384</sup> See generally, Peter Gabel, 'Reification in Legal Reasoning' (1980) 3 *Research in Law and Sociology* 25; Georg Lukács, 'Reification and the Consciousness of the Proletariat' in Rodney Livingstone (tr), *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press 1971) The author coined the term 'reification'.

<sup>385</sup> Douglas Litowitz, 'Reification in Law and Legal Theory' (1999) 9 *Southern California Interdisciplinary Law Journal* 401 The author argues that reification 'represents a kind of infection within legal doctrine and legal

national and international law, legal product of ideological reification include individual liberties, private property rights, and contractual rights, which (as discussed in the Chapter 5 discussion of interest rate regulation) are removed from political deliberation that aims to address inequality and domination.<sup>386</sup>

The scientification of neoclassical economics has also reified the realm of the market economy, rendering it and its theories as asocial and apolitical. This negation of their socially and historically contingent character renders economists unable to interrogate the social context, and critique the postulates of theory. Reification of mathematical methods employed in neoclassical economics, for example, was undertaken as a means of “expunging the messy realities of common sense and everyday prejudices from the lexicon of science”.<sup>387</sup> To this extent, economics engages in the reification of social institutions by masking human creative responsibility for the prevailing institutions and conditions in capitalist society.<sup>388</sup> Reification impedes critique of neoclassical theory and its policy failings, including cyclical economic crises, and also aids its global diffusion. For example, macro-econometric models used for monetary policy making, forecasting and market interventions are reified from the realities of rate fixing and manipulation, oligopolistic market shares, as discussed in the Chapter 4 discussion of the CBK’s use of monetary policy transmission mechanisms.

Within the ideology of technological rationality, reification is exhibited in two related concepts: technological determinism and technological autonomy. ‘Technological determinism’ posits that technologies have an asocial, autonomous functional logic, which “determines and dominates the mental and social situations of men as the driving force of social change”.<sup>389</sup> This implies that social institutions must adapt to the imperatives of technology, entailing, for example, trade-offs between technological efficiency and social values.<sup>390</sup> Social Studies of Finance (SSF) has demonstrated the reifying power of technological rationality, especially in their co-constitution of similarly reifying legal and economic ideologies. This includes the increasing deployment of algorithms in financial markets, and how this has amplified the

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theory because it is essentially an error, a delusion, and a mystification that blinds people to alternative legal arrangements by naturalising the existing legal system as inevitable’.

<sup>386</sup> *ibid* 401.

<sup>387</sup> O’Boyle and McDonough (n 64) 14.

<sup>388</sup> Jon D Wisman, ‘Legitimation, Ideology-Critique, and Economics’ (1979) 46 *Social Research* 291, 292.

<sup>389</sup> Gunther Ropohl, ‘A Critique of Technological Determinism’ in PT Durbin and F Rapp (eds), *Philosophy and Technology* (Springer Science & Business Media 2012) 86; Feenberg, ‘Subversive Rationalization’ (n 40) 304.

<sup>390</sup> Feenberg, ‘Subversive Rationalization’ (n 40) 304.



deference to the technical rationality in mediation of social life.<sup>391</sup> The black-boxing of algorithms underpinning search engines, which are encoded with assumptions of legal and economic ideology, and in which the “new spirit of capitalism has been inscribed”, obscures their inherent political and social biases.<sup>392</sup> Consequently, algorithms close spaces, rather than open hermeneutic possibilities for action.<sup>393</sup>

Technological black-boxing conceals the social agency responsible for the socially adverse impacts of technological mediation, such as the failure of risk management financial systems in the 2008 financial crisis, while vesting responsibility on technical inefficiency (rather than the failure of neoliberal politics and liberal legal and neoclassical economic paradigms underpinning global financial markets).<sup>394</sup>

Technological reification also decontextualizes financial markets through the intersubjective codifications and reflexive communication processes in financial technologies, which are not merely representative, but are constitutive of financial and market reality. For example, within consumer credit scoring models, various commodities, including money, are presented in functional terms, rather than as social relationships with social contexts. Hence unconscionable lending rates appear as mere market prices rather than usury. In addition, the consequences of trading certain commodities, such as agricultural derivatives in the global markets, are reduced to price swings in computer screens and collateral management in the back offices of central counterparties (CCPs), concealing impacts to the real economy, where poor farmers in developing countries cannot sell their commodities due to artificially depressed market prices.<sup>395</sup>

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<sup>391</sup> Rob Kitchin, ‘Thinking Critically about and Researching Algorithms’ (2017) 20 *Information, Communication & Society* 14, 14.

<sup>392</sup> Astrid Mager, ‘Algorithmic Ideology’ (2012) 15 *Information, Communication and Society* 769, 769.

<sup>393</sup> Marc Lenglet, ‘Conflicting Codes and Codings How Algorithmic Trading Is Reshaping Financial Regulation’ (2011) 28 *Theory, Culture & Society* 44, 62.

<sup>394</sup> See generally Adrian Mackenzie and Theo Vurdubakis, ‘Codes and Codings in Crisis Signification, Performativity and Excess’ (2011) 28 *Theory, Culture & Society* 3, 3.

<sup>395</sup> For a critique of the presentation of financial derivatives in financial markets, see Donatella Alessandrini, ‘Financial Derivatives and the Challenge of Performation: Where Contingency Meets Contestability’ in Emilie Cloatre and Martyn Pickersgill (eds), *Knowledge, technology and law* (Routledge 2015) The author argues that “financial derivatives act as a powerful technology able to affect current value-making processes. They do certain things to the value they are supposed to measure and it is important to take this process into account so as to appreciate both the way in which the real and the financial spheres of the economy are deeply entangled”.

### 6.3. Naturalization of Financial Market Institutions

Ideological naturalisation (a consequence of reification) makes contested market institutions appear obvious, self-evident and naturally-occurring, and separate from domains of action, rather than artificial constructs that stand as proxies for normative arrangements, and thus forecloses possibilities for imagining alternative arrangements.<sup>396</sup> Legal naturalization is demonstrated by the treatment of human rights, property rights, and the market, as institutions that precede the establishment of State, and therefore precludes State intervention except in instances requiring protection of wider public interest.<sup>397</sup> Ideological naturalization conceals the constitutive or performative power of law and the State. For example, property rights are not natural, as they are defined into existence by law, and are accredited, legitimated, and enforced as against third parties, only by the State.<sup>398</sup>

In addition, by naturalizing individual liberty and the dichotomy between private and public, legal ideology constitutes and performs the individual juridical subject with rights and duties.<sup>399</sup> In the process, it constructs a limited conception of liberty as space that should be protected only from State interference, but not interference by other more powerful juridical subjects in the private sphere.<sup>400</sup> The corporation as a legal person is naturalized through constitutive property and contract laws. Pistor *et al* argue, however, that “there is nothing natural about the idea that the residual profit from production vests in the entrepreneur; this results from the legal allocation of property rights in the surplus from production”.<sup>401</sup> The naturalization of individual liberty and private property rights underpins the philosophy of liberalization of financial markets.

Neoclassical economics, as a result of its universalisation and reification, also naturalises certain market institutions that are ideally social constructions, and domains of human action, into “out there”, naturally-occurring phenomena, thereby foreclosing any contestation. The appropriated positivist science naturalises and de-historicizes the historically-specific social relationships in capitalist society, so that things ‘just are’ as they appear.<sup>402</sup> The scientist is

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<sup>396</sup> Thompson (n 50) 66; Marks (n 38) 211.

<sup>397</sup> Roger Cotterrell, ‘Feasible Regulation for Democracy and Social Justice’ (1988) 15 *Journal of Law and Society* 5, 10.

<sup>398</sup> Deakin and others (n 54) 192–193.

<sup>399</sup> Cotterrell, ‘Feasible Regulation for Democracy and Social Justice’ (n 397) 10; Birla, ‘Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power’ (n 45).

<sup>400</sup> Cotterrell, ‘Feasible Regulation for Democracy and Social Justice’ (n 397) 10.

<sup>401</sup> Deakin and others (n 54) 194.

<sup>402</sup> O’Boyle and McDonough (n 64) 13; O’Boyle and McDonough (n 39) 202.

therefore absolved of the duty to move beyond the appearance, thereby contributing to ideological continuity of neoclassical theory and neoliberal market capitalism.<sup>403</sup>

For example, if neoliberal capitalist markets are deemed as objective, neutral, apolitical and efficient, and steered by the 'invisible hand' or natural laws of motion, then it is logical to conclude that the disturbing social inequalities and relations of domination produced in such economic systems can co-exist alongside the efficient markets, and are in fact entirely natural.<sup>404</sup> Economic ideology conceals the fact that 'efficient markets' and the adverse impacts of neoliberal market capitalism are not naturally-occurring phenomena; markets are deliberate constructions of State and civil society, involving various external artificial stimulants, including violence, State legitimation, cultural, political, economic and legal ideas, institutions, and technological artefacts.<sup>405</sup>

Technological naturalisation also occurs when dominant technological designs and processes achieve a hegemonic technical lock-in, and are perceived as the one best way for accomplishing specific tasks or organisational goals. This naturalizes and elevates a singular technocracy or rationality above other alternatives that may, for example, achieve the same goal but place less emphasis on efficiency than other moral and ethical concerns. Consequently, it forecloses discussions of alternative social and industrial arrangements, thereby concealing political choices that pass off as technically efficient choices. Technological naturalization legitimises new status and power arrangements which are biased in favour of the social actors constructing and maintaining the technological arrangements.<sup>406</sup>

Financial technologies reinforce the economic and legal naturalization of markets through their presentation of the nature and functioning of financial markets on the basis of these theories and doctrines.<sup>407</sup> They present markets as efficient and natural, rather than as artificial, socio-technical assemblages made possible by the normative scripting of financial technologies, and which assemblages can therefore be altered for the realisation of more

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<sup>403</sup> O'Boyle and McDonough (n 64) 13; O'Boyle and McDonough (n 39) 202.

<sup>404</sup> Frankfurter and McGoun (n 307) 173.

<sup>405</sup> See Polanyi (n 345) 57; See also Anghie, 'Universality and the Concept of Governance in International Law' (n 382).

<sup>406</sup> Ivar Berg and Arne L Kalleberg, 'The Next Long Swing: Spatialisation, Technocratic Control, and the Restructuring of Work at the Turn of the Century', *Sourcebook of Labor Markets: Evolving Structures and Processes* (Springer Science & Business Media 2012) 118.

<sup>407</sup> Barry and Slater (n 49) 286.

equitable socio-economic organisations.<sup>408</sup> For example, as discussed in Chapter 5, the ideologically-scripted credit scoring technologies naturalize and constitute the ‘disciplined’, prudent, responsible, creditworthy borrower described in the discourse of risk, as the natural borrower.

#### **6.4. Rationalization of Neoliberal Financial Market capitalism**

The ideological strategy of rationalisation is an exercise of power through meaning, to the extent that an ideology constructs a chain of logical arguments or reasoning to justify or legitimate certain institutional arrangements.<sup>409</sup> To the extent that the law is deemed to be objective and logical in its nature, role and functioning, then it can be deemed to embody legal rationality; in other words, the application of rational legal methods and reasoning is referred to as legal rationalisation. Weber defined the rationality of law as the quality that endeared it to capitalism in Western States.<sup>410</sup> He explained the affinity of Capitalism to law on the basis of three features of legal formalism: first, law’s autonomy, bureaucratization and professionalization; second, formal legal equality, which abstracts all natural and artificial juridical subjects; and third, law’s universality.<sup>411</sup>

Weber argued that formal-legal rationality facilitated capitalist economic behaviour and institutions by: providing stable rules which increased predictability and certainty for contracting parties; ideationally constituting new legal-commercial tools such as agency, negotiability, and the natural and artificial legal subject, which enhanced calculability, predictability and systematisation; and creating legal personhood, which interpellated business organisations into legal subjects with rights and duties, entitled to formal treatment under the law.<sup>412</sup>

Formal legal rationality constitutes, and is also constituted by neoclassical economic theory, which conceptualizes rationality as ‘rational economic action’, that is, ‘utility maximisation of scarce resources’, and which is given scientific weight by the appropriation of natural law

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<sup>408</sup> See Laura Lotti, ‘Fundamentals of Algorithmic Markets: Liquidity, Contingency, and the Incomputability of Exchange’ [2017] *Philosophy & Technology* 1. The author problematizes price as an adequate measure of financial value, and instead explores a different measure of worth. By resisting the neoliberal naturalisation of markets, she proposes a way to see markets as techno-social assemblages capable of adopting progressive politics.

<sup>409</sup> Marks (n 38) 211; Thompson (n 50) 61.

<sup>410</sup> See generally, Max Weber and Max Rheinstein, *On Law in Economy and Society* (Clarion 1967).

<sup>411</sup> David M Trubek, ‘Max Weber on Law and the Rise of Capitalism’ [1972] *Wis. L. Rev.* 720, 724.

<sup>412</sup> Robin Stryker, ‘The Sociology of Law’ in Clifton D Bryant and Dennis L Peck (eds), *21st Century Sociology: A Reference Handbook* (SAGE 2006) 341.

cosmology. This ‘purposive-rational action’ of individuals in the market constitutes a ‘means-ends rationality’ that replaces traditional modes of legitimation, colonises the consciousness of individuals, and mirrors the rationality attributed to capitalist economic systems.<sup>413</sup> Weber’s articulation of the rationality of the capitalist economic system (which, he argued, constitutes legal rationality) mirrors this neoclassical economic rationality:

“rational (deliberate and systematic) pursuit of profit through the rational (systematic and calculable) organisation of formally-free labour, and through rational (impersonal, purely instrumental) exchange on the market, guided by rational (exact, purely quantitative) accounting procedures, and guaranteed by rational (rule-governed, predictable) legal and political systems”.<sup>414</sup>

The constitutive power of formal-legal and neoclassical economic rationality is therefore material in shaping the norms of neoliberal capitalism, including human agency, responsibility, accountability, rationality and efficiency.<sup>415</sup> This ideological rationalisation of the ability of legal formalism and neoclassical economics to midwife capitalist modernity, results in the discrediting and delegitimizing of other alternative legal and economic systems as ‘irrational’, and the restriction of ‘instrumental reason’ within the boundaries of these ‘autonomous’ logics.<sup>416</sup>

Technological rationality is also crucial to the processes of legal and economic rationalization of neoliberal capitalism. Marcuse argues that domination appears as rational when a hegemonic system can use scientific and technological methods to make the growth of the forces of production the basis of its legitimation.<sup>417</sup> The main principle of ideological

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<sup>413</sup> Habermas (n 40) 71.

<sup>414</sup> Roger Brubaker, *The Limits of Rationality* (Routledge 2013) 1–2.

<sup>415</sup> Edelman and Stryker (n 52) 541; See also, generally John W Meyer and Brian Rowan, ‘Institutionalized Organizations: Formal Structure as Myth and Ceremony’ (1977) 83 *American Journal of Sociology* 340. The authors argue that many formal organizational structures arise as reflections of rationalized institutional rules, whose elaboration in modern states and societies accounts in part for the expansion and increased complexity of formal organizational structures. These institutional rules function as myths which organizations incorporate, gaining legitimacy, resources, stability, and enhanced survival prospects.

<sup>416</sup> Qian X. Y., ‘Traditional Chinese Law v. Weberian Legal Rationality’ (2010) 10 *Max Weber Studies* 29. The author, who critically examines the casting of non-Western law as irrational, notes that ‘Western legal thought as a whole - with its rationalist tradition - whether Anglo-American or Continental - is today accepted as uniquely the best in human legal history, and this is even accepted in non-Western countries like China’. ; See also Slattery and others (n 376) The authors note that the heterodox economic theories of Minsky, Keynes and others have been discredited, despite their convincing empirical invalidation of neoclassicism’s core tenets.

<sup>417</sup> Herbert Marcuse, ‘Freedom and Freud’s Theory of Instincts’ (1970) 199 *Five Essays: Psychoanalysis, Politics, Critical Theory* 3.

rationalisation of technological domination is efficiency. Despite the existence of multiple technical designs and processes for achieving a goal, the principle of technical efficiency usually determines what becomes the dominant technology in organising social life. Ideology critiques of technology contest this efficiency-rationalisation, and propose that there are multiple factors besides efficiency, which usually play a role in design choice.<sup>418</sup>

The rationale of efficiency therefore masks some of these interest-driven factors, while, in the process, borrowing the virtues of necessity and universality generally attributed to scientific rationality.<sup>419</sup> For example, the use of algorithms, artificial intelligence and other technological innovations in High-Frequency Trading (HFT) is hailed as increasing market liquidity by optimising trading in financial instruments at the minimum price, supposedly making markets more efficient. However, critics point out that the black-boxing of these technologies, due to their complexities which are inaccessible to human mental processes, deters attempts at auditing them, and therefore renders the technologies and their creators and users unaccountable.<sup>420</sup>

Technological rationalisation by financial technologies therefore contributes to the reproduction of neoliberal financial markets, and the restriction of possibilities for economic reform in the Third World by presenting technical efficiency as a necessity that must be secured through a trade-off with social values such as equity and morality. This efficiency-rationality becomes a pre-requisite for rational economic behaviour in computerized financial markets.

### **6.5. Narrativization of Financial Market and Economic Development**

The ideological strategy of narrativization involves historicising particular developments through particular narratives that endow respectability on particular practices and institutions, and legitimates their perpetuation as progressive, efficient or modern. Legal narrativization is exhibited by the Eurocentric accounts of the international legal order, characterised by Eurocentric (mis)interpretations of history. These accounts of international law legitimate past and present institutions and practices, including imperialism, colonialism, and neo-colonialism, the 'dynamic of difference', economic classifications of post-colonial States, and processes of attaining development.

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<sup>418</sup> Feenberg, *Transforming Technology: A Critical Theory Revisited* (n 319) 21.

<sup>419</sup> Andrew Feenberg, *Between Reason and Experience: Essays in Technology and Modernity* (MIT Press 2010) 67.

<sup>420</sup> See generally, Lotti (n 408).

For example, international law legitimated and in fact provided a legal framework for the imperial excursions of Western States in Africa, the Middle East, Latin America and the Caribbean, by narrativizing it as a ‘civilising mission’ that is, “the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe”.<sup>421</sup> International law rationalised and institutionalised the ‘dynamic of difference’, that is, the ‘fact’ of cultural difference between European states and non-European people, whereby the former was elevated as rational, modern, civilised, and developed, while the latter was othered as irrational, backward, uncivilised and under-developed.<sup>422</sup>

The narrativization of the imperial and colonial encounters in international law as the ‘civilising mission’ has consequently reproduced these cultural dichotomies in the membership and participation of States in the decision-making organs of the transnational financial regulatory institutions such as the IMF and the World Bank.<sup>423</sup> In addition, this narrativization also informed the conceptualisation of the notion of, and the paths and processes for attaining, development.

For post-colonial Third World countries, the narrative of development entails economic, legal, political, cultural and other institutional reforms towards realising a Western form of capitalist society. This particular narrativization of international legal history, modernity, and the structuring of contemporary transnational financial regulatory institutions ideologically conditions not only the legislators, policy makers and regulators, but also the citizens in Third World countries to strive towards a particular neoliberal conception and narrativization of modernity, development, civilization, and capitalist society.

Neoclassical economics as ideology, also legitimates and contributes to the reproduction of neoliberal financial markets through narrativization. Economists, like other social scientists, rely on a whole range of ‘rhetorical tetrad’: fact, logic, metaphors, and stories, to explain development, progress, change, and the emergence and sustenance of capitalist and other economic phenomena.<sup>424</sup> Within its power of narrativization lies the answer to neoclassical

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<sup>421</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 271) 3. For an articulation of the ‘civilising mission’ from the colonialists’ perspective, see Baron Frederick John Dealtry Lugard, *The Dual Mandate in British Tropical Africa* (Edinburgh; London: W Blackwood 1922).

<sup>422</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 271).

<sup>423</sup> See generally, Pahuja, *Decolonising International Law* (n 271).

<sup>424</sup> Deirdre N McCloskey, *If You’re So Smart: The Narrative of Economic Expertise* (University of Chicago Press 1990) vii-1.

hegemony, despite the well documented policy failures: “neoclassical economics provides a heuristic narrative of explanation that can cross temporal, geographic and political boundaries.”.<sup>425</sup> It exercises power by describing, explaining and legitimating conditions and institutions of social life experienced by individuals, thereby legitimating inequality, domination and exploitation in neoliberal market society.<sup>426</sup>

Ideological narrativization by neoclassical economics is evident in the descriptions and explanations for, among other concepts, modernity, economic development, increasing poverty in neoliberal capitalist society, and the prevalence of economic crises. For example, the rise of mathematical modelling of everything, including social life, is accounted for in the narrative of Western modernity. Kline notes that “an acceptance of the idea that mathematics is essential to grounded knowledge has been a factor in sections of popular culture for rather longer than even the post-enlightenment period”.<sup>427</sup>

Capitalist economic development in Western countries is narrativized as the product of enlightenment, and the embrace of neoliberal capitalist legal and economic postulates, while the under-development of the Third World is tied to the prevalence of ‘pre-modern’ social relationships entailing a reluctance to embrace radically neoliberal capitalist economic models. This narrative ideologically masks critical aspects of the development of capitalism, including the imperial, colonial and post-colonial encounters between developed and developing countries. Neoclassical economic narratives set development goals and objectives, and structure the processes for attaining those goals, in narrow hegemonic neoliberal capitalist paradigms that disqualify alternative social orderings.

The ideological narrativization of financial technologies is exhibited in its embedding in historical tales of modernity and related discourses, including the Other pre-modern, civilised versus uncivilised societies, developed/first world versus developing/Third World countries, the dynamic of difference, and the technological divide. These discourses create and set certain normative goals for the Third World, such as economic development, liberal democratic traditions, etc., which are presented as a cultural ideal anchored on the promise of technology. If the digital divide can be closed, then the Third World can achieve a cultural utopia of globalisation, democratic expression, increased individual and communal agency,

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<sup>425</sup> Alan Christopher Finlayson and others, ‘The “Invisible Hand”: Neoclassical Economics and the Ordering of Society’ (2005) 31 *Critical Sociology* 515, 516.

<sup>426</sup> *ibid* 520.

<sup>427</sup> Morris Kline, *Mathematics in Western Culture* (Oxford University Press 1964).



transparency, and economic development. The universalisation of these normative benchmarks entails an abstraction of economic, legal, political, cultural, moral, spatial and other particularities, while elevating a singular particular as universal. This universalisation of technological progress to the Third World is predicated on ostensibly neutral technology transfer from the global north, resulting in the transfer of neoliberal ideologies, discourses, and technical practices imbedded in the technical design, and concealed and legitimated as bridging the digital divide. Yet this results in technological domination.

Feenberg, for example, notes the enrolment of the claims of technological determinism in the narrativization of the role of technology in modernity and economic development:

“The two theses of technological determinism present decontextualized, self-generating technology as the unique foundation of modern society. Determinism thus implies that our technology and its corresponding institutional structures are universal, indeed planetary in scope. There may be many forms of tribal society, many feudalisms, and even many forms of early capitalism, but there is only one modernity, and it is exemplified in our society, for good or ill. Developing countries should take note: as Marx once said, calling the attention of his backward German compatriots to British advances: ‘de te fabula narrator’ – of you the tale is told.”<sup>428</sup>

The digitisation of finance, for example, is heralded as a technological innovation that universalises and liberalises the financial markets, fosters financial inclusion especially in Third World countries, and increases the efficiency and liquidity of the markets. Financial technologies that have digitised finance include dematerialisation of legal tender into electronic ledgers in banks, online banking, digital and other cryptocurrencies such as bitcoin and blockchain. While cryptocurrencies are narrativized as emancipating finance from State power, they however elicit concerns regarding their elitisms, opacity, black-boxing, and non-participatory nature, especially in the Third World which lacks adequate technological infrastructure.<sup>429</sup>

In addition, monopoly infrastructures such as the Society for Worldwide Interbank Financial Telecommunications (SWIFT) network, while enabling global financial connectivity, are discursively scripted in response to specific regulatory norms that they have been subjected

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<sup>428</sup> Feenberg, ‘Subversive Rationalization’ (n 40) 304.

<sup>429</sup> Wessel Reijers and Mark Coeckelbergh, ‘The Blockchain as a Narrative Technology: Investigating the Social Ontology and Normative Configurations of Cryptocurrencies’ [2016] *Philosophy & Technology* 1, 2.

to.<sup>430</sup> For example, state regulators such as the US Treasury have also used their licensing power to compel SWIFT to include in its membership criteria Anti-Money Laundering and Financing of Terrorism (AML-FT) regulatory guidelines.<sup>431</sup> Consequently, SWIFT has concentrated regulatory power in the hands of the US, and enhanced its ability to wage economic warfare against geopolitical rivals, and related financial institutions and individuals, in the form of economic sanctions.<sup>432</sup> Technological narratives of bridging the digital divide therefore conceal critical aspects of these hegemonic financial technologies.

## 7. Conclusion

This chapter has explored the second research sub-question: to what extent can interdisciplinary ideology-critique and performativity theory form theoretical assemblages within TWAIL praxis of resetting the international financial regulatory order to speak for Third World concerns?

This chapter has proposed an eclectic theoretical approach to the exploration of the role of ideas and technical practices in reproducing regulatory neoliberalism in Third World and global financial markets: an assemblage of Critical Theory's ideology critique, and Actor-Network Theory, and Performativity Theory. The eclectic approach is essential for two reasons. First, the ideational infrastructure of contemporary neoliberal financial markets and their regulatory practices is constituted by various ideas and practices, including formal legal doctrines, neoclassical economics, and technologies, and yet their respective analyses have been pigeon-holed into distinct theoretical programmes. Second, legal, economic and technological ideologies constitute and are constituted by other ideologies and practices, a relationship characterized by inclusivity, co-constitution and reflexivity, which relationship is concealed when they are housed in separate conceptual silos.

The discussion has explored the ideological role of the ideational infrastructure in sustaining and reproducing regulatory neoliberalism within financial global markets. Ideas project power through their constitution of meaning about social life. Legal formalism's claim to autonomy, purity, determinacy, and objectivity, is ideological to the extent that it conceals law's historical,

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<sup>430</sup> See generally, Susan V Scott and Markos Zachariadis, *The Society for Worldwide Interbank Financial Telecommunication* (Routledge 2013).

<sup>431</sup> Marieke De Goede, 'The SWIFT Affair and the Global Politics of European Security\*' (2012) 50 *JCMS: Journal of Common Market Studies* 214.

<sup>432</sup> See generally Juan Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (PublicAffairs 2013).

social, political, and contingent aspects, and thereby ideologically legitimates the relations of domination, and a neoliberal bias. Neoclassical economics is ideological to the extent that it makes claims to universality, rationality, transcendence and naturality. It appropriates the 'closed-system' assumptions and methodologies of natural science, in a bid to ideologically legitimate neoliberal capitalism, and naturalize its excesses (including poverty and inequality) as inevitable and acceptable. In addition, some ideas and practices underpinning technological society, including 'technological determinism', and 'technological autonomy', ideologically legitimate technology as neutral, apolitical and universal, thereby concealing its social origins and embedded relations of neoliberal, capitalist domination.

The Chapter has also explored the performative power of the ideational infrastructure of financial markets, which extends beyond its ideological impact, to actual constitution of social reality. Drawing from Performativity Theory, the discussion has demonstrated how neoclassical economics, legal formalism, and technological ideas and concepts do not merely describe economy, society and technology, but actively intervene by bringing up or raising economies, markets, technological organizations, and societies in their theoretical and ideological images. For example, Neoclassical economics performs the neoliberal financial markets by shaping, formatting and constituting the individual in the image of *homo economicus* – an atomistic, rational, selfish, utility-maximiser. On the other hand, legal formalism, as a 'sealed, scripted juridical logic and sovereign performative', performs the neoliberal financial markets by installing them as an abstract model for all social relationships, and produces the *homo economicus*, in the form of an autonomous, unmediated legal subject capable of contracting and willing into the future.

Technological ideas, devices and practices also perform neoliberal financial markets in two ways. First, they affect, alter, or reinforce particular narratives and arrangements of technological reality (despite the possibility of multiple technological realities) that constitute neoliberal markets. Second, they perform the other ideologies with which they are politically-encoded, including formal-liberal legal ideologies and neoclassical economic ideologies. Since technological ideologies and practices constitute and are constituted by other ideologies and related practices, they are also enrolled in the processes of economic performativity, and legal performativity or constitution of social and economic reality.

The discussion has also examined the strategies through which the ideological and performative power of the ideational infrastructure of financial markets sustains and

reproduces regulatory neoliberalism within financial markets. This includes the strategies of universalization, reification, naturalization, rationalization, and narrativization. The chapter therefore argues that TWAIL theoretical work should form inter-disciplinary assemblages with Critical Theory of Economics and Critical Theory of Technology, among other relevant programs. It is also argued that, while ideology critique ably deconstructs the various ideologically-legitimated ideas that undergird the globalised version of neoliberal financial markets, it tends to under-estimate the ability of ideas and practices to construct, constitute or shape the world they describe. Thus, performativity theory further articulates how ideas, ideologies, and their related practices and material manifestations can shape a particular economic world, allocate interests, identities, and capacities, and in the process, define problems and the possible range of solutions. Insights from both ideology critique and performativity theory are critical to the Third World project of resetting the international legal order to speak for its peoples.

## CHAPTER THREE

### Ideational and Technological Regulation of Third World Economies by the Bretton Woods Institutions

#### 1. Introduction

Chapter 2 has examined the ideological and performative role of economic, legal and technological ideas and practices in reproducing regulatory neoliberalism within transnational and national financial markets. It has also argued for the adoption an interdisciplinary assemblage of Critical Theory and Performativity Theory within TWAIL. This chapter employs the proposed theoretical framework in exploring the third research sub-question: how has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism within the IMF and World Bank?

The discussion thus examines the ideological and performative role of economic, legal and technological ideas and practices in shaping the IMF and World Bank's regulatory role in transnational finance, and their relationship with Third World countries. It focuses on the role of ideas in producing and fixing meanings of social reality, producing identities and respective capacities that consequently enable and constrain the action of individuals, institutions, States and other Actants within the global financial markets. Departing from, but not disregarding the conventional structuralist explanation of the BWIs' relationship with the Third World as determined by US structural power (the Treasury-Wall Street Complex), the chapter argues for the conceptualization of these transnational financial institutions as sites of active ideational, ideological and technological contestation, legitimation, performance, and diffusion to Third World States and markets.

Sections 2 and 3 explore the governance, decision making, membership and representation structures within the IMF and World Bank, respectively, framing the institutional context of Third World countries' under-representation, and historical contestation of the transnational financial regulatory order. Section 4 examines the different types of power deployed in various aspects of BWIs, including their establishment, State governance, bureaucratic operations and relationship with the Third World. It argues that the discourses of security, freedom, development and human rights have played a key role in the institutional design of the BWIs and the distribution of power between developed and Third World countries, and also between BWIs and Third World countries. It also argues that the BWI bureaucracies wield ideational

power in the form of economic, legal and technological rationalities endowed with ideological and performative power. Section 5 outlines the main conclusions, urging TWAIL practitioners to conceptualize transnational financial institutions as sites of active ideational, ideological and technological contestation, legitimation, performance, and diffusion.

## **2. The International Monetary Fund: Institutional Architecture**

### **2.1. The Establishment and Regulatory Role of the IMF**

The IMF was established under the 1945 Articles of Agreement of the International Monetary Fund, a treaty initially ratified by 29 of the 44 Allied nations present at the Bretton Woods Conference.<sup>433</sup> Before its establishment, the global economic order at that time was characterized by restricted national capital flows, and a fixed exchange-rate system, where national currencies were pegged at par value to the US dollar, which was also pegged to gold. Within this order, the IMF was therefore mandated to promote international monetary cooperation and international trade (through balance-of-payment liquidity support), promote and maintain exchange stability and orderly exchange arrangements, and a multilateral system of payments. This was to be undertaken mainly by providing the members with a fund from which they could draw from, to correct maladjustments in the balance of payments of their respective current accounts.

The original Articles of Agreement did not envisage a non-monetary role for the IMF. However, various factors, including international liquidity problems, increased international capital flows, globalization, the 1973 oil crisis, adoption of floating exchange rates, and the resultant sovereign debt crises and financial institutional collapses, gradually altered the role of the IMF within the global financial order.<sup>434</sup> For example, in 1973, after the abolishment of the fixed exchange rate system, and the adoption of the floating exchange rates, the IMF lost its main role of maintaining exchange arrangements.

However, the ensuing international financial instability as a result of the floating exchange rates gave the IMF a new role in global economic stabilization by way of loans to national economies

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<sup>433</sup> International Monetary Fund, *Articles of Agreement of the International Monetary Fund* (International Monetary Fund 2011).

<sup>434</sup> Daniel Bradlow, 'Stuffing New Wine into Old Bottles: The Troubling Case of the IMF' (2001) 3 *Journal of International Banking Regulation* 9, 9–12; Rajagopal, 'From Resistance to Renewal: Bretton Woods Institutions and the Emergence of the "New" Development Agenda' (n 118) 95. As discussed in Chapter 1, Rajagopal focuses on the BWIs' jurisdictional expansion in response to Third World resistance.

experiencing currency upheavals and other economic crises.<sup>435</sup> For example, in the Mexican and Asian crises of 1995 and 1997, IMF loan facilities of up to \$18 billion and \$36 billion respectively to the affected countries, were instrumental in stabilizing their economies. The IMF then acquired a further role in international financial regulation, since it advanced these loans on the basis of loan “conditionalities”, which included States’ undertakings to adjust its economic policies to remedy the cause of the economic problems, and also to ensure that the country will be able to repay the Fund. These conditionalities have therefore become the main regulatory tool through which the IMF ensures adoption of economic policies deemed global standards; it is therefore also a standard-setter.

The IMF also gained a surveillance or supervisory role in international financial regulation, by way of amendments to Article IV of the Articles of Agreement, to provide the mandate and powers to oversee the compliance of each member with its obligations under the Agreement. To this extent, under its Financial Sector Assessment Programme (FSAP) and the Report on the Observance of Standards and Codes (ROSC) programmes, undertaken jointly with the World Bank, the IMF assesses the resilience of a member country’s financial sector. This assessment includes financial regulatory areas such as financial stability and systemic risk.

The international financial regulatory reform measures mandated by the G20 after the 2008 GFC have further entrenched the role of the IMF, and increased synergies between it and other international financial regulators. Presently, the IMF is a non-voting member of the G20 and a full member of the FSB. It therefore works closely with the FSB and the World Bank in formulation of global financial regulatory standards, and the surveillance and supervision of their members’ compliance with the standards and IMF conditionalities.<sup>436</sup> In addition, the IMF leverages its Lender of Last Resort role to enforce global financial standards within its members.

## **2.2. Governance, Decision Making, Membership and Representation at the IMF**

Institutionally, there are four primary organs that run the IMF: the Board of Governors, the International Monetary and Financial Committee (IMFC), and the Board of Executive Directors.<sup>437</sup> The Board of Governors is the highest and primary policy making authority. It is

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<sup>435</sup> Krasner (n 11) 133.

<sup>436</sup> Biagio Bossone, ‘Integrating Macroeconomic and Financial Sector Analyses within IMF Surveillance: A Case Study on IMF Governance’ (International Monetary Fund 2008) IEO Background Paper.

<sup>437</sup> Daniel Bradlow, ‘The Governance of the IMF: The Need for Comprehensive Reform’ [2006] Available at SSRN 928467 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=928467](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928467)> accessed 1 February 2015;

constituted by either a Central Bank Governor or Finance Minister from each of the 188-member countries.<sup>438</sup> The Board of Governors meets annually. It has a smaller committee – the IMFC – composed of 24 members’ representatives drawn from the Board of Governors. It meets twice annually to consider and recommend relevant policy issues to the Board of Governors. There is also incorporated into the institutional framework a joint IMF-World Bank committee of Governors – the Development Committee – which also meets concurrently with the IMFC and considers and advises the Board of Governors on development policy issues and other issues affecting developing countries.

The IMF is run or administered by a Board of Executive Directors, who are seized of the operational, policy, lending and other day-to-day administrative matters of the Fund. The Board of Directors is composed of 24 members that mirror the IMFC’s membership, and who are representatives of, and are appointed by way of two criteria. First, the five largest shareholders – United States, United Kingdom, France, Germany and Japan – are each entitled to appoint their own executive director to the Board. China, by virtue of its weight as a large economy, also has a seat at the table. The other members are elected by groups or constituencies representing between 4 and 24 countries. By virtue of these groupings, countries such as Russia and Saudi Arabia have traditionally secured enough votes to appoint their own Executive Directors to the Board.

Decision-making of the Board is based on consensus and formal voting. The Board of Directors selects and appoints a Managing Director, who serves as the chairman and the chief executive officer. A Bretton Woods tradition has emerged whereby the IMF Managing Director is nominated by European countries, while the World Bank Director is nominated by the US. Emerging markets have increasingly clamoured for the appointment of a non-European Managing Director, leading to the appointment of a Chinese national as Deputy Managing Director in 2011.

While the day-to-day running of the Fund has been delegated to the Executive Board of Directors, the Board of Governors retains the mandate to approve quota increases, special drawing right (SDR) allocations, admission and expulsion of members, and amendments to the Articles of Agreements and Fund by-laws. It also acts as the final determiner on issues relating

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Ngaire Woods, ‘The Challenge of Good Governance for the IMF and the World Bank Themselves’ (2000) 28 *World development* 823.

<sup>438</sup> Bradlow, ‘The Governance of the IMF’ (n 437).



to interpretation of the IMF Articles of Agreement. Decision-making by the Board of Governors is undertaken by way of voting.

Membership and representation of countries in the IMF, including within the governance bodies, is determined by quotas. Each member country, upon accession to the Articles of Agreement, is assigned a quota based on its relative weight in the global economy, determined by the member's annual Gross Domestic Product (GDP), level of trade liberalization, volume of current account transactions, and official reserves. Subsequently, the member's quota determines its contribution to the Fund, the amount of financing it may access from the Fund, and voting power, especially in the Board of Governors.

As a result, voting power at the IMF is concentrated on 10 countries, which control more than 50% of the voting shares. These are, in order of declining voting power, the US, Japan, Germany, France, United Kingdom, China, Italy, Saudi Arabia, Canada and Russia. The US, with a voting share of 16.75%, remains the only country with unilateral veto power over major IMF decisions, and also informally controls the IMF by virtue of its geographical location in Washington DC. The State-to-State contact groups, especially the G7, and, since the global financial crisis, the G20, continue to wield immense influence on the IMF agenda and decision-making.

### **3. The World Bank: Governance and Institutional Architecture**

The 1944 Bretton Woods Conference also adopted the Articles of Association of the International Bank for Reconstruction and Development (IBRD), which has come to be known as the World Bank. The governance, decision-making, membership and representation structure of the World Bank mirrors that of the IMF, discussed above. Since much time at the World Bank was spent designing and negotiating the structure of the IMF, as the conference drew to a close, the same structure was adopted for the World Bank. For example, the allocation of votes among the Executive Directors of the World Bank is tied to the allocation within the IMF. The main difference between the governance structures of the two institutions is found in the World Bank's various financing facilities, and its funding sources.

The World Bank was conceived to provide capital for post-world War II reconstruction and development. Hence the Articles of Association provided for three mandates: assist in the reconstruction and development of war-ravaged economies, promote private foreign investment by providing loans and guarantees, and also increase international trade, economic growth, and the standard of living in member countries. Since the US government stepped into

the reconstruction efforts with its Marshall Plan, the Bank's core mandate was displaced. With the wave of decolonization in most parts of the world, the Bank consequently found a new role in the financing of development projects in developing countries in Africa, Asia and Latin America. This role included the alleviation of poverty and promotion of social development.

It is at this point that the Bank's financial regulatory role was defined and entrenched. As part of the loan financing and grant programmes, the Bank promoted, as part of its financing conditionalities, specific institutional, policy and regulatory reforms within the member countries in need of financing.<sup>439</sup> While the Articles of Agreement did not provide a specific role for the Bank in members' financial regulatory schemes, these financing conditionalities entrenched its role as an international financial regulator, especially in developing countries.<sup>440</sup>

The Bank's role was accentuated by the oil crisis of the 1970s, which led to financial crises, and left many developing countries grappling with high inflation and current account deficits.<sup>441</sup> Alongside the IMF, the Bank offered these countries various financing facilities tied to structural adjustment programmes (SAPs) that included macro-economic and micro-economic policy reforms such as market liberalization, privatization of State entities, reduction of recurrent expenditure on social programmes, and regulation.<sup>442</sup> By the 1990s, the World Bank and the IMF attempted to coordinate their standard-setting and surveillance programmes in respect of predominantly emerging market and developing economies.<sup>443</sup> These "neo-liberal" policies have been widely criticised for putting EMDEs in vulnerable positions within the global economy, and ultimately exposing them to the ravages of financial globalization.<sup>444</sup>

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<sup>439</sup> Axel Dreher, 'The Development and Implementation of IMF and World Bank Conditionality' <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=333960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=333960)> accessed 2 February 2015; Joan M Nelson, 'Promoting Policy Reforms: The Twilight of Conditionality?' (1996) 24 *World Development* 1551.

<sup>440</sup> Avgouleas (n 198); Rolf H Weber and others, 'Addressing Systemic Risk: Financial Regulatory Design' (2014) 49 *Texas International Law Journal*.

<sup>441</sup> Avgouleas (n 198).

<sup>442</sup> Dreher (n 439); Thomas J Biersteker, 'Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions' [1990] *International Studies Quarterly* 477; Axel Dreher, 'A Public Choice Perspective of IMF and World Bank Lending and Conditionality' (2004) 119 *Public Choice* 445; Jane Harrigan and Paul Mosley, 'Evaluating the Impact of World Bank Structural Adjustment Lending: 1980–87' (1991) 27 *The Journal of Development Studies* 63.

<sup>443</sup> Richard E Feinberg, 'The Changing Relationship between the World Bank and the International Monetary Fund' (1988) 42 *International Organization* 545.

<sup>444</sup> Harrigan and Mosley (n 442).

#### **4. The Nature of Regulatory Power within the Bretton Woods Institutions**

This chapter questions the adequacy of the Third World's approach to contestation of BWI's neoliberal regulatory hegemony in the global financial markets, which has concentrated on the issue of democratic and equitable State representation and participation. This latter approach to contestation is State-centric, to the extent that it has concentrated on the structural aspects of US and other countries' hegemony, which include their voting power, representation in decision-making organs, and material contributions to the funds. The argument proposed in this chapter is that other than structural and material State power, the BWI regulatory system is established, perpetuated, and operates on the basis of powerful economic, legal, technical and ideological rationalities that have the capacity to order the global financial markets, including States, citizens, market players and their capacities and interests, in favour of global capital, and against the interests of EMDEs.

Chapter 2 outlined how the ideational infrastructure of financial markets, that is, neoclassical economics, doctrines of legal formalism, technological ideas and their related technologies and practices, exercise ideological and performative power that acts upon actants<sup>445</sup> within the global financial markets, and delineates the identities, capacities, interests and possibilities for action. The discussion below examines the extent to which these ideas and practices have impacted on four phases and aspects of BWIs: the establishment of the BWI-based global financial system; the establishment of the BWI regulatory system; State governance of BWIs; and BWI bureaucratic power.

##### **4.1. Structural and Ideational Power in the Establishment of the Global Financial System**

The current (modified) version of the international monetary system is not a natural, pre-existing market system, but rather was co-constituted during the establishment of the BWIs by the victorious Allied Powers, and has consequently undergone ideological naturalization.<sup>446</sup> The State-level power dynamics are evident in the fact that the design of the BW international financial system was principally designed and negotiated between two countries, the US and

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<sup>445</sup> The term 'actant' is a concept of Actor-Network Theory that captures the fact that action occurs not necessarily as a result of singular agency, but rather within a specifically-configured assemblage of other human and non-human 'actants', wherein agency is distributed in relative degrees. See Latour (n 263) 54.

<sup>446</sup> For a discussion on the ideological construction and naturalization of the monetary system, see Geoffrey Ingham, "'Babylonian Madness": On the Historical and Sociological Origins of Money' in John Smithin (ed), *What is Money?* (Routledge 2002) 16.

the UK, represented by Harry Dexter White, and John Maynard Keynes, respectively.<sup>447</sup> The negotiated design, heavily favouring the US, was then presented to the 44 nations represented at the conference, and ratified by 29 of them. For example, Keynes made three proposals for the design of the monetary system that would have probably evolved much differently from the current system: the creation of a new, neutral world currency out of countries' balance-of-payment imbalances; the creation of an international bank from which countries would access financing without conditionalities; and the sharing of balance-of-payment deficit financing between surplus countries and deficit countries.<sup>448</sup>

The US, noting its economic dominance at that particular point in time, rejected these proposals, and instead advocated for retaining the dollar as de facto world currency, for deficit countries bearing the burden of their balance-of-payment shortfalls, and also for conditional lending that would place borrower countries at the regulatory power of the US.<sup>449</sup> This design of the international monetary system contributed to constituting US structural and ideological hegemony over global finance, and globalizing the trend of financialization, which hegemony Chimni likens to imperial continuity.<sup>450</sup> As discussed in Chapter 1, the adoption of the dollar as reserve currency in global finance, the expansion of US-controlled BWI financing into Third World countries, and pegging it to neoliberal financial sector reforms, have opened up global markets, especially Third World economies, to US structural influence.

The nature of power the US exercised over not only the UK, but the other Allied Nations, to accept an international monetary system that favoured it, was principally structural and material, rather than ideational, in nature. Since joining WWII at the tail end, the US had immense military and financial reserves, as compared to the UK, France, Russia and China, whose resources had been depleted by the war, and would be in need of US financing for post-

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<sup>447</sup> Benn Steil, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order* (Princeton University Press 2013) 201.

<sup>448</sup> E Jeffrey Popke, 'Recasting Geopolitics: The Discursive Scripting of the International Monetary Fund' (1994) 13 *Political Geography* 255, 258.

<sup>449</sup> *ibid* 259.

<sup>450</sup> BS Chimni, 'International Financial Institutions and International Law: A Third World Perspective' in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010) 32. Chimni argues that international financial institutions 'have their basis in colonial ideas, categories and practices.'

war reconstruction.<sup>451</sup> Hence the US was entrusted with the primary responsibility for “ordering the world economy”.<sup>452</sup>

#### 4.2. Ideational Power in the Regulatory Design of BWIs

The power dynamics at play in the design of the regulatory scheme to police the new international monetary system was also largely structural, save for the nature of the resources that were deployed in the effort. Other than the military, economic and political clout that the US commanded, it carefully deployed specific discourses and practices such as ‘development’, ‘economic growth’, ‘poverty’ and ‘human rights’, to design not only the regulatory mandate of the IMF and the World Bank, but also State governance of the regulatory institutions.<sup>453</sup> These discourses and related practices were crucial to this exercise of power in various respects. For example, they produced and fixed meanings that would be lived and experienced by other players in the global economy, including States, corporations, international regulatory institutions, and individuals in respective countries globally.<sup>454</sup> This includes concepts such as Gross Domestic Product (GDP) as the measure of economic growth, which, as a global definition of State power: ranks countries; determines their influence in global governance institutions; drives their development policies and dictates economic reform programs they adopt; and determines their adoption of international regulatory standards, based on their negative effect on GDP growth.<sup>455</sup>

In addition, these discourses and practices produced social identities and respective capacities that either enabled or constrained the actions or exercise of power among stakeholders in the global economy, such as, for example, developed economy/first world and developing economy/third world categories.<sup>456</sup> The discursive practices would also articulate and diffuse

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<sup>451</sup> For example, Steil records that the US, through White and his Treasury Department associates, used the Lend-Lease Programme, to press the British for trade concessions that would ultimately water down Britain’s imperial influence not only over international finance, but specifically the BWIs. `See Steil (n 447).

<sup>452</sup> Popke (n 448) 258.

<sup>453</sup> See the Chapter 1 discussion of the development of discourses both at the institution of the BWIs, but also as responses to Third World contestation of international financial law and related financial institutions such as the IMF and the World Bank, as captured in Rajagopal, *International Law from Below* (n 382).

<sup>454</sup> Michael N Barnett and Martha Finnemore, ‘The Politics, Power, and Pathologies of International Organizations’ (1999) 53 *International organization* 699, 699–712; Michael Barnett and Raymond Duvall, ‘Power in International Politics’ (2005) 59 *International organization* 39, 55, 56.

<sup>455</sup> Fioramonti (n 2) 3; See also Sundhya Pahuja, ‘Global Poverty and the Politics of Good Intentions’ in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Bloomsbury Publishing 2014) 35. Pahuja argues that the ostensibly scientific and universal concept of GDP was introduced after decolonization, to maintain and conceal International Law’s hierarchy of racial difference.

<sup>456</sup> Fioramonti (n 2) 3.

new norms, rationalities and categories of actors across the global economy.<sup>457</sup> Some of these exercises of power through discourse are mentioned below.

### **The Discourse of Security and Freedom**

The discursive scripting of the IMF and the World bank is evident in the US appropriation of the security and freedom discourse at the end of WWII, and the beginning of the Cold War, to cast the communist Soviet Block as an enemy of freedom and free markets, and to position the Bretton Woods system of international finance, and national capitalist economic systems, as the antithesis of this threat to freedom.<sup>458</sup> In addition, this creation of 'the other' was also extended to the classification of States into developed/first world States, on the one hand, and developing/underdeveloped/third world States, on the other hand.

### **The Development Discourse**

The classification of developed and developing countries was of course preceded by a discourse of 'development' that sought to distinguish the former imperial States from the newly-independent States, that were considered 'traditional', 'backward', 'uncivilised', and in need of development.<sup>459</sup> The discourse of development, and the consequent State classification, enabled the ideational ordering of the regulatory relationship between the US, BWIs and Third World countries, in at least three ways.

First, the US was able to draw a false, conceptual line, between economic and political domains, and hence the extent of democratic participation, in the emerging international institutions.<sup>460</sup> For example, while the principle of equal democratic participation was embedded in certain UN organs on the basis that the sovereignty of States was an equally binding concept, this was not the case for BWIs. The US appropriated the discourse of development to apportion State influence over the governance of the BWIs on the basis of State economic strength, including its Gross Domestic Product (GDP). The end result was that the weighted voting rights of the member States to the IMF favoured the US. This was a conscious effort by the US to maintain

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<sup>457</sup> Barnett and Duvall (n 454); Barnett and Finnemore (n 454).

<sup>458</sup> Popke (n 448) 262.

<sup>459</sup> Pahuja, *Decolonising International Law* (n 271) 8.

<sup>460</sup> *ibid* 19, 129.

unrivalled influence over the IMF and the World Bank, and consequently over Third World countries, which subsists to date.<sup>461</sup>

Second, the 'development' discourse created the social reality of the 'Third World', and enabled the establishment of BWIs with jurisdiction to interfere in, manage, and even control these economies, on the economic rationale that they required technocratic intervention to achieve developed country status.<sup>462</sup> For example, the IMF and the World Bank were given surveillance powers over these economies, and also the power to subject borrower countries to economic management programmes in the form of Structural Adjustment Programmes (SAPs).<sup>463</sup> These programmes amounted to democratic or political power grabs, as the IMF micromanaged even political aspects of economic management, such as budgetary allocations.<sup>464</sup> Anghie compares this 'ideological scripting' of the BWIs to the establishment of the Mandate System of the League of Nations, which was meant to bring civilization to, and economically develop, the colonial territories.<sup>465</sup>

The third related exercise of power was the effect that the discourse had on the newly-independent post-colonial States, the so called Third World States. By constituting the States and their citizenry, and their self-perception on its terms, the (under-)development discourse "create[d] the Third World politically, economically, socially and culturally", and in the process, enrolled the Third World into the economic imperatives of developed countries.<sup>466</sup> This included the liberalization of Third World economies, including their financial markets, for the entry of transnational capital, which, due to its dis-embedded, extractive and speculative nature, was not primed to support the real development needs of these countries, such as sustainability, long-term and agricultural investments. This has been evident, for example, in

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<sup>461</sup> *ibid* 23. Pahuja notes that the quota allocation formula was political rather than scientific, considering that its US State Department creator had been instructed on deriving a formula for an already-determined outcome of US voting superiority.

<sup>462</sup> Balakrishnan Rajagopal, 'International Law and the Development Encounter', *International law from below: development, social movements, and Third World resistance* (Cambridge University Press 2003) 31. Rajagopal contends that the development discourse set a teleological imperative of 'catching up', which ordered the political and economic aspirations of Third World countries.

<sup>463</sup> Popke (n 448) 263.

<sup>464</sup> Rajagopal, 'From Resistance to Renewal: Bretton Woods Institutions and the Emergence of the "New" Development Agenda' (n 118) 128. Rajagopal argues that the development discourse, and related discourses such as good governance, expanded the IMF's mandate over Third World countries to include poverty alleviation, income distribution, environmental protection, anti-corruption campaigns, and reduction of military expenditure.

<sup>465</sup> See generally, Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 271).

<sup>466</sup> Marc DuBois, 'The Governance of the Third World: A Foucauldian Perspective on Power Relations in Development' (1991) 16 *Alternatives: Global, Local, Political* 1.

the critique of products of this economic development discourse - International Investment Law and related treaties - which protect foreign investments in the Third World, at the expense of State sovereignty over resources, community rights, environmental rights, and labour rights.<sup>467</sup>

### **4.3. Power in the State Governance of the BWIs**

As discussed in Sections 2 and 3, State governance of the IMF and the World Bank is undertaken more directly, as the respective Articles of Agreement spell out the institutional arrangements for membership and weighted voting in various organs, based on quotas tied to economic strength of the member countries' economies. As indicated earlier above, voting power at both the IMF and World Bank is concentrated on 10 countries, which control more than 50% of the voting shares. These are, in order of declining voting power, the US, Japan, Germany, France, United Kingdom, China, Italy, Saudi Arabia, Canada and Russia.<sup>468</sup> This means that EMDEs have remained side-lined in terms of effective representation.

Due to this institutional power arrangement that reserves a prominent sphere of influence for the US, most theories of international organizations have historically argued that the sources of power shaping the BWIs and their policies are, principally, the "US Treasury-Wall Street complex".<sup>469</sup> Indeed, State governance exercised by the US and other European State powers has ensured that the BWIs have not only adopted neoliberal regulatory policies that favour the interests of these countries, but also their compatible domestic interests. In fact, governmental positions within the BWIs are not attributed to or explained by the institutional or regulatory logic of the respective BWIs, but rather the domestic preferences, ideas and interests of the respective countries represented in the governance boards of the transnational regulators.<sup>470</sup>

Thus, over the years, the normative preferences of States represented in the IMF Board have hardly changed. For example, Clegg observes that on issues such as loan conditionality and default liability, directors representing materially powerful (creditor) states would predictably

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<sup>467</sup> See the discussion in Chapter 1 on Third World contestation of International Law, and as captured, generally, in Sornarajah, 'Resistance and Change in International Investment Law' (n 136).

<sup>468</sup> Dennis Leech, 'Voting Power in the Governance of the International Monetary Fund' (2002) 109 *Annals of Operations Research* 375; David P Rapkin and Jonathan R Strand, 'Reforming the IMF's Weighted Voting System' (2006) 29 *The World Economy* 305.

<sup>469</sup> L Clegg, *Controlling the World Bank and IMF: Shareholders, Stakeholders, and the Politics of Concessional Lending* (Springer 2013) 1. Clegg lists two other sources, which I discuss separately, below: transnational elite serving global capitalists' interests, and autonomous, technocratic BWI staff.

<sup>470</sup> See Stefan A Schirm, 'Ideas and Interests in Global Financial Governance: Comparing German and US Preference Formation' (2009) 22 *Cambridge Review of International Affairs* 501.



vote successfully in favour of the use of IMF resources as a form of collective insurance against borrower default, and of loan conditionalities, while directors from non-Creditor nations to take a negative stance on these issues.<sup>471</sup>

There is, however, an important corridor of influence in State governance of the IMF, which should not be under-estimated. The perpetuation of neoclassical economic theory, liberal legal theory, and regulatory neoliberalism at the IMF and World Bank has been sustained by an intricate network of academics, think tanks, foundations and the media, which promote their discourses and related practices, norms, ideas and theories, with respect to international development, and the work of the BWIs.<sup>472</sup> Some of these institutions, which have successfully lobbied the US and other powerful States controlling the BWIs, include the Mont Pelerin Society, the American Enterprise Institute, Cato Institute, the Heritage Foundation, and the Hoover Institute. Over the years, revolving doors have been established between these institutions, the US government, and the BWIs, ensuring a closed ecology of neoliberal discursive, normative, and ideational influence over the transnational regulators.<sup>473</sup>

This conveyor belt of economic, legal and technical ideology has delivered remarkable victories for the proponents of a neoclassical bend of regulatory policies at the BWIs. For example, in the 1970s, when the US banks purposed to expand their business into countries with capital controls and un-liberalized financial markets, they lobbied the US government to lead a diplomatic push at the General Agreement on Tariffs and Trade (GATT) forum, to first, have services conceptualized as tradable economic phenomena, and second, also have finance classified as a service – “financial services” – and include these financial services under GATT negotiations for trade liberalization.<sup>474</sup> This effort was supported by economists in the academia, who were also contracted to churn out publications over a period of time, discursively creating the previously non-existent service industry now known as “financial services”.<sup>475</sup>

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<sup>471</sup> Liam Clegg, ‘Global Governance behind Closed Doors: The IMF Boardroom, the Enhanced Structural Adjustment Facility, and the Intersection of Material Power and Norm Stabilisation in Global Politics’ (2012) 7 *The Review of International Organizations* 285, 304.

<sup>472</sup> Christian E Weller and Laura Singleton, ‘Peddling Reform: The Role of Think Tanks in Shaping the Neoliberal Policy Agenda for the World Bank and International Monetary Fund’ in Dieter Plehwe, Bernhard JA Walpen and Gisela Neunhöffer (eds), *Neoliberal hegemony: A global critique* (Routledge 2007) 71.

<sup>473</sup> Weller and Singleton (n 472).

<sup>474</sup> Christophers (n 333) 190.

<sup>475</sup> See generally, Christophers (n 333).

The liberalization of financial services, allowing foreign capital into national economies, has now become one of the BWI orthodoxies and main loan conditionalities that have had mixed results for Third World economies, and have been blamed for exacerbating the 1990s Asian, Latin American and Russian financial crises.<sup>476</sup> This network of norm entrepreneurs has therefore been a pivotal source of power for proponents of neoclassical economics and neoliberal regulatory policies within the BWIs.

#### **4.4. Power in the Internal Bureaucratic Governance of the BWIs**

##### **4.4.1. BWI Bureaucratic Autonomy**

As discussed above, conventional realist theories of international regulation have held that normative change at the BWIs originates from 'above', that is, the US Wall Street-Treasury Complex.<sup>477</sup> State representation however, also experiences certain resistance not accounted for in realist theories of international regulation. In spite of their seats in the IMF and World Bank Executive Boards, State representatives have been known to vent that they are unable to shape the operational aspects of the 'unwieldy' BWI bureaucracies, which tend to have a mind of their own.<sup>478</sup> Over the course of their existence, BWI bureaucracies have emerged as independent, exercising power autonomously in ways unintended and unanticipated especially by the States that established their regulatory structures.<sup>479</sup>

As demonstrated in the IMF's 1980s adoption of capital account liberalization as a norm, without State advocacy (or perhaps absent State resistance), it is increasingly becoming apparent that norm origination, adoption, embedding and application can be internal within the BWIs, and independent of the preferences of the powerful States in the respective IMF and World Bank boards.<sup>480</sup> This autonomy is linked to the 'bureaucratic culture' prevalent within the BWIs, which Clegg defines as "the set of basic assumptions that affect how organizational actors interpret their environment, select and process information, and make decisions so as to maintain a consistent view of the world, and their organisation's role in it."<sup>481</sup> Another

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<sup>476</sup> See the discussion on impact of financial liberalization on emerging market economies, in Chapter 1, and generally, in Joseph E Stiglitz, 'Capital Market Liberalization, Economic Growth, and Instability' (2000) 28 *World development* 1075.

<sup>477</sup> See generally, Bhagwati (n 236).

<sup>478</sup> Clegg (n 469) 2.

<sup>479</sup> Barnett and Finnemore (n 454) 699.

<sup>480</sup> Jeffrey M Chwieroth, 'Normative Change from Within: The International Monetary Fund's Approach to Capital Account Liberalization' (2008) 52 *International Studies Quarterly* 129, 130.

<sup>481</sup> Clegg (n 469) 12.

explanation of this relative autonomy of international financial institutions, found within TWAIL, is Chimni's argument that it is "a function of the fact that they [transnational financial regulatory institutions] do not seek to advance the interests of one or another advanced capitalist State, but that of the global capitalist system in its different phases."<sup>482</sup>

#### **4.4.2. The Nature of BWI Bureaucratic Power**

This capacity of bureaucratic culture to shape identities, interests, and capacities has emerged as a significant source of power not only within the BWIs but the arena of transnational governance.<sup>483</sup> In this sense, the BWI bureaucracies have become relatively autonomous and separate sites of authority in transnational financial governance, to the extent that they create their own rules, originate discursive social knowledge, and in the process, articulate and diffuse new norms, rationalities, principles, actors and identities.<sup>484</sup> For example, the IMF and the World Bank bureaucracies have been instrumental in creating and fixing new meanings of issues such as 'development', and creating a sense that these are shared international tasks requiring State cooperation and BWI interference. They have also been instrumental in classifying the world, thereby creating and sustaining various categories of State and non-State actors such as developed and developing countries, the First and the Third World, and, in the process, creating new interests for particular actors, e.g. 'achieving development' or 'promoting human rights' among the Third World.

These categories have given and deprived certain capacities to certain groups within transnational financial regulatory order. For example, the World Bank criteria for distinguishing between a farmer and a peasant determines who, within the World Bank's development machinery, is recognized as having knowledge relevant to solving development problems (the farmer) and who doesn't (the peasant).<sup>485</sup> The BWI bureaucratic power to articulate and diffuse new norms, rationalities, principles and actors is also seen in their ability to transfer models of political and economic organisation, such as democracy and free markets, around the world. For example, Chapter 4 examines the IMF's diffusion into Kenya, of the McKinnon-Shaw hypothesis, a neoclassical economic theory underpinning the liberalization of financial markets, through Structural Adjustment Programs (SAPs), and technical assistance programs for

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<sup>482</sup> Chimni, 'International Financial Institutions and International Law: A Third World Perspective' (n 450) 34.

<sup>483</sup> Clegg (n 469) 13.

<sup>484</sup> Barnett and Finnemore (n 454) 699.

<sup>485</sup> See generally, Guy Gran, 'Beyond African Famines: Whose Knowledge Matters?' (1986) 11 *Alternatives* 275.

macroeconomic modelling and macroeconomic governance. Chapter 5 also examines the World Bank's introduction of the Governance and Rule of Law agenda as a conceptual framework for the liberalization of financial markets, based on New Institutional Economics (NIE).

#### **4.4.3. Sources of BWI Bureaucratic Power**

Weberian-inspired arguments about the bureaucratic power of international organizations, including the BWIs, rely on the "legal-rational authority" of these institutions, to explain why these bureaucracies can make a break from the preferences of the powerful State that created them.<sup>486</sup> To expound on this 'legal-rational authority' in the case of IMF and World Bank bureaucracies, this section employs the theoretical framework of rationality as an ideological strategy of economic, legal and technological ideas, as articulated in Chapter 2.<sup>487</sup>

#### **Legal Rationality**

The IMF and World Bank bureaucracies not only make rules, but also rely on the legal authorities, rationales, and norms that establish and empower them to undertake their transnational regulatory functions and exercise bureaucratic power. They include, first, the respective multilateral treaties establishing them, and the underlying Public International Law norms and principles applicable to them as subjects of International Law (e.g. *Pancta Sunt Servada*).<sup>488</sup> Second, the laws include private international law principles, or *Lex Mercatoria*, which apply to the BWIs as parties to international financial market transactions, e.g. property law, human rights, and contract law.<sup>489</sup> As discussed in Chapters 2 and 5, these ostensibly rational, autonomous, objective, neutral, transcendental and universal legal norms and rationalities, underpinning transnational financial law, are ideological and performative in nature.<sup>490</sup>

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<sup>486</sup> Barnett and Finnemore (n 454) 699.

<sup>487</sup> See section 6.4 of Chapter 2.

<sup>488</sup> Daniel D Bradlow, 'International Law and the Operations of the International Financial Institutions' in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010) 1–2.

<sup>489</sup> *ibid* 1–2. Bradlow contends that the dual nature of the BWIs - as subjects of Public International Law and also as parties to private international financial contracts - raises various issues, including the IFIs' international obligations in policies they fund, whether they have specific international obligations they must comply with in undertaking their treaty functions, and whether they can be liable for the negative effects of their policies on contractual and third parties.

<sup>490</sup> For a discussion of International Law as ideology, see Marks (n 38); See also Scott (n 38).

These legal norms and discourses are not merely fleeting institutional rules that are easily replaceable. Rather, they shape the way an issue is seen by global policy makers, both within the BWIs and national institutions, and thereby control the possibilities of action or inaction in relation to the issue. In this sense, these legal norms are powerful. Eslava and Pahuja contend that legal discourses on property, trade, development, the environment, and human rights deployed by the BWIs are considered potent transmitters of particular modes of being.<sup>491</sup>

For example, the conception of international human rights law universalized by the BWIs is a corporatized version that favours the rights of transnational corporations over natural persons, and also promotes individualism through the promotion of individual rights over communal rights.<sup>492</sup> The globalizing discourse of ‘trade in services’, whether financial or other form, commodifies and equates services to goods, thereby obscuring and stripping services of their distinct social, cultural, environmental positioning in everyday life and personal relationships.<sup>493</sup> The World Bank’s advocacy for the introduction and enactment of private property rights, such as through land titling programs, as means of unlocking dormant capital for economic development, conflicts with alternative land use regimes of customary law systems, and inaugurates processes of inclusion and exclusion, landlessness, and new identities of private land owners and squatters.<sup>494</sup>

The language of law has been recognised for its significant role in ideologically legitimising dominant neoliberal regulatory ideas, since “its discourses tend to be associated with rationality, neutrality, objectivity and justice.”<sup>495</sup> In addition, it constitutes and thereby performs the neoliberal economic relations. As argued by Brown, in addition to securing the rights of capital and structuring competition, “neoliberal juridical reason recasts political rights,

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<sup>491</sup> Eslava and Pahuja (n 14) 106.

<sup>492</sup> See Mutua, ‘The Ideology of Human Rights’ (n 151) 589; See also, Anghie, ‘Time Present and Time Past’ (n 149) 244.

<sup>493</sup> A Claire Cutler, ‘Toward a Radical Political Economy Critique of Transnational Economic Law’ in Susan Marks (ed), *International law on the left: re-examining Marxist legacies* (Cambridge University Press 2008) 212.

<sup>494</sup> Tania Murray Li, ‘Formations of Capital and Identity’, *The Will to Improve: Governmentality, Development, and the Practice of Politics* (Duke University Press 2007) 96, 109. For a critique of formal property rights, see Joseph E Stiglitz, ‘The Economics Behind Law in a Market Economy: Alternatives to the Neoliberal Orthodoxy’ in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press 2013). Haldar and Stiglitz demonstrate how, in the context of provision of credit to the poor, the informal micro-credit approach of Yunus’ Grameen Bank, has in certain respects performed better than Hernando de Soto’s formal “property rights” approach.

<sup>495</sup> Chimni, ‘Third World Approaches to International Law’ (n 152) 15.

citizenship and the field of democracy itself in an economic register...” thereby depoliticising these issues.<sup>496</sup>

This legal rationality has therefore emerged as a powerful relatively autonomous ideational regulatory agent, which has been relied on by the BWIs in their regulation of Third World economies. Post-colonial and Third World studies, including TWAIL, have criticised the operation of international law using the discourse of rationality, as ‘technologies of empire’, to extend neo-colonial management of former colonial territories (the Third World) by former imperial powers (developed economies) within the BWI regulatory framework.<sup>497</sup>

As demonstrated in the examples above, the legal discourses on trade in financial services, human rights, and property which are deployed by the BWIs have also been criticised for promoting the interests of global capital, to the detriment of the welfare of the global South.<sup>498</sup> The short-term, speculative nature of transnational capital destabilizes the hurriedly-liberalised Third World financial markets, causing volatility and financial crises. In addition, as discussed in Chapter 4, foreign direct investment is prioritized by domestic financial markets policy makers over local capital, thereby maintaining an interest rate differential that attracts international capital while raising domestic lending rates, thereby constraining domestic access to affordable credit.

### **Economic Rationality**

The BWIs were established, generally, to undertake the task of economic regulation of the global markets. As discussed more elaborately in Chapter 2’s theoretical framework, the dominant discourse of neoclassical economics has over time succeeded in the process of economization, that is, the qualification of the domain of the social relationships of production and exchange as ‘economic’ and, in the process, to privilege the deployment of analytical apparatuses, language rationalities, institutions and descriptions based on or emanating from the (mainstream) economics discipline, above other analytical paradigms.<sup>499</sup>

The implications of this process of economization is that, within the BWIs, economic rationality is ideologically legitimated and privileged as the dominant paradigm within which IMF and

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<sup>496</sup> Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (MIT Press 2015) 151–152.

<sup>497</sup> See generally, Pahuja, *Decolonising International Law* (n 271); Eslava and Pahuja (n 14); Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 271); Chimni, ‘International Financial Institutions and International Law: A Third World Perspective’ (n 450).

<sup>498</sup> Chimni, ‘The World of TWAIL’ (n 107) 20.

<sup>499</sup> Çalışkan and Callon (n 310) 369, 370.

World Bank bureaucrats view and interpret global regulatory issues, select and process information related to these issues, and generate regulatory choices for responding to these issues. Economic rationality is defined by Umar as “...based on reasoned choices that involve the comparison of alternatives according to their capacity to promote efficient solution for public problems. Choices involve comparison of alternatives in terms of their total costs and benefits to the society.”<sup>500</sup>

The effect of economisation on the BWI bureaucracies is that, in the IMF, for example, most of the staff recruited are economists or have economic training, from specific institutions with a bias towards neoclassical rather than heterodox approaches to economics.<sup>501</sup> Extensive research has shed light on the powerful role of professional training in economics as a socialization mechanism, and a critical source for individuals’ ideas about social life.<sup>502</sup> More recently, Callon’s Performativity Theory has also articulated the performativity of economics, that is, the ability of economic doctrines to perform, shape and format the economy, rather than merely describe it.<sup>503</sup> These research programmes point to the ideological and performative power of economic theories, doctrines, ideas, discursive practices and norms, to act on individuals, and to enable or constrain their cognition of possibilities for action and inaction.

For example, Clegg argues that the IMF’s use of neoclassical economic rationalities as analytical or cognitive paradigms results in the interpretation of balance-of-payment shortfalls as macroeconomic anomalies requiring remedial action in the form of tighter credit supply, and reduced government expenditure.<sup>504</sup> This paradigm is contrasted to Keynesian economics that would, for example, advocate for more government spending.

The prevalence of economists and economic rationalization within the BWI bureaucracies, is therefore one of the reasons not only for BWI relative autonomy from State interests in certain instances, but also the prevalence of neoclassical economic rationalities underpinning BWI regulatory standards, policies and loan conditionalities. Rather than always emanating from

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<sup>500</sup> K Umar, ‘Rationalism and the Problematique in Policy Making and Analysis: The Case of Public Policy Targeting in Africa’ 809 <<http://repository.up.ac.za/handle/2263/3955>> accessed 13 January 2017.

<sup>501</sup> Jeffrey M Chwieroth, ‘Testing and Measuring the Role of Ideas: The Case of Neoliberalism in the International Monetary Fund’ (2007) 51 *International Studies Quarterly* 5, 6.

<sup>502</sup> See generally, David Colander and Arjo Klamer, ‘The Making of an Economist’ (1987) 1 *The Journal of Economic Perspectives* 95; AW Coats, ‘Changing Perceptions of American Graduate Education in Economics, 1953–1991’ (1992) 23 *The Journal of Economic Education* 341.

<sup>503</sup> Callon, ‘Introduction’ (n 43) 2.

<sup>504</sup> Clegg (n 469) 13.

the 'US Wall Street-Treasury complex', specific economic norms and rationalities have originated within the internal 'rational' decision making processes, and have been embedded in, and in certain instances ousted from, the BWI bureaucratic machinery.

For example, capital account liberalization, and the use of capital controls as an IMF policy has undergone a number of flips since 1944. The IMF Articles of Agreement have provided since 1944 that member States have a right to use capital controls. However, in the 1980s and 1990s, internal debates among the IMF staff turned capital controls as a regulatory policy option, into economic heresy. This was due to new, contested research that supported capital account liberalization.<sup>505</sup> It was during this period that the BWIs pressured Third World economies, including Kenya, to liberalize their financial markets (discussed in Chapter 4).<sup>506</sup> Even so, other research, and empirical evidence from the 1990s emerging markets crisis, pointed to the need for EMDEs to use capital controls to protect their economies from the volatility of the global markets.<sup>507</sup> After the 2008 financial crisis, the IMF once again rethought its stance on this policy, and seems to be open to EMDEs enacting capital controls, but only with the guidance and advice of the IMF.<sup>508</sup>

As seen with the issue of capital controls, empirical evidence does not always give economic rationality the upper hand within the BWI policy making bureaucracy. Policy is sometimes made on the basis of economic ideology or dogma, rather than empirical evidence, as demonstrated in the IMF advocacy for financial market liberalization.<sup>509</sup> While earlier economic research in the 1970s (specifically the Mckinnon-Shaw theses) had claimed that interest rate liberalization, and financial market liberalization, would lead to reduction of market lending rates, empirical evidence discounted these arguments, especially in EMDEs.<sup>510</sup> However, the IMF refused to abandon this policy. Stiglitz has argued that in this case, "the IMF did not believe

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<sup>505</sup> Jeffrey M Chwieroth, *Capital Ideas: The IMF and the Rise of Financial Liberalization* (Princeton University Press 2009) 1, 2.

<sup>506</sup> See generally, Rose W Ngugi and Jane W Kabubo, 'Financial Sector Reforms and Interest Rate Liberalization: The Kenya Experience' (African Economic Research Consortium 1998) AERC Research Paper 72.

<sup>507</sup> Manuela Moschella, 'The Institutional Roots of Incremental Ideational Change: The IMF and Capital Controls after the Global Financial Crisis' (2015) 17 *The British Journal of Politics and International Relations* 442, 452.

<sup>508</sup> *ibid.*

<sup>509</sup> While empirically-provable theories have more credibility than bare ideology, it is also true that empirical evidence depends on the kinds of questions asked, and can therefore also be political or discursive.

<sup>510</sup> Ronald Mckinnon and Sven Grassman, 'Financial Repression and the Liberalisation Problem within Less-Developed Countries' in Dr Sven Grassman and Professor Erik Lundberg (eds), *The World Economic Order* (Palgrave Macmillan UK 1981); Edward Stone Shaw, *Financial Deepening in Economic Development* (Oxford University Press 1973).



that policy should be based on theory or evidence. Either it had an agenda that was different – perhaps promoting the interests of the financial markets – and/or the policies were based more on ideology, not economic science...”.<sup>511</sup>

Another example of autonomous, bureaucratic norm changes within the IMF was the shift from Keynesianism to Monetarism, which was precipitated not by a direct preference of Monetarist economic policies over Keynesian economic policies, but rather the adoption of rule-based rather than discretionary approaches to macro-economic policy making within the concessional lending programmes. That is, the shift towards Monetarism was precipitated by the fact that it was more rules based, while Keynesianism was discretion-based.<sup>512</sup>

The mainstreaming of economic rationality in the BWI bureaucratic machinery had another effect: the discursive construction of the BWIs as “technocratic experts” in the economic management and development of EMDEs, and the othering of, or “closing off discursive space to traditional and local knowledges” inherent within the EMDE citizens and policy makers and regulators.<sup>513</sup> This not only justified BWI interventions in the politics and economic policy making of EMDEs, but also created within EMDE citizens and policy makers subjectivities of capacity inadequacy and dependence on BWI technical advice. Consequently, economic rationality in the form of ‘technocratic advice’, or ‘technical assistance’ was imposed onto economic, social and cultural systems of EMDEs, far removed from the neoliberal capitalist economies of the West, thereby entrenching and globalising the system of neoliberal capitalism.

### **Technical Rationality**

As discussed in Chapter 2, technological ideas, practices and artefacts are both ideological and performative. Through the ideologies of technological determinism and autonomy, the rationality of technical systems not only conceals the social origins and interests of technological design, but also creates subjectivities, whereby social values and interests are subjugated to the imperatives of the ostensibly autonomous technology.<sup>514</sup> Technological designs and practices also are capable of enacting and thereby performing the ideologically

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<sup>511</sup> Stiglitz, ‘Capital Market Liberalization, Economic Growth, and Instability’ (n 476) 58.

<sup>512</sup> Ben Clift and Jim Tomlinson, ‘When Rules Started to Rule: The IMF, Neo-Liberal Economic Ideas and Economic Policy Change in Britain’ (2012) 19 *Review of International Political Economy* 477, 481–484.

<sup>513</sup> Popke (n 448) 264.

<sup>514</sup> This is discussed in section 4.4 of chapter 2. On technology as ideology, see Feenberg, *Transforming Technology: A Critical Theory Revisited* (n 319) 56. See also Feenberg, ‘Subversive Rationalization’ (n 40) 318.

legitimated ideas about particular technological organisation.<sup>515</sup> In addition, as Socio-Technical *Agencements* (STAs) or hybrid assemblages of human and non-human actants, technologies perform and bring into reality the economic and legal ideologies embedded within them.<sup>516</sup> Thus, within the global financial markets, increased leveraging of various computing technologies by various market players, and policy makers and regulators, has also provided another source of technical rationality that acts upon global market players, including EMDEs, to adopt particular modes of economic organization.

Technical standards embedded in various aspects of the architecture of financial technologies, are discursive, to the extent that they act as purveyors of particular economic discourses on the nature of financial markets and social life. These technical standards are embedded in representational screen interfaces through which users see the markets, deductive algorithms forming part of the software that powers the logic of the computers, and even the plastic-and-metal aspects of the computing hardware that determine the limits of certain human intentionality.<sup>517</sup> Aside from the deliberate embedding of particular discourses in these systems, the autonomous agency of financial technologies is embodied in their ability to distance the users from, for example, the real markets that the technological interfaces represent.<sup>518</sup> In addition, the computing technologies are also scoping systems, to the extent that they sieve and project a uniform view of global markets that are in reality, “partial, contested and fragmented”.<sup>519</sup> The technologies therefore “bypass the political and social geographies of the world” and assimilate national and local differences in economic organisation.<sup>520</sup>

The regulatory agency or power of technical rationality has been noted in the deployment of the Debt Management and Financial Analysis System (DMFAS), a computing system initiated

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<sup>515</sup> Law and Singleton (n 48) 766.

<sup>516</sup> Çalışkan and Callon (n 330) 9.

<sup>517</sup> Preda (n 55) 755. Preda argues that five features constitute agential aspects of financial technologies, in which these technologies constitute the markets: temporal structures, visualization modes, representational and interpretive languages, cognitive tools and categories, and group boundaries.

<sup>518</sup> See generally, Mark Coeckelbergh, *Money Machines: Electronic Financial Technologies, Distancing, and Responsibility in Global Finance* (Routledge 2016) Coeckelbergh contends that financial technologies “contribute to impersonal, disengaged, placeless, and objectifying relations”, which, in the context of globalized financial markets, makes it difficult to exercise and ascribe responsibility. He also examines how financial technologies can be contested and morally and socially re-oriented through technological ideas and practices.

<sup>519</sup> Karin Knorr Cetina and Barbara Grimpe, ‘Global Financial Technologies: Scoping Systems That Raise the World’ in TJ Pinch and Richard Swedberg (eds), *Living in a material world: economic sociology meets science and technology studies* (MIT Press 2008) 163.

<sup>520</sup> *ibid.*

by the United Nations Conference on Trade and Development (UNCTAD), BWIs, and more than 66 Creditor and Debtor institutions and States at the global level, to manage sovereign debt among EMDEs.<sup>521</sup> The DMFAS is discursively programmed to undertake surveillance of debtor States by requiring them to input into the system, specific formats of microeconomic and macroeconomic information into the system, whose programming logic then beams a particularly scripted interpretation of this information to Creditor States and institutions.<sup>522</sup> The DMFAS is discursively scripted to the extent that it provides or advances specific or particular interpretations of debtor countries' economic well-being and vulnerabilities, based on ostensibly neutral and technocratic, but really, inherently biased and political, interpretive lenses.<sup>523</sup>

These three types of rationality discussed above – legal, economic and technical rationality – do not act in isolation, but rather in negotiation, many times mediated by the particular interests that the BWI bureaucrats are ideologically biased towards.

#### **4.4.4. External Influences on Bureaucratic Power**

In the same context in which State representation and interests in the IMF and World Bank executive boards are influenced by norm entrepreneurs and other parties, so are their bureaucracies. For example, the internal economic debates within the IMF leading to certain regulatory policy shifts, such as capital controls versus capital account liberalization, interest rate regulation versus financial markets liberalization, and austerity programmes versus stimulus package policies, have mirrored economic debates in the academies, research centres and think tanks, and the media.<sup>524</sup>

The post-2008 ideational shift within the BWIs to macroprudential regulation, for example was a fundamental normative change that was not simply necessitated by the crisis, or taken advantage of by the EMDE States, but rather was foregrounded by comprehensive investments in economic, legal and technical rationalities within and without the BWI bureaucracies. Baker argues that the macroprudential ideational shift occurred under four 'scoping' conditions. First was prior intellectual and institutional presence of ideas favourable to macroprudential policy.

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<sup>521</sup> For a historical account of the initiation of DMFAS, see United Nations Conference on Trade and Development, 'Debt Management and Financial Analysis System' (United Nations Conference on Trade and Development 1992) DMFAS Newsletter 1.

<sup>522</sup> Cetina and Grimpe (n 519) 162–163.

<sup>523</sup> *ibid.*

<sup>524</sup> Chwioroth, 'Normative Change from Within' (n 480) 132.

Second was the advantageous positioning of ideational advocates in professional policy networks and related environments. Third was active networking, promotion of the ideational shift, and persuasion of professional peers by norm entrepreneurs. The fourth condition was the existence of explanatory capacity and a feasible programme of action, alongside professional esteem, status, standing or prior intellectual performance of the norm entrepreneurs.<sup>525</sup>

These examples underscore the pivotal role and influence of normative ideational networks of the academy, research centres, think tanks, policy circles and other fora through which ideational shifts originate and gain authoritative traction that makes its way into the BWI bureaucracies.

## **5. Conclusion**

This chapter has explored the third research sub-question: how has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism within the IMF and World Bank? The chapter has explored the institutional context of Third World States' historical contestation against BWIs, by discussing the governance, decision making and representation rules that have historically under-represented Third World countries, and propped up the structural power of the US and other developed countries in transnational financial regulation. While acknowledging the materiality and significance of the US and other developed countries structural and material power, and the influence of the US Treasury-Wall Street complex within these institutional arrangements, the discussion suggested that there has emerged an additional source of regulatory power within the BWIs – the influence of relatively autonomous, ideological and performative ideas and bureaucratic practices. The discussion has examined the role played by specific ideas in three aspects of the BWIs: establishment and of the BWIs; State governance of the BWIs; and the BWIs' regulation of Third World economies.

For example, during the establishment and structuring of the BWIs, other than the military, economic and political clout that it commanded, the US carefully deployed specific discourses and practices such as 'development', 'economic growth', to design not only the regulatory mandate of the IMF and the World Bank, but also State governance of the regulatory

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<sup>525</sup> Andrew Baker, 'The New Political Economy of the Macroprudential Ideational Shift' (2013) 18 *New Political Economy* 112, 114.

institutions. Concepts such as Gross Domestic Product (GDP) as the measure of economic growth were created as global definitions of State power, ranking countries into developed and developing economies, and determining their influence within the BWIs. State governance of the BWIs has also been impacted by external ideational power, through lobbying. Regulatory neoliberalism at the IMF and World Bank has been sustained by an intricate network of academics, think tanks, foundations and the media, which promote their discourses and related practices, norms, ideas and theories, with respect to international development, and the work of the BWIs. This conveyor belt of economic, legal and technical ideology has delivered remarkable victories for the proponents of a neoclassical bend of regulatory policies at the BWIs, including the classification of finance as a service, and the subsequent liberalization of financial markets.

Ideas in the form of economic, legal and technological rationalities have also impacted on the bureaucratic culture of the BWIs, making them relatively autonomous and separate sites of authority in transnational financial governance, to the extent that they create their own rules, originate discursive social knowledge, and in the process, articulate and diffuse new norms, rationalities, principles, actors and identities. This includes the conceptualization of economic rationalities and ideas such as 'development', and creating a sense that these are shared international tasks requiring State cooperation and BWI interference. In addition, legal discourses on property, trade, development, the environment, and human rights deployed by the BWIs are considered powerful sources of particular modes of being. Lastly, technological infrastructure for regulating (by monitoring) Third World economies, such as the Debt Management and Financial Analysis System has also embedded and diffused, globally, certain BWI economic and legal discourses of financial markets, with ideological and performative power.

The ideological and performative ideas, including legal formalism, neoclassical economics, and technological rationality, that constitute these institutions, and the global monetary order, are significant influences that determine the regulatory policies that the BWIs favour, and how they exercise their regulatory power over Third World economies. The discussion has demonstrated how, over time, the expert neoclassical economic and rule of law theories on economic growth, development, and financial market deepening, have decoupled from their originators' interests, and exercised a 'relatively autonomous' ideological and performative power upon IMF and World Bank bureaucrats, and Third World regulators. In addition, the discussion also

demonstrated how these neoliberal economic and legal rationalities have been embedded and made durable in various technologies circulated by BWIs, including algorithmic-driven macro-econometric models and the DMFAS.

Implications of these findings are that the Third World should conceptualize BWIs as neither benevolent development institutions nor inescapably exploitative mechanisms for global capitalism, but rather as sites for active and continuous ideological and technological intersection and contestation.

## CHAPTER FOUR

### **Economization: The Ideological and Performative Effect of Neoclassical Economics in the Liberalisation of Kenya's Interest Rates Market**

#### **1. Introduction**

Chapter 3 has examined the regulatory role of the ideological and performative nature of ideas within the Bretton Woods Institutions (BWIs). This chapter explores the first aspect of the fourth research question: how has the ideological and performative power of economic ideas and related practices reproduced regulatory neoliberalism in Kenya's interest rate markets? It is the first of three related aspects of the Kenya case study that explores the role which economic, legal and technological ideas, practices and related institutions play in the reproduction and sustenance of regulatory neoliberalism in Third World financial markets. The discussion explores the role of neoclassical economics in framing, delineating and limiting the actions of Kenyan financial markets regulators and policy makers in addressing the problem of high interest rates and high consumer indebtedness in the domestic market, and in contesting neoliberal transnational financial regulatory standards.

Since the liberalisation of financial markets as a result of BWIs' loan conditionalities, Kenya, like other financial markets, has experienced mixed results, including increased market lending rates. Nevertheless, despite the criticisms and discrediting of neoclassical economic orthodoxy and financial market liberalisation, this neoliberal regulatory paradigm remains the main policy frame for devising regulatory solutions to bring down lending rates. This includes the CBK's use of macro-econometric models as part of its liberalised, market-centred monetary policy mechanism, to influence lending rates downwards. Employing ideology critique and economic performativity theory, the discussion explores the ideological and performative role of neoclassical economic theories including the Mckinnon-Shaw hypothesis, Efficient Markets Hypothesis, General Equilibrium Theory, and related practices such as macro-econometric modelling. The chapter argues that the adoption of neoclassical economic theories, and related policy and technical practices by Kenyan policy makers and regulators reproduces and sustains regulatory neoliberalism, liberalised financial markets, high interest rates and high indebtedness. In addition, it limits policy choices available for redressing the high interest rate problem.

The chapter is organised into 7 further sections, to capture the chronology of the regulatory debate. Section 2 briefly outlines the theoretical framework for exploring the ideological and performative power of neoclassical economics and related practices. It argues that the neoclassical economic theories and practices adopted by Kenyan regulators, including the Mckinnon-Shaw hypothesis, Efficient Markets Hypothesis, General Equilibrium Theory, and macro-econometric modelling, ideologically legitimate and perform neoliberal financial markets, and regulatory neoliberalism. Section 3 lays the framework for the case study by recounting the IMF-driven financial sector liberalization process in Kenya and the context of high interest rates, and contestation of the neoliberal regulatory paradigm. Section 4 examines implementation of IMF structural adjustment programs through the construction and embedding of neoclassical macro-econometric models. It argues that this established macro-econometric governability of the domestic financial markets, thereby ideologically legitimating and performing liberalized financial markets.

Section 5 explores the efforts by Kenya's Parliament to re-politicize the domestic financial markets and their regulation. It demonstrates the ideological nature of the various neoclassical economic theories underpinning interest rate liberalization. Section 6 analyses the regulators', policy makers', and bankers' use of neoclassical economic rationalities and policies to depoliticize the issue of high interest rates, and demonstrates the contradictions inherent in regulatory neoliberalism. Section 7 contains the conclusions and recommendations for further research. It argues that the political project of constituting sustainably fairer interest rates markets in Kenya requires the levying of both the ideological and performative power of legal, economic, and technological ideas and practices.

## **2. Ideological, Constitutive and Performative Power of Neoclassical Economics**

Chapter 2 outlined the theoretical framework for examining the role of neoclassical economics and related practices, techniques and technologies in reproducing neoliberal markets and related regulatory practices, and also in restricting or limiting the options or possibilities for regulatory reform in Third World countries. Through the deployment of an assemblage of ideology critique and economic performativity theory, the discussion demonstrated the cognitive and normative agential power of economic ideas, practices and related institutions in constituting market relations, shaping identities and respective capacities that either enable or constrain the actions or exercise of power among stakeholders in the global economy. This



theoretical framework is used to examine the role of neoclassical and other economic theories in embedding a neoliberal market paradigm within the Central Bank of Kenya, the National Treasury, and other financial sector policy makers and regulators, and in sustaining the liberalised financial markets, and concomitant high interest rates and high indebtedness.

The neoclassical economic theories such as the Mckinnon-Shaw Hypothesis, and policy and regulatory practices such as macro-econometric modelling, and monetary policy interventions, are conceptualised as ideologies, for three related reasons. First, they are ideological to the extent that they have developed into the dominant, albeit subjective ideational apparatus for interpreting and interacting with the Kenyan economy and society, not only within regulatory bureaucracies, but also in the academia, government and non-government economic think tanks, and the private financial sector. This is despite their partial and at times outright inaccurate perspectives on the nature and workings of the Kenyan economy and financial markets, as exhibited by their well-documented policy failures, including persistence of high interest rates. Within Economic Performativity and the related Actor-Network Theory rubric, this process is referred to as 'economization', that is, the uncritical and controversial qualification of activities, behaviours, spheres or fields as 'economic'.<sup>526</sup> The consequence of economization is the privileging of analytical apparatuses, rationalities, concepts and language of neoclassical economics.<sup>527</sup>

Second, the economic theories and related practices are ideological to the extent that they offer a partial view of the nature and workings of the economy, as a singular, totalising view. This is as a result of the adoption of 'closed-systems' natural law and natural science assumptions and methodologies such as mathematical modelling which, in a bid to simplify the complexities of the real world, adopt simplifying and inaccurate assumptions. The implications of this 'scientification' of CBK and National Treasury macro-econometric modelling of the monetary and financial sector, is that neoclassical theories and practices of financial sector liberalization are presumed to be superior to other heterodox approaches to interest rates regulation, and thus side-line them, while branding any critiques as irrational. Third, the theories and practices underpinning financial liberalization in Kenya are ideological to the extent that they conceal, and, at worst, legitimate and sustain socially-constructed and systematised relations of domination exemplified by exploitative interest rates. The market

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<sup>526</sup> Çalışkan and Callon (n 310) 370.

<sup>527</sup> *ibid* 369–370.

aspects concealed by neoclassicism's claims to market autonomy and theoretical neutrality include the social and political aspects of the 'market-priced' interest rates, including market manipulation through the CBK monetary policy mechanism, banking cartel rate-fixing, and power asymmetries between lenders and borrowers.

The power of neoclassical economic theories and practices deployed by the CBK, National Treasury and the financial sector is, however, not restricted to its effect on the cognitive paradigms of the regulatory bureaucrats and policy makers. As articulated by the interlocutors of economic performativity theory, neoclassical economics does not merely describe the economy or seek to understand how it works; neoclassical economics actually performs, shapes and formats the economy. To this extent, it is argued that the Kenyan financial markets are constituted and re-constituted on the basis of neoclassical macro-econometric models, and therefore mimic, albeit with failure, the partial or inaccurate assumptions of the closed economic system. Due to the ideological legitimation and embedding of neoclassical economics and related practices within the CBK, the National Treasury, and the banking sector (which is equated to generic performativity)<sup>528</sup>, the uses of these theories and practices by all market players in the financial sector delivers a self-validating feedback loop. This validation of the neoclassical economic theories and related macro-economic models is used as further evidence for sustaining the market liberalisation policies, despite the problem of high interest rates and high indebtedness in Kenya.

The chapter argues that the CBK's macro-econometric model deployed in monetary policy transmission have enabled generic and effective performativity of the interest rate market. Generic economic performativity is established by demonstrating that the neoclassical economic theories and models are used by not only academics but also Kenyan financial markets participants, regulators and policy makers. Effective performativity is established by demonstrating the effect of the economic practices, which in this case, is the establishment of macroeconomic governability using the macro models. The reflexive character of macroeconomic modelling, and its subsequent deployment in evaluation, forecasting, analysis and intervention, is what has an effect the economy. Economic agents' knowledge of the causal

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<sup>528</sup> Generic performativity is achieved where the economic theories and practices are used, not just by academics, but also in the 'real world', by market participants, policy makers, regulators, etc. See Mackenzie (n 153) 16–17.

relationships between various economic variables feeds back into their economic behaviour, while that of regulators and policy makers feeds into economic policy advice and interventions.

### **3. Liberalization of Interest Rates Market in Kenya, and Political Contestation**

Since the commencement of the IMF stabilisation programmes in EMDEs, in the 1970s, one of their most criticised reform proposals, fashioned as loan conditionalities, has been the liberalisation of developing countries' financial markets, and especially interest rates markets.<sup>529</sup> Relying on the Keynesian Liquidity Theory, Kenya, like many other developing economies at the time, implemented a policy of maintaining low interest rates (adjusted for inflation, so as to maintain positive real interest rates), as a strategy for maintaining a low cost of credit, which, the Government believed, would increase investment activity and economic development.<sup>530</sup> This was undertaken through interest rate controls that included lending rate caps for commercial banks, non-bank financial institutions (NBFIs) and building societies, and minimum savings rates for all deposit-taking institutions. In addition, banking regulation banned non-interest rate charges, and stipulated that the calculation of interest rates was to be on a reducing balance basis.<sup>531</sup>

The 1973 oil crisis brought inflationary pressure to bear on capped interest rates, turning them into negative real interest rates. This prompted the Kenya government, in 1974, to start the first of a series of upward revisions of the lending rate caps, so as to maintain positive real interest rates, and give lenders room to price their loans and deposits profitably.<sup>532</sup> In 1979, the government's request for financial assistance from the IMF, to deal with the external shocks occasioned by exchange rate volatility, opened the door to the introduction of structural adjustment programmes (SAPs) and other IMF-recommended macro-economic policy prescriptions that continue to structure Kenya's current economic policies. The 1980s were marked by several SAP reforms to the financial sector, including further upward adjustments to the lending rate ceilings. The IMF advocated for interest rate liberalization as a necessity for maintaining positive real interest rates, so as to encourage the mobilisation of savings. This

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<sup>529</sup> See generally, Mkandawire (n 13); Godwin R Murunga, 'Governance and the Politics of Structural Adjustment in Kenya' in Godwin R Murunga and Shadrack W Nasong'o (eds), *Kenya: The struggle for democracy* (Zed Books 2007).

<sup>530</sup> Keynes, in his liquidity theory of interest, argues for low interest rates to speed up the accumulation of capital. See Ngugi and Kabubo (n 506) 13. See generally, Keynes (n 376).

<sup>531</sup> 'Reducing balance basis' meant that interest was charged on the outstanding loan amount, rather than the original or principal amount borrowed. See Ngugi and Kabubo (n 506) 13.

<sup>532</sup> *ibid.*

would supposedly trigger the deepening of the banking sector, entrance of new lenders into the market, increased competition, and the lowering of the interest rate spread, which would also ensure competitively low costs of credit, as per the government's policy target.<sup>533</sup>

By 1991, Kenya's interest rate market had been fully liberalized. The lending and deposit rate caps were abolished, while banks were allowed to include all kinds of charges and fees to the lending rates. In addition, banks were given the liberty to contractually set the interest rate calculation method. The impact of interest rate liberalization on the cost of credit has, however, not been positive. Between 1991 and 2016, despite the deepening and development of Kenya's financial sector into a regional powerhouse, and the entrance into the market of both local and foreign financial institutions, the lending rates have remained excessively high, while the deposit rate has remained very low, resulting into a high interest rate spread. This has resulted into high levels of borrower indebtedness and non-performing loan portfolio, and constrained access to credit for investment and economic development.<sup>534</sup>

During this period of interest rate liberalization, specific market practices of lenders have prompted calls for the re-regulation of interest rates. First, lenders have maintained excessively high interest rates (at some point in the 1990s, reaching 70%) that exceed the rate of return of any average investment in Kenya, thereby locking borrowers in a cycle of indebtedness and poverty. Second, with no constraints placed on contractual provisions related to interest rates, lenders fashioned standard clauses in loan instruments, which gave them unfettered discretion to raise the contractually agreed lending rates by any margin, and without consulting the borrowers. This legitimized the banks' practice of ambushing credit-compliant borrowers with excessive and unexplained new interest rates, repayment amounts, and penalties that they were unable to meet, resulting in loan defaults and loss of collateral. Third, the legal framework for the enforcement of collateral has favoured the lenders, privileging their right to auction collateral that has often been in the form of family property, often in sham sales, even before the loan repayment dispute has been determined by the courts.

With these general trends in the domestic lending market, it is no surprise that since 2000, there have been at least four legislative initiatives to re-introduce lending rate ceilings and

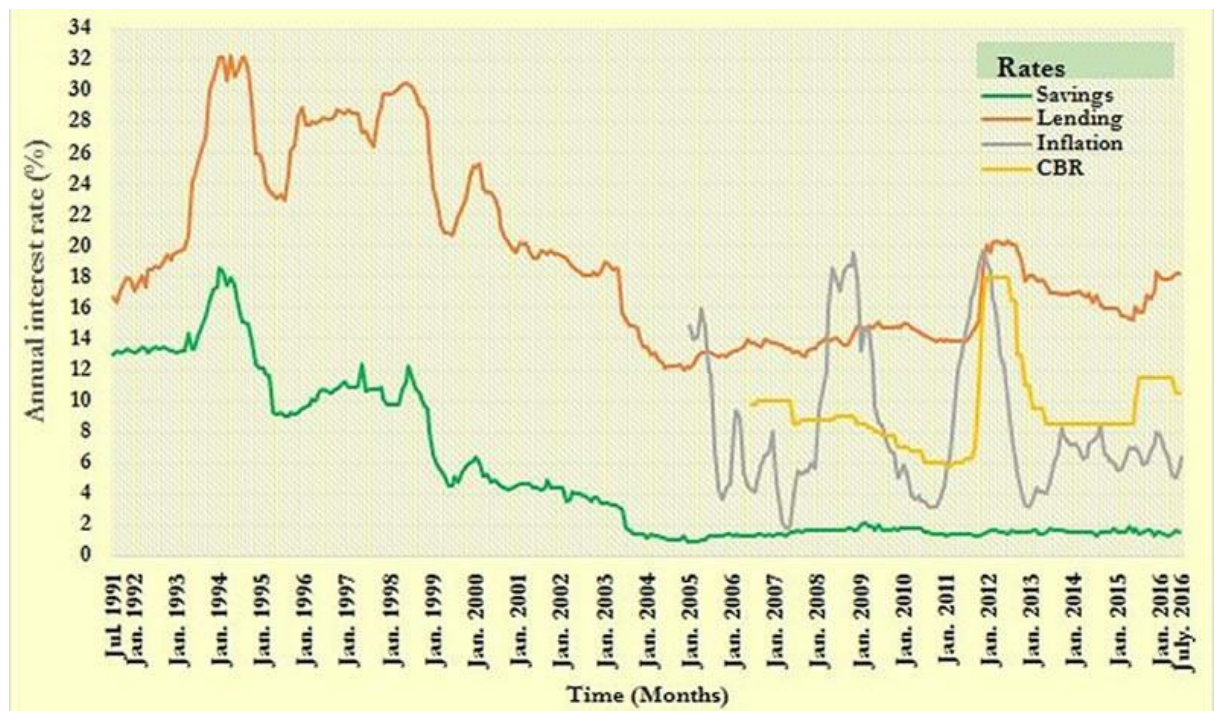
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<sup>533</sup> See generally, Thorvaldur Gylfason, *Credit Policy and Economic Activity in Developing Countries with IMF Stabilization Programs* (International Finance Section, Department of Economics, Princeton University 1987).

<sup>534</sup> See the 2013 World Bank report on the perennial problem of high interest rates: Smita Wagh and others, 'Kenya Economic Update : Reinvigorating Growth with a Dynamic Banking Sector' (The World Bank 2013) 83267.

deposit rate floors, and also the legislation of other statutory protections for borrowers in credit contracts. This culminated in the August 2016 enactment of the Banking (Amendment) Act<sup>535</sup>, which introduced new lending rate ceilings and deposit rate floors, among other earlier consumer protection provisions.<sup>536</sup> This regulatory debate that has unfolded since the initial liberalization of the interest rate market in 1991, provides an interesting case study on the local contestation of neoliberal regulatory paradigms in the Kenyan banking sector.

**Figure 1: Trends in Principal Rates in Kenya**



Source: Central Bank of Kenya (2015)

<sup>535</sup> No. 25 of 2016, Laws of Kenya. The amendment introduced a section 33B(1) to the Banking Act (Cap. 488, Laws of Kenya), which provided that: “A bank or a financial institution shall set - (a) the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and (b) the minimum interest rate granted on a deposit held in interest earning in Kenya to at least seventy per cent, the base rate set and published by the Central Bank of Kenya.”

<sup>536</sup> Other interest rate regulations introduced between 2000 and 2016 include: Section 44A of the Banking Act, which entrenched the *In Duplum* rule in statute, providing that the interest payable on non-performing loans should not exceed the amount of the principal loan; Sections 53-71 of the Consumer Protection Act (No. 46 of 2012), which relate to credit agreements, and 2012 CBK Prudential regulations relating to banks’ increases of interest rates. The legal provisions relating to interest rate regulation are discussed in detail in Chapter 5 on the role of the ideology of the Rule of Law on regulation of interest rates in Kenya.

#### 4. Economizing and Performing the Interest Rates Market in Kenya

The economization of the Kenyan interest rate market relates to how specific economic theories and paradigms were deployed to justify and implement interest rate liberalization (alongside other financial market reforms), and to discourage the re-introduction of interest rate caps. This process of economization is significant because it depoliticised the interest rate market, and side-lined non-economic paradigms such as usury, and concerns about power asymmetries between lender and borrower, in the debate. For example, the IMF-led interest rate liberalization project in Kenya and other countries was grounded on the McKinnon-Shaw theory of financial repression. The authors separately argued that interest rate controls distort financial markets by preventing market intermediaries such as banks from efficiently pricing and allocating loans, resulting in negative real interest rates on deposits and loans. Consequently, this results in low rates of mobilising savings, which discourages the accumulation of financial wealth, and hence, prevents financial deepening.<sup>537</sup>

It was therefore recommended under the IMF SALs and SAPs that Kenya, a financially repressed economy, abolish interest rate controls, allow market regulation and provide for indirect monetary policy interventions by the CBK.<sup>538</sup> The interest rate liberalization reforms were not undertaken in isolation, but rather as part of comprehensive economic reforms that included trade liberalization, capital account liberalization and removal of foreign exchange and credit controls, as globalization took root around the world. The introduction of indirect monetary policy interventions by the CBK, in place of the interest rate controls, in a globalized domestic economy, meant that the CBK and National Treasury policy makers had to embrace and employ any particular relevant stream of economic theory that explained the causal relationships between the key macro-economic variables, such as inflation, exchange rates, interest rates and economic growth, and also forecast the behaviour of economic agents. This not only made the economy 'visible' but available for economic steering and other interventions. The adoption of specific macroeconomic theories by the CBK and National Treasury therefore established macro-economic governability, that is, the extent to which the Kenyan economy

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<sup>537</sup> See Ronald I McKinnon, *Money and Capital in Economic Development* (Brookings Institution Press 2010); See also Shaw (n 510).

<sup>538</sup> Rose W Ngugi, 'Financial Reform Process in Kenya: 1989–96' (2000) 12 *African Development Review* 52, 53; Ngugi and Kabubo (n 506) 11.

could be perceived as amenable to targeted interventions by the financial regulators and policy makers.<sup>539</sup>

The successful establishment of this macro-economic governability, however, depended on the establishment of a common policy paradigm among the regulators, policy makers, and market players in the financial markets, and economy as a whole. A policy paradigm refers to “a coherent set of cognitively held – and inter-subjectively agreed upon – causal assumptions or accounts of how an object of policy behaves”.<sup>540</sup> It is this embedding of a particular (in this context, neoclassical) economic policy paradigm within Kenya’s economic policy and regulatory institutions, and interest rate market players, and the subsequent practice of macro-economic governability in the interest rates market, that has enabled the process of economization, and ultimately, the performativity of economic theory in the interest rate market.

Under its SAPs and successive lending conditionalities with the Kenyan government, the IMF has been instrumental in embedding specific neoliberal macro-economic policies and practices within Kenya’s policy making and regulatory institutions, including the National Treasury and the CBK. Indeed, formulation of successive macro-economic models by the CBK and National Treasury has usually been undertaken upon consultation of, and with the technical assistance from, the IMF.<sup>541</sup> These ‘macro models’ are “representations of quantitative relationships among macroeconomic variables such as employment, output, prices, government expenditures, taxes, interest rates, and exchange rates.”<sup>542</sup> They are used by the CBK and National Treasury to forecast the behaviour of various economic variables and economic agents in, for example, the interest rate markets, and also to undertake policy analysis and evaluation.<sup>543</sup>

To date, there have been four main macroeconomic models formulated by the Kenya government to assist in macroeconomic governability in the interest rate liberalization era.<sup>544</sup>

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<sup>539</sup> On macroeconomic governability, see Braun (n 305) 51.

<sup>540</sup> Lasse F Henriksen, ‘Economic Models as Devices of Policy Change: Policy Paradigms, Paradigm Shift, and Performativity’ (2013) 7 *Regulation & Governance* 481, 482. See also, PA Hall, ‘Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain’ (1993) 25 *Comparative Politics* 275. The author popularized the notion of policy paradigms in economic policy making.

<sup>541</sup> Centre for Economic Governance and Aids in Africa (n 122).

<sup>542</sup> Stephen N Karingi and Njuguna Ndung’u, *Macro Models of the Kenyan Economy: A Review* (Kenya Institute for Public Policy Research and Analysis 2000) 6.

<sup>543</sup> *ibid.*

<sup>544</sup> Other non-government individuals and agencies have, as far back as 1965, constructed macro models of the Kenyan economy. These include Howe and Karani (1965), UNCTAD (1968) and Elliot et al. (1996). See also Jacob Wanjala Musila and UL Gouranga Rao, ‘A Forecasting Model of the Kenyan Economy’ (2002) 19

The first model was known as the Macroeconomic Policy Model (MEPM), which was formulated and used as a basis for short-term planning in Kenya. However, since it modelled a controlled economy, it was discontinued after the economic liberalization reforms. The second model, the Medium to Long-Term Model (MELT3), was formulated but never used.<sup>545</sup> Both the MEPM and MELT3 did not model the role of interest rates, and therefore are not relevant for the present discussion.

In the year 2000, the Kenya Institute of Public Policy Research and Analysis (KIPPRA), a semi-autonomous government think tank, in collaboration with the National Treasury, sought to formulate a new macro model of the Kenyan economy. This model was to account for the theoretical shortcomings of not only the MEPM and MELT3, but also the IMF's Polak model, used in its stabilization programme in Kenya and other developing countries, and also the World Bank's Revised Minimum Standard Model (RMSM).<sup>546</sup> For example, while KIPPRA economists criticised the MEPM and MELT3 for lacking sound theoretical foundations, they also pointed out the IMF's Polak model's erroneous causal relationships between domestic credit and domestic interest rates, and also the World Bank RMSM's rudimentary nature of the financial programming model, and the failure to include many important variables.<sup>547</sup>

These critique of the BWI models are significant. Other than questioning the ontology, methodology and practice of macro-economic modelling, they also reveal the shortcomings of the reputed and irreproachable economic rationality of the BWIs' policy prescriptions to Third World regulators. The practice of macroeconomic modelling, however, suffers certain significant limitations. For example, some models abstract important details, making it difficult to study interactions between individual agents. Second, they rely on strong assumptions, such as the presence of complete markets, and therefore are misleading and unable to describe highly non-linear economic dynamics. Third, the models may also overstate individual rationality and foresight, and the degree of homogeneity.<sup>548</sup>

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Economic Modelling 801, 801; See, for example, James Elliott, Sung Y Kwack and George S Tavlas, 'An Econometric Model of the Kenyan Economy' (1986) 3 Economic Modelling 2.

<sup>545</sup> Karingi and Ndung'u (n 542) 6.

<sup>546</sup> *ibid* 25.

<sup>547</sup> *ibid* 7, 8.

<sup>548</sup> Maureen Were and others, 'A Theoretical Framework for Kenya's Central Bank Macroeconometric Model' (Africa Growth Initiative at Brookings 2013) Working Paper 10 3. These critiques are especially relevant for the Dynamic Stochastic General Equilibrium (DSGE) models.



This KIPPRA-Treasury project resulted in the formulation of the KIPPRA-Treasury Macro Model (KTMM), which was used by the National Treasury and CBK for macroeconomic governability – that is, planning, forecasting, market intervention, and analysis – for the next decade. The KTMM recognised the growing relevance of interest rates in a macro model for the Kenyan economy, especially how they affect investment. However, interest rates were merely variables to be manipulated to reach other major macroeconomic policy goals, such as inflation targeting.<sup>549</sup>

Despite its robustness as compared to previous macro models, the KTMM was formulated with a more detailed ‘government’ sector than monetary sector, as an aide in the national government’s budgetary and planning processes. The model had a weak formulation of the monetary sector, and had insufficient linkages between monetary policy and the rest of the economy. Therefore, it was not sufficiently detailed to cater for the needs of the monetary policy processes. Consequently, in 2011, the CBK developed its own macro-econometric model “to aid in the analysis of monetary policy in addition to providing short term macroeconomic forecasts”.<sup>550</sup>

The CBK Macro-Econometric Model, was specifically formulated to undertake three functions. First, it was to support the Monetary Policy Committee (MPC) and the Bank’s research department in “further understanding how the economy works through the complex interactions of various economic agents”, and in their monetary policy-making functions. Second, it was meant to aid in evaluating the impact of various shocks and policies on the economy. Third, and quite significant, the macro model would structure the communication between the CBK and the public, on the economic rationale of its decisions<sup>551</sup> As is discussed below, the MPC has the statutory role of deciding on the relevant indirect monetary policy interventions in Kenya’s then-liberalised interest rate markets.

A review of the 2000 KTMM and the 2011 CBK Macro-Econometric Model shows four related economic doctrines and assumptions that shaped the dominant macroeconomic policy paradigm embedded in the CBK and National Treasury macroeconomic models, and which shaped the regulators’ and policy makers’ response to the problem of excessively high interest rates in Kenya. First is the McKinnon-Shaw Hypothesis that liberalization of the interest rates

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<sup>549</sup> Karingi and Ndung’u (n 542) 34.

<sup>550</sup> Maureen Were and others, ‘Assessing the Effectiveness of Monetary Policy in Kenya: Evidence from a Macroeconomic Model’ (2014) 37 *Economic Modelling* 193, 194.

<sup>551</sup> Were and others (n 548) 2.

market would lead to competitively low interest rates for borrowers. Interest rate liberalization reforms were built on this hypothesis, and therefore the KTMM and CBK models assume an efficient liberalized interest rate market.<sup>552</sup> Second, and related to the Mackinnon-Shaw Hypothesis, is the assumption that prevailing interest rates in Kenya at any one time are determined by the supply and demand forces of the market.<sup>553</sup> This assumption is based on the General Equilibrium Theory and Efficient Markets Hypothesis.

The third policy paradigm is that in the liberalised interest rates market, CBK's indirect monetary policy interventions, through the Monetary Policy Transmission mechanisms, can be effectively used to influence the market lending rates upwards or downwards. Hence the monetary policy transmission instruments, such as the CBK policy rate,<sup>554</sup> the Cash Reserve Ratio,<sup>555</sup> and Open Market Operations (OMOs)<sup>556</sup> are deemed effective replacements of interest rate controls.<sup>557</sup> This policy paradigm is premised on the theoretical assumption of the economy as a closed system, and the consequent adoption of 'closed-systems' natural law and natural science assumptions and methodologies such as mathematical modelling which, in a bid to simplify the complexities of the real world, adopt simplifying and inaccurate assumptions.

The fourth policy paradigm is inflation targeting, which subordinates other legitimate macro-economic policy targets such as the maintenance of low domestic lending rates, for low inflation numbers.<sup>558</sup> High domestic lending rates have therefore become CBK's instrument for meeting its inflation targets, despite the collateral damage to economic recovery and new domestic investments.<sup>559</sup> This paradigm captures the contradictions inherent in economic

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<sup>552</sup> Ngugi and Kabubo (n 506); McKinnon (n 537); Shaw (n 510).

<sup>553</sup> For the KTMM assumptions, see Maureen Were and Stephen N Karingi, *Better Understanding of the Kenyan Economy: Simulations from the KIPPRA-Treasury Macro Model* (Kenya Institute for Public Policy Research and Analysis 2002). For the CBK Macroeconometric model, see, for example, Were and others (n 548) 2.

<sup>554</sup> The 'Central Bank policy rate' is defined and established under Section 36(4) of the CBK Act as "the lowest rate of interest that the CBK charges banks and micro-finance institutions", and functions as the "interest rate channel" for CBK monetary policy transmission, that is, signalling the CBK's monetary policy stance.

<sup>555</sup> The 'Cash Reserve Ratio' is provided under Section 38 of the CBK Act as 'the minimum cash balances on deposit with the Bank as reserves against their deposit and other liabilities', and serves as the 'bank lending channel' for CBK monetary policy transmission, by regulating the amount of bank reserves available for lending to the public.

<sup>556</sup> 'Open Market Operations' are provided for under Section 47 of the CBK Act, and refer to the CBK's buying and selling of negotiable securities, as a means of affecting monetary supply.

<sup>557</sup> For the CBK Model, see Were and others (n 548) 7–10; See also Were and others (n 550) 194.

<sup>558</sup> Centre for Economic Governance and Aids in Africa (n 122).

<sup>559</sup> Njuguna Ndung'u, *The Exchange Rate and the Interest Rate Differential in Kenya: A Monetary and Fiscal Policy Dilemma* (Kenya Institute for Public Policy Research and Analysis 2000) 1.

thinking that harms the economically vulnerable, but expresses optimism in economic growth beneficial to them.

This macro-economic policy paradigm, embedded in the macro-economic models, has taken root among regulators, policy makers, and other market stakeholders in the interest rate market in Kenya. This embedding has ideologically legitimated and performed regulatory neoliberalism, liberalised financial markets, high interest rates and high indebtedness in Kenya's banking sector. In addition, it has limited policy choices available for redressing the high interest rate problem, as demonstrated by the discussions below on the legislative efforts to re-regulate the interest rate market, and opposition to these efforts by market participants and regulators, on the basis of neoclassical economic theory.

## **5. Political Contestation of Neoclassical Financial Liberalization Paradigms**

Despite market liberalization reforms, domestic lending rates remained high in Kenya (See figure 1 above). This led to high indebtedness, the increase in non-performing loans, and the reduction in access to much needed credit. Consequently, in 2000, Hon. Joe Donde, an Opposition Member of Parliament (MP), introduced a Bill (also known as the Donde Bill) seeking to cap lending rates at 4% above the CBK Treasury Bill rate, provided that the interest payable could not exceed the principal debt, and also establishing a deposit rate floor of 70% of the Treasury Bill Rate. The Bill garnered rare support from both sides of the House, and the public, but was vehemently opposed by the Executive, including the National Treasury, the CBK, the bankers (represented by the KBA), and BWIs, who had commenced talks with President Moi's government on resumption of aid that had been suspended since the early 1990s.<sup>560</sup>

Though it was passed by Parliament on 29<sup>th</sup> November 2000, President Moi refused to assent to the Donde Bill, and returned it to the House for amendment, with a Memorandum ostensibly stating that "One clause of that bill contradicts the Central Bank Act. For this reason, I will not give assent for the passage of the bill into law until the anomaly is rectified by parliament,". He did not clarify which clause it was. It was widely thought that President Moi succumbed to the pressure from the BWIs, who were appalled at Kenya's return to interest rate controls.<sup>561</sup>

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<sup>560</sup> Murunga (n 529) 263–300.

<sup>561</sup> Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2013) 648.

Parliament amended and returned the Donde Bill for assent, essentially preserving the interest rate capping provisions. The President signed the Bill into the law that came to be informally known as the Donde Act.<sup>562</sup> Immediately after the enactment, the Kenya Bankers Association (KBA), on behalf of the banking sector, rushed to the Constitutional Court, and filed a suit seeking to have the Donde Act declared null and void, on the basis of the retrospective application of a section of the law creating penal offences.<sup>563</sup> On January 24, 2002, the High Court issued its judgment, declaring that the Act was void in so far as it was penal and retroactive.<sup>564</sup> Parliament repealed the Donde Act in 2004.

In 2005, Parliament enacted the *In Duplum* Rule, which entrenched in the Banking Act the Common Law rule that the interest charged on loans should not exceed the principal.<sup>565</sup> In addition, in 2010, the Kenyan people enacted a new constitution which for the first time provided, under Article 46, for the rights of consumers.<sup>566</sup> Consequently, in 2012, Parliament passed the Consumer Protection Act<sup>567</sup> which laid out a comprehensive list of legislative protections of the consumer in an unsecured credit agreement.<sup>568</sup> However, the *In Duplum* Rule and consumer rights did not result in the reduction of interest rates.

Consequently, in the 2011 and 2012 legislative sessions, two MPs from the Orange Democratic Movement wing of the Grand Coalition Government – Hon. Jakoyo Midiwo and Hon. Ogindo – attempted to introduce the Donde Act provisions as amendments to the Finance Bills 2011 and 2012. Once again, this motion pitted the House against the Executive, National Treasury, CBK

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<sup>562</sup> Central Bank of Kenya (Amendment) Act No. 4 of 2001, Laws of Kenya. The amendment introduced a section 39(1) to the Central Bank of Kenya Act, which provided that: “(1) the maximum rate of interest which specified banks, or specified financial institutions may charge on loans or advances shall be the 91-day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest 91-day Treasury Bill rate, plus four per-centum... (2) the minimum rate of interest which specified banks, or specified financial institutions may pay on deposits held in interest-earning accounts shall be seventy per-centum of the 91-day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest 91-day Treasury Bill rate...”

<sup>563</sup> While the Act was assented to on August 6, 2001, its commencement date was stipulated as January 1, 2001. Since Section 39(4) provided that contravention of the interest rate caps was a punishable offense under the Banking Act, this contravened Section 77(4) of the Constitution of Kenya, which provided that criminalisation of formerly lawful and innocent acts or omissions was not permitted.

<sup>564</sup> *Albert Ruturi, JK Wanywela & Kenya Bankers Association V The Minister of Finance & Attorney General and Central Bank of Kenya* (2002) 1 Kenya Law Rep 61 (High Court at Nairobi).

<sup>565</sup> Section 44A of the Banking Act, Cap. 48, Laws of Kenya.

<sup>566</sup> Constitution of Kenya 2010, Laws of Kenya.

<sup>567</sup> No. 46 of 2012, Laws of Kenya.

<sup>568</sup> The legal aspects provisions of interest rate regulation are discussed in more details in the next section on juridification.

and the Bankers.<sup>569</sup> In a bid to defeat Midiwo and Ogindo legislative motions, the government delayed the debate of the Finance Bill 2012, risking the contravention of a constitutional deadline that could have defunded government activities for the next financial year.<sup>570</sup> In fact, after the 31<sup>st</sup> December 2011 deadline, the government illegally collected taxes for four months, until the Finance Bill was passed in April 2012.<sup>571</sup> Ultimately, the motions to introduce the interest rates caps through the Finance Bill were defeated on a vote.

The last attempt to re-regulate the Kenyan interest rate market was undertaken by Hon. Jude Njomo, a Member of Parliament from the ruling Jubilee Coalition government, and also representing a constituency from President Uhuru Kenyatta's political backyard. The Central Bank of Kenya (Amendment) Bill was a replica of the Donde Bill, save for the fact that it sought to cap lending rates at 4% above the CBK policy rate, rather than the Treasury Bill rate. On August 24, 2016, against the spirited remonstrations of the CBK, the National Treasury, the Kenya Bankers Association, and the BWIs, the President signed the Bill into law, ending the 25-year-old era of interest rate liberalization.<sup>572</sup>

The politicization of the high interest rates in Kenya was undertaken mainly through the parliamentary debates relating to interest rate regulation, and in newspaper editorials, where various stakeholders listed earlier above prosecuted their respective cases for and against interest rate regulation. At least five key issues emerge from an analysis of these debates: (1) the feasibility of self-regulation of liberalized interest rate markets; (2) the accountability and democratisation of CBK monetary policy making; (3) the social role and responsibility of banks in the Kenyan economy; (4) regulatory bias towards transnational against local capital; and (5) the politics of BWI economic policy prescriptions for Kenya.

### **5.1. The Feasibility of Self-Regulation of Liberalized Interest Rate Markets**

As discussed above, the Mckinnon-Shaw Hypothesis argued that liberalized credit markets would efficiently mobilise and allocate domestic financial resources, lower the cost of

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<sup>569</sup> George Ngigi, 'Banks Face Major Shake-up If MPs Pass Midiwo Bill' *Business Daily* (Nairobi, 3 October 2012) <<http://www.businessdailyafrica.com/Banks-face-major-shake-up-if-MPs-pass-Midiwo-Bill/539552-1524316-1n05rz/index.html>> accessed 21 September 2016.

<sup>570</sup> George Ngigi, 'Githae Ducks Bare-Knuckle Interest Rates War with MPs' *Business Daily* (Nairobi, 15 March 2012) <<http://www.businessdailyafrica.com/Githae-ducks-bare-knuckle-interest-rates-war-with-MPs-/539546-1367240-fw3071z/index.html>> accessed 27 October 2016.

<sup>571</sup> Edwin Mutai, 'MPs Lose 12-Year Battle over Interest Rate Caps' *Business Daily* (Nairobi, 22 April 2012) <<http://www.businessdailyafrica.com/MPs-lose-12-year-battle-over-interest-rate-caps-/539546-1391644-format-xhtml-b67v5bz/index.html>> accessed 27 October 2016.

<sup>572</sup> Banking Act 2016 (Cap 488, Laws of Kenya).

intermediation, and consequently lower market lending rates. However, this self-regulatory capacity of efficient, liberalized markets, and its theoretical cornerstone, have been interrogated amid concerns over asymmetrical power relationships, and the manipulation of the local and global markets, in favour of financiers, and to the disadvantage of borrowers.

For example, proponents of interest rate caps, including Hon. Otieno Kajwang', underscored the vulnerability of the Kenyan economy within globalised markets, and argued that global financial markets were controlled or manipulated by BWIs and major currency speculators.<sup>573</sup> On the local front, the legislators, including Hon. Donde, argued that the Kenyan banking sector was an imperfect, oligopolistic, and cartel-like market, with many market entry barriers, and could therefore not qualify as a perfect market in which the forces of demand and supply could efficiently price the cost of lending.<sup>574</sup> In addition, despite the consistent increase in the number of financial institutions in the lending sector, and consequently, competition, bargaining power remained asymmetrically steeped against borrowers, who acquiesced to draconian contractual terms.

These sentiments were in response to the governing Party's opposition to the re-introduction of interest rate controls, considering that Kenya had already adopted market liberalization. There was remarkably no concerted effort to extoll the positive economic developments attributed to the liberalization of the financial markets. During the 2011 legislative debate, however, the Finance Minister Robinson Githae was quick to pin the fresh spike of interest rates on the Euro crisis, rather than market manipulation. This was despite prevalent opinion among the economic experts, including the IMF, that Kenya had not been affected by the Euro Crisis.<sup>575</sup> Indeed, this is an example of the scape-goating of global crises to conceal the hand of local financial markets players in the collusive manipulation of the currency market.<sup>576</sup>

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<sup>573</sup> Hansard Editor, 'Proceedings of the Parliamentary Debate on the Second Reading of the Central Bank of Kenya (Amendment) Bill, during the Session of the 8th Parliament' (Kenya National Assembly 2000) Official Hansard Report 3005.

<sup>574</sup> *ibid* 2999.

<sup>575</sup> Hansard Editor, 'Proceedings of the Parliamentary Debate on the Motion for Adoption of the Report on the Decline of the Kenya Shilling, during the 10th Parliament' (Kenya National Assembly 2012) Official Hansard Report 45.

<sup>576</sup> See Kenya National Assembly, *Report of the Parliamentary Select Committee on the Decline of the Kenya Shilling Against Foreign Currencies* (10th Parliament-Fourth Session, Kenya National Assembly 2012). The report found evidence of collusion between the CBK and banks to manipulate the currency market, for profit.

## 5.2. Democratisation versus Technocratization of Monetary Policy Making

Theoretical assumptions underpinning neoclassical economics, especially the view of the monetary economy, and financial markets, as ‘closed systems’ amenable only to the mathematical modelling methodologies of economic technocrats, have also been confronted by the calls for accountability and democratization of CBK’s monetary policy making. These calls for democratization have arisen amid legislative efforts to embed practices of regulatory neoliberalism, that is, ‘de-politicising’ monetary policy, by making central banks independent from political oversight. The legislative efforts have been precipitated by BCBS recommendations on regulatory design, and the general donor attitude of ‘Silence, Development in Progress’.<sup>577</sup>

The latter trend reflects the replacement of democracy with technocracy, and is one of the reasons why critics of interest rate controls label them ‘populist politics’.<sup>578</sup> For example, during the 2012 debates on Hon. Midiwo’s legislative motion, Transport Minister Amos Kimunya cautioned the House against “playing populist and communist politics with our economy”.<sup>579</sup> Such sentiments have persuaded self-respecting economists advocating for interest rate caps to distinguish themselves from the ‘populist’ and ‘communist’ tag.

For example, in November 2000, when Hon Donde stood before the House to introduce the Donde Bill for the third reading, he was compelled to remind his colleagues that he was an accomplished economist who had in fact worked with Prof. Hopkins, the Chief Economic Advisor to the former Prime Minister of Britain, and the political doyen of neoliberalism, Margaret Thatcher.<sup>580</sup> In addition, during the same period, the then Opposition Leader, Hon. Mwai Kibaki, honoured an invite by the World Bank to their Nairobi offices, where they hoped to dissuade him from supporting the pending Donde Bill. He reportedly pre-empted the discussion by warning them that “we did not come here to have tea. I am an economist and I want you to know that we will not sit back and wait to see our people suffer”.<sup>581</sup> This is because

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<sup>577</sup> Murunga (n 529) 288. The phrase is traced to Joseph Ki-Zerbo, a Burkinabé politician, who remarked that when he visited state houses to see friends he had fought with for independence, he would be welcomed symbolically by big signs proclaiming: ‘Silence! Development in Progress’, to symbolise the trade-off between economic development and democratic participation.

<sup>578</sup> See, for example, Hornsby’s description of the Donde Bill as a ‘popular and populist measure’, in Hornsby (n 561) 648.

<sup>579</sup> Mutai (n 571).

<sup>580</sup> Hansard Editor, ‘Second Reading of the Donde Bill’ (n 573) 3003.

<sup>581</sup> Health Minister Charity Ngilu recounted how in 2000, she accompanied President Kibaki, who was then Opposition leader, to meet officials of the World Bank. Hansard Editor, ‘Proceedings of the Parliamentary

of the entrenched view that non-economists lack epistemic authority to question economic rationales of policy choices, or that economists supporting market regulation are not well-heeled in their discipline.

Calls for the democratic accountability and oversight of the CBK by a Parliamentary committee (including the fixing of the CBK policy rate) emanated from the increasing irrational and controversial monetary policy decisions that the CBK made, behind the cloak of technocratic and epistemic authority. These included the high pricing of Treasury Bills to create profit avenues for banks, leading to high market lending rates,<sup>582</sup> and the 2011 connivance between the CBK and banks to set a CBK policy rate below the interbank lending rate, thereby giving some banks cheap money to engage in manipulation of the currency market.<sup>583</sup> These events reinforced the long-held view of market capture of the CBK and National Treasury monetary policy making.<sup>584</sup>

Calls for the democratization of CBK monetary policy making have therefore critiqued and deconstructed the economic ideology of economic policy making in Kenya as a purely technocratic, apolitical, asocial and objective endeavour.

### **5.3.The Social Role and Responsibility of Banks in the Kenyan Economy**

Both General Equilibrium Theory and the Efficient Markets Hypothesis are invoked by proponents of regulatory neoliberalism to make at least three arguments. First, the market lending rates are products of the efficient interaction of demand and supply forces in the credit market. Second, these lending rates, no matter how high, reflect the optimal outcome for both creditors and debtors. Third, any regulatory intervention by the government will leave either or both parties worse off. Consequently, this legitimates the increasing financialization of the Kenyan economy, characterized by the increasing power and profits of institutional lenders, to

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Debate on the Motion for Adjournment of the House, Sine Die, during the 10th Parliament' (Kenya National Assembly 2012) Official Hansard Report 43.

<sup>582</sup> See Hon. Donde's contribution on his policy discussions with the CBK governor: Hansard Editor, 'Second Reading of the Donde Bill' (n 573) 3001. See also, the contributions of Hon. Kibaki and Hon. Twaha, who were concerned that the high Treasury Bill rates were enriching banks and driving up market lending rates in Hansard Editor, 'Proceedings of the Committee of the Whole House, Debate on the Central Bank of Kenya (Amendment) Bill, during the Session of the 8th Parliament' (Kenya National Assembly 2000) Official Hansard Report 3063.

<sup>583</sup> Kenya National Assembly (n 576).

<sup>584</sup> See, generally, Martin Brownbridge, *Government Policies and the Development of Banking in Kenya* (Institute of Development Studies 1996). See also, Martin Brownbridge, 'Financial Distress in Local Banks in Kenya, Nigeria, Uganda and Zambia: Causes and Implications for Regulatory Policy' (1998) 16 Development Policy Review 173.



the disadvantage of borrowers, and other sectors of the real economy. In addition, it absolves banks of any social role in market society, as the objectives of the market are purely the realization of shareholder profit.

The social role and responsibility of Kenyan banks has thus come up amid the increasing financialization of the Kenyan economy. The National Treasury, CBK, Parliamentarians and other commentators have voiced concerns that Kenyan banks were posting record profits, while most sectors of the real economy, including agriculture and manufacturing, were performing poorly.<sup>585</sup> While acknowledging that the Kenyan economy was indeed capitalist, Parliamentarians, including Finance Minister David Mwiraria, noted that a significant portion of bank profits were made from trading CBK treasury Bills, and thus, taxpayers monies, rather than interest on lending to the public.<sup>586</sup>

In addition, the essential position of the banking sector as the main financial intermediary, the legal privileges enjoyed by banks under Kenya's monetary economy, such as exclusive bond trading privileges, and even membership in the National Payment System (essentially a public infrastructure), elicited calls for a more conscionable approach by banks, to lending to the public. Despite the capitalist nature of Kenya's economy, there was a strong sentiment that banks should have a sense of duty for the country's development, alongside shareholder profits. In 2016, after Parliament passed the Njomo Bill, and sent it to the President for assent, the Kenya Bankers Association entered into a non-binding Memorandum of Understanding with the CBK, pledging to reduce interest rates by 150 basis points, create a Kshs. 30 Billion fund for exclusive concessionary lending to small and medium enterprises (SMEs), set up a Kshs. 100 million technical assistance programme for SMEs, and enhance ethical banking

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<sup>585</sup> Moses Michira, 'Banks Making Too Much Money, Says CS Rotich' *Standard Digital News* (Nairobi, 20 August 2016) <<http://www.standardmedia.co.ke/article/2000212657/banks-making-too-much-money-says-cs-rotich>> accessed 21 September 2016; George Ngigi, 'Banks Defy New Loan Pricing Tool to Rake in Sh141bn' *Business Daily* (Nairobi, 3 February 2015) <<http://www.businessdailyafrica.com/Banks-defy-new-loan-pricing-tool-to-rake-in-Sh141bn/539552-2610950-u5meilz/index.html>> accessed 26 October 2016.

<sup>586</sup> Hon. Muiruri argued, for example, that banks made a lot of profit from trading Treasury Bills, and therefore it was fair to regulate the profits from lending. See Hansard Editor, 'Proceedings of the Committee of the Whole House, Debate on the Central Bank of Kenya (Amendment) Bill, during the Session of the 8th Parliament' (n 582) 2002. Hon. Mwiraria, then Shadow Finance Minister, decried the fact that foreign owned banks such as Barclays Bank made up to Kshs. 7 billion from trading CBK Treasury Bills, but did not give much regard to lending to the public to stimulate economic development. See Hansard Editor, 'Proceedings of the Parliamentary Debate on the 2002 Budget Speech of the Minister of Finance, during the 8th Parliament' (Kenya National Assembly 2002) Official Hansard Report 1147.

practices.<sup>587</sup> Nevertheless, noting that banks had reneged on their earlier promises to effect similar measures, President Uhuru Kenyatta assented to the interest rate capping Bill.

The debate on the social role and responsibility of banks has therefore been an ideology-critique of the General Equilibrium Theory and Efficient Markets Hypothesis, which ideologically reify markets and institutional lenders from society, and promote financialization of the Kenyan economy.

#### **5.4. Transnational Versus Local Capital: Implications of Regulatory Bias**

Another issue that has arisen within the regulatory debates is the bias that CBK and National Treasury macroeconomic policies exhibited toward foreign or transnational capital, to the disadvantage of local capital. One of the concerns underscored by both local and international financial regulators over interest rate caps has been capital flight, due to the narrowing of the interest rate differential. Therefore, one of the reasons for the CBK's policy to maintain interest rate deregulation, and a positive interest rate differential, is to attract the flow of foreign capital into Kenya.<sup>588</sup> However, the downside of these foreign capital inflows is that they are 'hot money' - essentially speculative and short-term, and take flight at the first sign of lowering interest rates.<sup>589</sup> Consequently, CBK's monetary policy has been criticised for catering to speculative foreign capital that does not stay long enough to stimulate local economic development, while undermining local savings capacity due to the low market deposit rate.<sup>590</sup>

Another related concern has been the dominance that foreign banks exercise over Kenya's money supply, and market share of the banking sector (estimated at 45% as at 2013),<sup>591</sup> and their influence over CBK macroeconomic policy making, equated with a loss of State

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<sup>587</sup> See Memorandum of Understanding from Kenya Bankers Association, 'Memorandum From The Bank Chief Executive Officers Through The Kenya Bankers Association To The Central Bank Of Kenya In Response To The Banking (Amendment) Bill 2015' (10 August 2016) <[www.kba.co.ke](http://www.kba.co.ke)>. See also George Ngigi, 'Banks Dangle Sh30bn SME Loans to Avert Interest Rates Cap' *Business Daily* (Nairobi, 11 August 2016) <<http://www.businessdailyafrica.com/Banks-dangle-Sh30bn-SME-loans-to-avert-interest-rates-cap/539552-3340258-s1uqrl/index.html>> accessed 21 September 2016.

<sup>588</sup> See Ndung'u, *The Exchange Rate and the Interest Rate Differential in Kenya: A Monetary and Fiscal Policy Dilemma* (n 559).

<sup>589</sup> *ibid.*

<sup>590</sup> See the contributions of Hons. Kajwang' and Kibaki, on the one hand, decrying the focus on speculative foreign investment flows, rather than growing domestic savings. See also Vice President George Saitoti's call for a middle ground, since foreign direct investments and low lending rates can co-exist: Hansard Editor, 'Second Reading of the Donde Bill' (n 573) 3007–3016.

<sup>591</sup> Sarah Sanya and Matthew Gaertner, *Assessing Bank Competition within the East African Community* (International Monetary Fund 2012) 17; Wagh and others (n 534) 39.

sovereignty.<sup>592</sup> The government's compliance with the BWIs' requirements for privatization of government banks by selling them to 'strategic' foreign investors under lending conditionalities have also been seen as further alienation of local capital in favour of transnational capital.

Against the BWIs' privatisation recommendations, Parliamentarians have also called for greater participation of government banks in the lending market, so as to break the oligopolistic and cartel-like practices of private banks in setting high interest rates.<sup>593</sup> Hon. Midiwo's ill-fated 2012 legislative Motion for interest rate caps, for example, also called for government agencies to be mandated to withdraw their savings from private banks, and deposit them in government-owned banks. These funds would then be lent out at below-market rates, so as to force the market to lower the high interest rates. Banks warned that this measure would cause a liquidity crisis that would lead to bank collapses.<sup>594</sup>

### **5.5. The Politics of BWIs' Economic Policy Prescriptions for Kenya**

The ideology of technocracy underlying the view of BWIs' neoclassical economic policy prescriptions as neutral, apolitical and asocial, has also been interrogated by Kenyan Parliamentarians. One of their concerns has been the unquestioned implementation by Kenyan financial regulators and policy makers of the macroeconomic policy prescriptions issued by the IMF and World Bank in their stabilization programmes in developing countries, despite the unsound theoretical bases of their models. For example, in 2000, Opposition leader Mwai Kibaki decried the fact that "regulators have sold their souls to foreign theories... [and] need to be persuaded to cap interest rates...[yet] Kenya is an agricultural country".<sup>595</sup>

In addition, members of the Parliamentary Finance and Planning Committee in the 10<sup>th</sup> Parliament noted that in their meetings with the IMF, the donor was unable to reconcile its opposition to interest rate regulation in Kenya, with support for the continuing regulation of interest rates in other developed countries. Nobel Laureate and former World Bank Chief

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<sup>592</sup> Hon. Muite argued that foreign banks' control over Kenya's money supply was essentially the country's loss of sovereignty. Hansard Editor, 'Proceedings of the Parliamentary Debate on the Second Reading of the Banking (Amendment) Bill, during the Session of the 9th Parliament' (Kenya National Assembly 2004) Official Hansard Report 4552.

<sup>593</sup> Hansard Editor, 'Proceedings of the Parliamentary Debate on the Banking (Amendment) Bill, during the Session of the 9th Parliament' (Kenya National Assembly 2004) Official Hansard Report 4866. Finance Minister David Mwiraria argued that the government had killed local banks, while promoting foreign banks. Noting that the necessary policy was to get Kenyans saving money, he proposed the establishment of regional banks across the country, which would take deposits from locals and lend to them regionally.

<sup>594</sup> Ngigi, 'Banks Face Major Shake-up If MPs Pass Midiwo Bill' (n 569).

<sup>595</sup> Hansard Editor, 'Second Reading of the Donde Bill' (n 573) 3007.

Economist Joseph Stiglitz has famously derided the IMF's dishonesty in prescribing interest rate liberalization in agricultural developing countries such as Kenya, yet the developed countries only liberalized their interest rate markets after the 1970s, long after cementing their developed economy status.<sup>596</sup>

The politicization of the Kenyan interest rates markets, as captured in these five issues, among others, exposed the weaknesses of the macroeconomic paradigms driving market liberalization, and reframed the lenses through which the problem of high interest rates in a liberalised financial sector were perceived, discussed and confronted. For example, the epistemic concerns of economic sociology, such as social foundations and duties of the banking system in Kenya, were articulated in a field that has been firewalled by neoclassical financial economics. However, as seen below, the process of economization also attempted to claw back and redraw the narrative.

## **6. Economizing the Politics of High Interest Rates in Kenya**

Despite their opposition to the introduction of interest rate caps, the CBK, National Treasury, Kenya Bankers Association, BWI, and KIPPRA, among other stakeholders, agreed that the high interest rates were a problem. They, however, differed on what was the cause of the high interest rates, and what, other than legislative caps, should be done to address the situation. The CBK, for example, asked Parliament to drop the interest rate capping Bill, and to give the market time to force banks to adjust their lending rate downwards, or lose their dominance.<sup>597</sup> In addition, the CBK governor Patrick Njoroge (a former Senior Economist at the IMF) preferred the CBK's use of soft power, such as the publication of lending rates of each commercial bank, and also lending infrastructural measures such as movable assets as collateral, setting up of an electronic collateral registry, and the ongoing digitisation of land registries.

With regard to the proposed interest rate caps, the CBK Governor contended that capping interest rates would "lead to inefficiencies in the credit market, promote informal lending channels, and undermine the effectiveness of monetary policy transmission."<sup>598</sup> The CBK's policy recommendations on how to deal with the high interest rates have also been supported

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<sup>596</sup> Joseph E Stiglitz, *Globalization and Its Discontents* (Penguin 2003) 32, 33.

<sup>597</sup> Otiato Guguyu, 'Central Bank Opposes MPs' Bid to Put Ceiling on Interest Rates' *Daily Nation* (Nairobi, 17 February 2016) <<http://www.nation.co.ke/business/Central-Bank-opposes-MPs-bid-to-put-ceiling-on-interest-rates/996-3080314-11p46wq/index.html>> accessed 26 October 2016.

<sup>598</sup> Central Bank of Kenya, 'Monetary Policy Statement' (Central Bank of Kenya 2016) 15.

by the National Treasury, which has also observed that Kenyan banks have been making too much money at the expense of borrowers.<sup>599</sup>

Banks, on their part, have consistently echoed the warnings of the CBK and the BWIs on the effects of interest rate capping laws on the lending market in Kenya. They have also blamed the high interest rates on the insufficient lending market infrastructure, including (at various instances over the last 16 years) the absence of credit reference bureaus, inefficient lands registries, an inefficient judicial system, macro-economic instability, etc.<sup>600</sup> Their policy recommendation has been to ask the government to improve the efficiency of the lending market, before interest rates can go down.

The BWIs have also consistently warned against attempts by the Kenyan Parliament to re-introduce interest rate controls, and even threatened to withhold aid in 2000. They have counselled that these controls will distort market pricing, and lead to a reduction of financial inclusion and access to credit, as banks would only lend to the low-risk borrowers with good collateral and credit histories.<sup>601</sup> An interesting concern stated by the IMF, and echoed by the CBK Governor, has been that the interest rate caps will blunt monetary policy instruments of the CBK.<sup>602</sup> This is an example of how a specific macro-economic policy paradigm of the IMF/CBK has prevented the regulators from seeing high interest rates as a crisis; rather, the inability to achieve other macroeconomic objectives such as inflation targeting is what the regulators deem as problematic.<sup>603</sup>

Instead, the recommendations by the BWIs to the Kenyan and other governments legislating interest rate caps has been to: (1) increase competition in the banking sector; (2) reduce information asymmetries in the lending market, through credit reference bureaus and publication of interest rate comparators; (3) increase consumer literacy and consumer

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<sup>599</sup> Michira (n 585).

<sup>600</sup> Deloitte Consulting Limited, 'An Analysis of Economic and Competitive Factors Influencing Kenyan Interest Rates' (Kenya Bankers Association 2014).

<sup>601</sup> Wolfgang Fengler, 'How Price Controls Can Lead to Higher Prices' <<http://blogs.worldbank.org/african/how-price-controls-can-lead-to-higher-prices>> accessed 22 September 2016; Duncan Miriri, 'Kenya's Move to Cap Commercial Rates May Lock out Borrowers -IMF' *Reuters* (Nairobi, 25 August 2016) <<http://www.reuters.com/article/kenya-banks-imf-idUSL8N1B639Q>> accessed 22 September 2016.

<sup>602</sup> Mitsuhiro Furusawa, 'Monetary Policy and the Future of Central Banking: Implications for Africa' (50th Anniversary of the Central Bank of Kenya, Nairobi, 13 September 2016) <<http://www.imf.org/en/News/Articles/2016/09/13/sp091316-Monetary-Policy-and-the-Future-of-Central-Banking-Implications-for-Africa>> accessed 22 September 2016.

<sup>603</sup> *ibid.*

protection; (4) develop the micro-finance sector; (5) improve collateralization infrastructure efficiency.<sup>604</sup> Since the 2002 change of guard from the Moi era to the reform-branded era of Presidents Kibaki and Uhuru Kenyatta, the government has undertaken some of these reforms, with mixed results in the interest rate market.

While some progress has been registered in the first four recommendations, with mixed results, the discussion and analysis below focus on the first two: the regulation of competition in the banking sector, and the reduction of information asymmetries through CRBS and publication of interest rate comparators. This is because these two policy proposals directly engage economic theories related to financial markets liberalization, especially the Efficient Markets Hypothesis.

### **6.1.Competition in the Kenyan Banking Market**

The Efficient Markets Hypothesis, the neoclassical economic theory rationale offered by BWIs for interest rate deregulation in Kenya, posited that market liberalization will allow more lenders in the market, increase competition, and consequently drive down interest rates.<sup>605</sup> One of the positive developments of the financial liberalization era is that more players have entered the lending market. For example, from 1994 to 2015, CBK-regulated lenders increased from 33 to 55, considering that during this period, a number of banks underwent liquidation, while others merged as a result of higher capital requirements.<sup>606</sup> However, despite the increased number of lenders, the market has shaped up into an oligopolistic structure, characterised by market segmentation, according to the World Bank.<sup>607</sup> In addition, the IMF also notes that less competitive foreign banks control up to 45% of the market.<sup>608</sup>

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<sup>604</sup> See Samuel Munzele Maimbo, Henriquez Gallegos and Claudia Alejandra, 'Interest Rate Caps Around the World: Still Popular, But a Blunt Instrument' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2513126 <<http://papers.ssrn.com/abstract=2513126>> accessed 30 August 2016; See also Fengler (n 601).

<sup>605</sup> See Ngugi and Kabubo (n 506) 11. The IMF and World Bank reform recommendations suggested that as the financial markets became competitive, the efficiency of intermediation would increase, the costs of intermediation would go down, followed by the lowering of interest rates.

<sup>606</sup> Central Bank of Kenya, 'Bank Supervision Annual Report 2015' (Central Bank of Kenya 2016) <[www.centralbank.go.ke](http://www.centralbank.go.ke)>; See also Francis Mwega, 'The Competitiveness and Efficiency of the Financial Services Sector in Africa: A Case Study of Kenya' (2011) 23 African Development Review 44.

<sup>607</sup> Wagh and others (n 534) 39.

<sup>608</sup> Sanya and Gaertner (n 591) 17, 18.

The CBK has also frequently noted its frustration with the cartel-like practices of Kenyan banks in maintaining high interest rates.<sup>609</sup> Indeed, in December 2015, the Competition Authority of Kenya (CAK) announced that it was commencing investigations against banks for the failure to cut interest rates on loans in the face of an improved fiscal environment. In its preliminary report released in April 2016, the CAK found that Kenyan banks, through the KBA, were engaging in interest rate fixing and market zoning. It also called for the disbandment of the KBA, since it is a price-setting cartel.<sup>610</sup> In response to this charge, the KBA commissioned a report by Deloitte, which pushed back on the CAK report, and argued that the Kenyan banking sector was indeed very competitive.<sup>611</sup>

The uncompetitive nature of the Kenyan banking sector is cause for concern, considering the CBK and BWI preference for market determination of interest rates. In addition, it demonstrates the failure of the Efficient Markets Hypothesis, the ideological pillar of interest rate liberalization, and its fetishization by financial markets regulators.

## 6.2. Credit Reference Bureaus

The Efficient Markets Hypothesis holds that markets fully, accurately and instantaneously incorporate all publicly-available information into market prices. Thus, information symmetry plays a key role in neoclassical economic theory's arguments on the efficiency of unregulated markets. A related theory, Akerlof's theory of asymmetrical information, thus argues that incomplete information between market traders leads to inefficient markets. Therefore, according to neoclassical theory, credit information sharing within consumer credit markets counters adverse selection, moral hazard, information monopoly, and over-indebtedness.<sup>612</sup>

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<sup>609</sup> Brian Ngugi, 'Cartel-like Behaviour Blamed for High Banking Charges' *Daily Nation* (Nairobi, 9 February 2016) <<http://www.nation.co.ke/lifestyle/smartcompany/Cartel-like-behaviour-blamed-for-high-banking-charges/1226-3068342-hrd92wz/index.html>> accessed 20 September 2016.

<sup>610</sup> Competition Authority of Kenya, 'Annual Report and Financial Statements 2014/2015' (Competition Authority of Kenya 2015) Statutory Annual Report 32, 33; Gerald Andae, 'CAK Accuses Banks and Millers of Colluding to Fix Product Prices' *Business Daily* (Nairobi, 17 April 2016) <<http://www.businessdailyafrica.com/CAK-accuses-banks-and-millers-of-colluding-to-fix-product-prices/539546-3163692-naybj0/index.html>> accessed 19 September 2016.

<sup>611</sup> Deloitte Consulting Limited (n 600); Jared Osoro, 'Why Kenyan Banks Remain Competitive Rivals' *Business Daily* (Nairobi, 7 June 2015) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Why-Kenyan-banks-remain-competitive-rivals-/539548-2743248-rlw26d/index.html>> accessed 19 September 2016.

<sup>612</sup> See Tullio Jappelli and Marco Pagano, 'Information Sharing, Lending and Defaults: Cross-Country Evidence' (2002) 26 *Journal of Banking & Finance* 2017; See also A Jorge Padilla and Marco Pagano, 'Sharing Default Information as a Borrower Discipline Device' (2000) 44 *European Economic Review* 1951.

These theoretical frameworks have informed Kenyan banking policy makers and regulators' turn to the statutory establishment of credit reference bureaus as mechanisms for strengthening the efficiency of the liberalized interest rate markets, and lowering the cost of credit. In fact, one of the reasons that Kenyan banks gave for high interest rates was the risk premium necessitated by lack of information regarding borrower credit-worthiness. Consequently, in July 2008, the CBK formulated and published the Banking (Credit Reference Bureau) Regulations, 2008, providing for the establishment and operation of Credit Reference Bureaus (CRBs) and for the sharing of borrower credit worthiness among lenders.<sup>613</sup> By September 2016, three CRBs had entered the market, and one of them – TransUnion – had listings of more than 16 million borrowers, making about a third of Kenya's total population.

The expectations that the introduction of CRBs would lead to lower interest rates have, however, not materialized, mainly due to the banks' misuse of borrower information. In July 2016, the CBK was compelled to issue a circular to banks, threatening legal sanctions, as a result of their misuse of the shared credit information, including blacklisting of borrowers for failure to pay non-credit related charges such as account closing fees, or ATM charges, submission of inaccurate negative borrower data to the CRBs, and failure to give these borrowers the legally stipulated notice of such action.<sup>614</sup> In addition, the banks also started using the threats of blacklisting as a debt-collection strategy. The credit information sharing system therefore became a credit access constraint, rather than a risk-management tool for pricing loans accordingly, as blacklisted borrowers would be locked out of lending facilities, instead of being subjected to higher interest charges.<sup>615</sup> Indeed, this situation was compounded by a 2016 CRB report indicating that more than 400,000 Kenyans were blacklisted for non-payment of as little as Kshs. 100 (about £0.70 GBP). In addition, the banks have also failed to use the positive credit info to reward compliant borrowers.<sup>616</sup>

These negative experiences that borrowers were subjected to by the banks has elicited a number of legal suits by borrowers, seeking damages from banks for misuse of the credit information, and also a petition to Parliament for the disbanding of the CRBs, as their existence

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<sup>613</sup> Legal Notice No. 97 of 2008, Laws of Kenya.

<sup>614</sup> George Ngigi, 'CBK Puts Banks on Notice for Abuse of Credit Bureaus' *Business Daily* (Nairobi, 17 August 2016) <<http://www.businessdailyafrica.com/Bank-executives-face-CBK-action-for-misuse-of-credit-scoring/539552-3347638-129jg92/index.html>> accessed 20 September 2016.

<sup>615</sup> *ibid.*

<sup>616</sup> George Ngigi, 'Pain of Kenyans Blacklisted for Amounts as Small as Sh100 in Mobile Loans, Bank Fees' *Business Daily* (Nairobi, 9 September 2016) <<http://www.businessdailyafrica.com/Pain-of-Kenyans-blacklisted-for-amounts-as-small-as-Sh100/539552-3374802-103kvlwz/>> accessed 22 September 2016.



seemed to compound the suffering of Kenyan borrowers.<sup>617</sup> This situation prompted an editorial by Kenya's premier business newspaper, *Business Daily Africa*, to call for the banking industry to sort out the CRB mess, before populist Parliamentarians took action.<sup>618</sup>

The challenges of credit information sharing as a mechanism for lowering market lending rates in Kenya counsel against placing too much faith on theoretical prescriptions of efficient markets, especially where there is evidence of misuse of information to create even larger power asymmetries in favour of the banks. This is discussed in greater detail in the Chapter 6 case study on credit information sharing technologies.

### 6.3. The Kenya Banks' Reference Rate (KBRR)

As discussed above, and in Chapter 6, credit information sharing can still deepen information asymmetries within the lending market, especially where borrowers have little information about the creditors' side of the business, including interest rate comparators. Indeed, neoclassical economics acknowledges that strong markets are predicated on both lender and borrower being bilaterally informed, that is, information symmetry.<sup>619</sup> However, the discipline has not built consensus on whether there should be government regulation, and if so, what type of regulation would be ideal. Arguments against regulation are still premised on the fact that these interferences will distort markets more significantly than asymmetrical information.<sup>620</sup>

This conundrum dominated the debate on the adequate response to the misuse of credit information sharing infrastructure by banks, and absence of a downward adjustment in lending rates. Therefore, in 2013, the newly-elected President Kenyatta set out to implement one of his campaign manifesto items, which was the reduction of domestic lending rates. A Cost of Credit Committee was formed, constituted by two Cabinet Secretaries (who were formerly CEOs of two major banks), CBK and KBA representatives. The committee's recommendation

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<sup>617</sup> Edwin Mutai, 'Parliament Urged to Disband Credit Reference Bureaus' *Business Daily* (Nairobi, 10 May 2016) <<http://www.businessdailyafrica.com/Parliament-urged-to-disband-credit-reference-bureaus/539546-3198168-ggn16x/index.html>> accessed 20 September 2016.

<sup>618</sup> Editorial, 'Correct Credit Bureau Flaws' *Business Daily* (Nairobi, 11 May 2016) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Correct-credit-bureau-flaws/539548-3199370-tgm3vgz/index.html>> accessed 20 September 2016.

<sup>619</sup> Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 2009) 13. Friedman argues that 'the possibility of co-ordination through voluntary co-operation rests on the elementary - yet frequently denied - proposition that both parties to an economic transaction benefit from it, provided the transaction is bi-laterally voluntary and informed'.

<sup>620</sup> Richard A Epstein, 'The Neoclassical Economics of Consumer Contracts Exchange' (2007) 92 *Minnesota Law Review* 803, 806.

for addressing the high interest rates was the creation of the Kenya Banks' Reference Rate (KBRR), which was supposed to be a market lending rate signal that would empower borrowers by increasing transparency and competition in the pricing of loans, and ultimately, bring down interest margins.<sup>621</sup>

The KBRR framework came into effect in July 2014, and required banks to disclose and explain to their customers the effective base rate (KBRR) and any additional premium (K) above the base rate. This premium was to be broken down to enable clients to understand its components. This would also allow the Government and the Central Bank to make targeted policy interventions to lower the premium.<sup>622</sup>

Banks, however, largely defied the guidance offered by the KBRR pricing, and, in 2015, announced an increase in sector profits from Kshs. 124 to 141 billion.<sup>623</sup> Considering that it was the banks that had proposed the KBRR in an effort to appease legislators who were making serious attempts at enacting interest rate caps, many commentators thought the banks had exercised bad faith, and had themselves to blame for the ultimate passing of the interest rate controls.<sup>624</sup> This was yet another government-backed market optimizing mechanism that had been short-circuited by the lenders.

The cartel-like behaviour of the banks, and their sabotage of the CRB and KBRR market mechanisms have least inspired the economic argument that the liberalized interest rate market would eventually bring down the high lending rates. In fact, sharp divisions continue to linger among Kenyan economists on whether the financial liberalization reforms were undertaken properly. For example, it has been argued that the sequencing of the IMF-prompted reforms in Kenya was against best practice, which required interest rate liberalization to have followed the putting in place of other financial market fundamentals, such as macro-economic and financial stability, and a competitive, rather than an oligopolistic

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<sup>621</sup> Central Bank of Kenya, 'Bank Supervision Annual Report 2014' (Central Bank of Kenya 2015) 12 <[www.centralbank.go.ke](http://www.centralbank.go.ke)> The KBRR is computed as an average of (a) the Central Bank Rate (CBR) and (b) the 2-month weighted moving average of the 91-day Treasury bill rate. The 91-day Treasury Bills reflect the floor of risk-free assets while the CBR reflects the stance of monetary policy. A customer should therefore expect to be charged a lending rate of KBRR + "K", and should be seen as the minimum price for banks to participate in the credit market.

<sup>622</sup> *ibid.*

<sup>623</sup> Ngigi, 'Banks Defy New Loan Pricing Tool to Rake in Sh141bn' (n 585).

<sup>624</sup> Editorial, 'Banks Have Themselves to Blame on Interest Rates Bill' *Business Daily* (Nairobi, 28 July 2016) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Banks-have-themselves-to-blame-on-interest-rates-Bill/539548-3320344-10comy4/index.html>> accessed 21 September 2016.

market.<sup>625</sup> Otherwise the reforms risked high interest rates, bankruptcy, and loss of monetary control, which were the eventual results. In addition, an oligopolistic market structure has taken root.

These findings have been echoed by Nobel Laureate in Economics, and former Chief Economist at the World Bank, George Stiglitz, in his famously harsh criticism of IMF stabilization policies in Kenya and other developing countries. Stiglitz critiqued the IMF's insistence of interest rate liberalization in Ethiopia and Kenya as erroneous, since the agricultural nature of the two countries' economies, their state of economic development, and the structure of the financial sector, did not provide a conducive environment for interest rate liberalization. He notes that developed countries liberalized their interest rate markets after the 1970s, long after their financial markets were stable.<sup>626</sup>

## 7. Conclusion

This chapter has explored the fourth research question: how has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism in Kenya's interest rate markets? In this effort, the discussion has examined the role of neoclassical economics in framing, delineating and limiting the actions of Kenyan financial markets regulators and policy makers in addressing the problem of high interest rates and high consumer indebtedness in the domestic market, and in contesting neoliberal transnational financial regulatory standards.

The contestation exhibited between the stakeholders in Kenya's interest rate market, to impose a particular paradigm of how the phenomenon of high interest rates should be perceived, framed, discussed and confronted, has demonstrated the ideological and performative power of neoclassical economic theory in establishing macroeconomic models and policy paradigms as cognitive locks. Despite the recognition by the CBK, National Treasury, banks, BWIs and other stakeholders, that high domestic lending rates were not only a problem, but also a deterrent to Kenya's long-term development goals, and that the liberalized interest

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<sup>625</sup> Ngugi and Kabubo (n 506) 35; Maureen Were, Rose Ngugi and Phyllis Makau, 'Experiences with Financial Sector Reforms and Trade Liberalization in Kenya' (Kenya Institute for Public Policy Research and Analysis 2013) Research Proposal 48.

<sup>626</sup> Stiglitz, 'Capital Market Liberalization, Economic Growth, and Instability' (n 476); Stiglitz, *Globalization and Its Discontents* (n 596) 32, 33.

rate market had failed to mediate them downwards, the macro-economic policy paradigm has remained tied to the neoclassical economics of financial liberalization.

### **Ideological Legitimation of Regulatory Neoliberalism and Interest Rate Liberalization**

The discussion has demonstrated the ideological power of various neoclassical economic theories in legitimating regulatory neoliberalism, and financial markets liberalization, as the only schemes for organizing Kenya's credit markets to achieve lower interest rates. The ideological effect of the various economic theories is demonstrated through the four main principles underpinning the regulation of the financial markets. First, in the course of the regulatory debates, the CBK, National Treasury, KIPPRA and the BWIs have maintained a dogged faith in the Mckinnon-Shaw hypothesis on the power of the liberalized financial markets to tame interest rates. This is despite evidence of growing interest rate spreads 25 years after deregulation.

Second, the regulators and policy makers have maintained faith in the General Equilibrium Theory, and the Efficient Markets Hypothesis, in their continued implementation of macroeconomic models built on the assumption that prevailing interest rates in Kenya at any one time are determined by the supply and demand forces of the market.<sup>627</sup> This is despite evidence that the banking sector is oligopolistic and continues to exhibit cartel-like tendencies in retaining high interest rates.<sup>628</sup>

Third, the CBK has maintained its faith in the use of purportedly 'scientific' and 'mathematical' macro-econometric models, to undertake monetary policy interventions. The CBK has contended that the CBK policy rate, the Cash Reserve Ratio, and Open Market Operations (OMOs), are effective replacements of interest rate controls, and can be effectively used to bring down lending rates.<sup>629</sup> This is despite the CBK's Monetary Policy Committee, and various studies, including by CBK and Treasury insiders, separately noting the weakness of the monetary policy transmission mechanisms, and specifically the non-response of market lending rates to these instruments.<sup>630</sup>

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<sup>627</sup> For the KTMM assumptions, see Were and Karingi (n 553); For the CBK Macroeconometric model, see, for example, Were and others (n 548) 2.

<sup>628</sup> See Competition Authority of Kenya (n 610); Wagh and others (n 534); Sanya and Gaertner (n 591).

<sup>629</sup> For the CBK Model, see Were and others (n 27) 7–10; See also Were and others (n 26) 194.

<sup>630</sup> Were and others (n 550) The authors find that a change in the CBK policy rate is ineffective in signalling long-term lending, which responds marginally.

Fourth, the CBK continues to pursue inflation targeting as its main macroeconomic policy, despite its consequent effect of high market lending rates, which ultimately hurts economic recovery and deters new investments.<sup>631</sup> High domestic lending rates have therefore become CBK's instrument for meeting its inflation targets, despite the collateral damage to economic recovery and new domestic investments.<sup>632</sup> This demonstrates the contradictions inherent in the economic theories relied on by the CBK in its task of macroeconomic governability.

### **Performance of the Interest Rates Market**

In addition, this particular policy paradigm has also taken hold in the entire Kenyan banking sector. An integral aspect of the CBK's economic steering of the interest rate market (and the rest of the monetary sector) is communication of its monetary policy direction to the market, and the subsequent reaction by market participants to this communication. Therefore, macroeconomic governability is possible only where the financial markets, especially the lenders, share an intersubjective understanding of the causal relationships between the various economic variables and the behavioural expectations included in CBK's macro-econometric models. It is for this reason that after the 2016 interest rate caps were enacted into law, the financial markets reacted to the anticipated negative consequences to the banking sector's profitability by shedding Kshs. 47 Billion worth of banks' share value, at the Nairobi Securities Exchange (NSE), and, within the next eight days, Kshs. 243 Billion worth of other equities' value.<sup>633</sup>

These examples demonstrate at least the first two levels of economic performativity. Generic performativity of these macroeconomic paradigms is established by the fact of their deployment by the CBK, National Treasury and BWIs in macroeconomic governability, and their use by financial market participants, including banks. The equations and assumptions underlying the KTMM, CBK Macro-Econometric Model, the IMF's Polak Model, and the World Bank's RSMS are proof of this application of theory.

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<sup>631</sup> Centre for Economic Governance and Aids in Africa (n 122); Ndung'u, *The Exchange Rate and the Interest Rate Differential in Kenya: A Monetary and Fiscal Policy Dilemma* (n 559) 1.

<sup>632</sup> Ndung'u, *The Exchange Rate and the Interest Rate Differential in Kenya: A Monetary and Fiscal Policy Dilemma* (n 559) 1.

<sup>633</sup> Geoffrey Irungu, 'NSE Investors Lose Sh243bn after Rates Cap Hits Bank Shares' *Business Daily* (Nairobi, 15 September 2016) <<http://www.businessdailyafrica.com/NSE-investors-lose-Sh243bn-after-rates-cap-hits-bank-shares/539552-3382894-yk4t1wz/>> accessed 26 October 2016.

Effective performativity is established by institutional embedding of the practice of macroeconomic modelling within the economic policy making structures at the CBK, National Treasury, KIPPRA, and the BWIs, over a long period of time. As argued by Egmond and Zeiss, the practice of macroeconomic modelling of the Kenyan economy has led to the entrenching of routines and patterns in economic research and policy making circles, thereby entrenching particular policy paradigms that have been hard to deconstruct during the interest rate regulatory debate.<sup>634</sup> A good example is the CBK's concern that interest rate caps make its present monetary policy instruments less effective.

It can thus be argued that the mere achievement of macroeconomic governability using the respective macro models employed by the CBK and National Treasury reflects effective performativity.<sup>635</sup> The reflexive character of macroeconomic modelling, and its subsequent deployment in evaluation, forecasting, analysis and intervention, is what has an effect the economy. Economic agents' knowledge of the causal relationships between various economic variables feeds back into their economic behaviour, while that of regulators and policy makers feeds into economic policy advice and interventions.<sup>636</sup> The macroeconomic model therefore achieves an intersubjective representation and visualisation of an abstract economy that is amenable to economic steering and other interventions.<sup>637</sup> Consequently, the market participants, including regulators, policy makers, lenders, consumers and other intermediaries, calculate their economic actions based on the causal relationships and assumptions embedded in the macro model.

To this extent, the conformity of the Kenyan economy, even marginally, to the CBK and Treasury macroeconomic models, establishes the effective performativity of the various neoclassical economic theories discussed, including the Mckinnon-Shaw Hypothesis, the Efficient Markets Hypothesis, and the General Equilibrium Theory.

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<sup>634</sup> Stans Van Egmond and Ragna Zeiss, 'Modeling for Policy: Science-Based Models as Performative Boundary Objects for Dutch Policy Making' (2010) 28 *Science & Technology Studies* 73.

<sup>635</sup> Braun (n 305) 48.

<sup>636</sup> Mary S Morgan and Tarja Knuuttila, 'Models and Modelling in Economics' in Uskali Mäki (ed), *Philosophy of Economics*, vol 13 (Elsevier 2012) 51.

<sup>637</sup> Jens Maeße, 'Spectral Performativity. How Economic Expert Discourse Constructs Economic Worlds' (2013) 14 *economic sociology\_the european electronic newsletter* 25, 27.

## Implications on Third World Contestation

The various manifestations of economic performativity in the interest rates market in Kenya have two implications. First, the entrenchment of a particular neoclassical macroeconomic policy paradigm – that is, financial liberalization – has made it harder to intervene in the interest rates market, and establish a fairer and moral economy. This is because the process of economic performativity, as described by Callon, has entailed the enrolment of the various stakeholders in the lending market, together with “economic theories, concepts and other empirical phenomena”, into a “network that is connected by a specific language and communal project”.<sup>638</sup> Therefore, the establishment of alternative markets – whether capped interest rates markets or other forms of regulation – within a global economy, requires the deconstruction of the prevailing policy paradigm and attendant network of market actors, and the reconstruction of a new market.

Second, economic performativity also presents the Third World visionaries of alternative interest rate economies with the transformative potential of macroeconomic models, and their constitution as *agencements* for achieving policy paradigm shifts.<sup>639</sup> Third World proponents of ‘fairer’ and ‘moral’ interest rates markets, for example, should consider the discursive, normative, technical, material, social and political resources that the neoliberal project has expended in entrenching neoclassical economics into social life, and match the effort.<sup>640</sup>

The re-introduction of interest rate caps in the Kenyan lending market in 2016 was the culmination of a mere ‘skirmish’ between the processes of economization and politicization, with a small victory to the latter. The war, however, will be fought on whether Kenyans succeed in establishing an economic paradigm that combines collective action with individual calculation and optimization. This means that government regulatory schemes aimed at lowering consumer lending rates, including the market for creditor lending information, will only be successful through intersubjective understanding with the market. For example, both bankers and borrowers should have a common understanding that affordable credit leads to increased economic investments, and an economic boon to creditor and debtor. This understanding should replace the current paradigm of a zero-sum game, where lower lending rates results in a credit crunch, as bankers shift their credit reserves to speculative investments

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<sup>638</sup> Leon Wansleben, *Cultures of Expertise in Global Currency Markets* (Routledge 2013) 21.

<sup>639</sup> Henriksen (n 540) 482.

<sup>640</sup> For a discussion on the establishment of global neoliberal hegemony, see Harvey (n 3).

on government treasury bills. In addition, the construction of a fairer credit market also depends on building a sustainable reservoir of local development capital, while weening the economy of dependence on transnational capital, which characteristically imports with it policy prescriptions of regulatory neoliberalism.



## CHAPTER FIVE

### **Juridification: The Ideological and Constitutive Effect of the Rule of Law in the Liberalisation of Kenya's Interest Rates Market**

#### **1. Introduction**

This thesis examines the ideological and performative power of economic, legal, and technological ideas, practices and related institutions in reproducing regulatory neoliberalism in transnational and national financial markets. Chapter 4 has explored the ideological and performative role of neoclassical economics in framing high interest rates and high consumer indebtedness as an economic rather than political problem, and consequently restricting the regulatory possibilities.

This chapter is the second instalment of the Kenya case study, exploring the second aspect of the fourth research sub-question: how has the ideological and performative power of legal ideas and related practices reproduced regulatory neoliberalism in Kenya's interest rate markets? It examines the role of the 'Rule of Law' as legal ideology, and unpacks its concealed constitutive and performative power in the financial markets. It explores the nature of the rule of law as part of the ideational infrastructure of contemporary financial markets in Kenya, and its entrenchment of neoliberal transnational regulatory standards in the financial sector through various Bretton Woods Institutions' loan conditionalities and reform programs. Even though the Rule of Law claims to be neutral and apolitical, it undergirds neoliberal assumptions and concepts about nature, role and functioning of markets, and economic development. In addition, through its reifying and naturalising ideological strategies, this ideology obfuscates the role of law in constituting market relations, shaping identities and respective capacities to act.

Consequently, the discussion demonstrates how the rule of law restricts the possibilities for constructing (through regulation) fairer and affordable interest rate markets in Kenya. The rule of law indeed has a positive impact in the deepening of financial markets, and the provision of credit. However, it also has the potential to reproduce systemic inequalities in liberalised financial markets, and to constrain or limit the solutions available to financial market regulators, policy makers and legislators, in addressing unduly high interest rates, high indebtedness and unaffordable credit.

The chapter is organised into four further sections. Section 2 briefly outlines the theoretical argument. It argues that the rule of law doctrine is ideological, since its claims to autonomy, purity, determinacy, objectivity, and transcendence conceal law's historical, social, political, and contingent aspects, and legitimate its relations of domination, and a neoliberal bias. Section 3 discusses the embedding of the rule of law discourse in Kenyan development discourse and the financial markets liberalization process. It argues that the ideology of the rule of law has constituted, and been co-constituted by, the discourse of economic development introduced in Kenya by various transnational actors, including the BWIs. Section 4 critically analyses the ideological and performative role of the rule of law doctrine underpinning interest rate liberalisation in Kenya. It argues that the rule of law doctrine harbours a bias for neoliberal capitalism and regulatory neoliberalism, which have reproduced power asymmetries between borrowers and lenders, and impeded the regulation of high interest rates. Section 5 contains the main conclusions and suggestions for directions for further research. It argues for the deconstruction and reconstruction of the Rule of Law into a concept that aids rather than impedes progressive politics of economic reconstruction.

## **2. Ideological, Constitutive and Performative Power of the Rule of Law**

The discussion in Chapter 2 laid out the critical, theoretical framework for the nature, role and functioning of mainstream legal ideas including the rule of law in financial markets, in four conceptual moves.

The first conceptual move is the shift from interests and material legal institutions to the ideological power of legal ideas, that is, the ability of the rule of law to exercise power through the construction of meaning. The rule of law and its constituent elements are ideological due to their tendency to obscure the complexities, contradictions and dilemmas inherent in their claims (about society, markets, the economy, and the law) in abstractions that imply universal truths.<sup>641</sup> The ideology critique of the rule of law in this chapter and the rest of the study does not imply that the rule of law is undesirable or wrong. Rather, the critique asserts that the specific conceptualisation and usage of the rule of law to advance neoliberal politics of market liberalization advances a partial perspective which is treated as a total perspective, and which conceals or deters recognition of the domination, oppression and inequality in society.<sup>642</sup> This

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<sup>641</sup> Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (n 397) 9.

<sup>642</sup> Roger Cotterrell, *The Sociology of Law: An Introduction* (Oxford University Press 1992) 120–122.

ideological concealing occurs through various ideological strategies discussed in chapter 2: universalization, reification, naturalisation, rationalization and narrativization.<sup>643</sup>

The second conceptual move is the articulation of the relative autonomy of law. This entails two steps: first, the deconstruction of legal formalism's assertion of the autonomy of law from society and politics; and second, the rejection of legal instrumentalism, that is, the idea of the rule of law as merely the superstructure of capitalist society, or the preferences of the dominant classes.<sup>644</sup> Thus, despite its social and political construction, the concept of the rule of law can acquire some relative autonomy from social actors, through practices of legal fetishism.<sup>645</sup> Consequently, a particular, historically and socially contingent conception of the rule of law is ossified and reified from changes or reconfigurations of power, and with time makes subjects of its creators.<sup>646</sup> Nevertheless, in capitalist society, the law is not fully autonomous, as it "articulates with and must be explained by the systemic requirements of capitalism..."<sup>647</sup> The relative autonomy of law thus aids the understanding of the agential power of the rule of law as a discourse of economic development, and its specific affinity, or 'essential homology' with liberal capitalism.<sup>648</sup> Forms and practices of the rule of law tend to become embedded in 'relatively autonomous structures', transcending and helping to shape the desires, interests, and cognitive perspectives of social groups.<sup>649</sup>

The third conceptual move entails the further articulation of this 'essential homology' of the rule of law with capitalism, as inherent in the form of law, that is, the 'commodity-form of law'.<sup>650</sup> This concept compares the logic of juridical equality of legal subjects in the formalistic conception of the rule of law, with the commodity form in market capitalism, which creates the appearance that all products are equal, despite the qualitatively distinct labour-value that

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<sup>643</sup> Thompson (n 50) 60; This thesis makes use of Marks' adaptation of Thompson's typology of ideological strategies. Marks (n 38) 112.

<sup>644</sup> Balbus (n 7) 571–572.

<sup>645</sup> *ibid* 572–573. The author locates the emergence of legal autonomy from the fetishism of the law, and the perverse logic of the legal form, "which creates a fetishized relationship between individuals and the law in which these individuals attribute subjectivity to the law and conceive themselves as its objects or creations".

<sup>646</sup> Ronald Weitzer, 'Law and Legal Ideology: Contributions to the Genesis and Reproduction of Capitalism' (1980) 24 *Berkeley Journal of Sociology* 137, 146–147. The author argues that relative autonomy of the law is solidified in two ways. First, political contestations increasingly necessitated that the legal order appear transcendental, and above class manipulation. Second, legal victories by the dominated potentially contribute to the reproduction of the illusion that the legal system is just and equitable, thereby legitimising the legal system, soliciting consent, and establishing hegemony.

<sup>647</sup> Balbus (n 7) 572.

<sup>648</sup> *ibid* 573.

<sup>649</sup> Gordon (n 6) 101.

<sup>650</sup> Balbus (n 7) 573.

has gone into its creation.<sup>651</sup> By embracing formal juridical equality, the formalist conception of the rule of law thus masks and conceals class and social inequalities, and depoliticising legal relations through the separation of the legal and the political spheres. In this way, the rule of law neutralises, depoliticises, and maintains coercive, exploitative, and inherently political legal relations within liberal market capitalism.<sup>652</sup> The commodity form theory of law demonstrates how formal juridical equality of legal subjects as an element of the rule of law reproduces and sustains liberal market capitalism in Third World countries where the concept is deployed.

The fourth conceptual move is the recognition of the rule of law and its constituent concepts as a historically effective force, with the power to constitute material economic relations, including individual liberty, property rights, contractual relations, and transactional capacities. The deconstruction of the ideologically reified and naturalised economic institutions such as property rights, for example, simultaneously reveals the role of rule of law concepts in constituting them. The rule of law is not simply a set of autonomous ideas or attitudes determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped.<sup>653</sup> Law has constitutive power to the extent that its concepts, definitional categories, labels and ideas play a subtle and often imperceptible role in how economic actors come into existence, organise their activities and relationships, and arrange their governance. The law therefore provides cognitive possibilities and values for organising economies.<sup>654</sup>

The discussion below uses this conceptual framework of the rule of law as an ideology and as a constitutive force with a bias for liberal market capitalism, to explore the role of law in creating a basis for the liberalization of interest rates market in Kenya. The conceptual framework also explores the foreclosing of certain policy options for dealing with the problem of high interest rates, on the basis of their 'irrational', or 'political' nature.

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<sup>651</sup> *ibid* 573–575.

<sup>652</sup> Cutler, 'Gramsci, Law, and the Culture of Global Capitalism' (n 294) 532.

<sup>653</sup> Harrington and Merry (n 350) 711.

<sup>654</sup> Edelman and Stryker (n 52) 540.

### 3. The Rule of Law in Financial Sector Reforms in Kenya

#### 3.1. Ideology of the Rule of Law or the Ideology of Development?

The emergence of the ideology of the rule of law as a basis for the liberalisation of financial markets, and lending rates in Kenya, has not proceeded in an organic manner as has been observed in the UK and the US, for example where it forms an important aspect of popular legal consciousness.<sup>655</sup> In these countries, the concept of the rule of law developed and gained an historically and socially contingent understanding stemming from the respective political struggles of various eras.<sup>656</sup> As noted by Ghai, the predominant ideology in popular consciousness of Kenyan and other Africans, since their respective independence from colonial rule, has been the ideology of modernisation and development.<sup>657</sup> The ideology of the rule of law has been midwifed into the discourse of development in Kenya and other African countries as a result of their engagement with the Bretton Woods institutions (BWIs).

Even then, as discussed below, the rule of law as a legal and ideological concept, though significant in terms of how national economic policies and financial sector reforms are framed, is restricted to what Gordon calls 'elite legal consciousness', that is, lawyers, judges, bureaucrats and other practitioners.<sup>658</sup> Ghai notes that forms of development generated through post-colonial authoritarianism (such as Kenya) gives rise to certain contradictions: where the ideology of the rule of law is largely absent in universal consciousness, but is present in "a propertied and professional middle class which values democracy and human rights for both pragmatic and ideological reasons".<sup>659</sup> Hence one of the questions this discussion illuminates is the ideological power of the concept of the rule of law, and how it captures the policy paradigms of Kenyan financial sector regulators and policy makers, and constrains more politically popular policy choices for addressing the issue of high interest rates.

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<sup>655</sup> Trubek describes legal consciousness as "that aspect of the consciousness of any society that explains and helps justify its legal institutions, the way in which society integrates understanding of legal order with other ideas which give meaning to the social world. It includes all the ideas about the nature, function and operation of law held by anyone in society at a given time". See Trubek, 'Where the Action Is' (n 61) 592.

<sup>656</sup> Brian Z Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2008) 3 NYUJL & Liberty 516, 542. For example, in the UK, the rule of law emerged from the concept of natural law, which was the argument used to defend property rights threatened by monarchs and legislatures.

<sup>657</sup> Yash Ghai, 'The Theory of the States in the Third World and the Problem of Constitutionalism' (1990) 6 Connecticut Journal of International Law 411, 417. Ghai argues that Third World citizens appear to regard the promotion of development as the primary task of the government, which then justifies the aggregation and concentration of power, and dismisses human rights debates, on the imperatives of development.

<sup>658</sup> Gordon (n 6) 120–121.

<sup>659</sup> Ghai (n 657) 422.

### 3.2. The Law and Development Project in Kenya

The role of the rule of law in the development process in post-colonial Kenya can be traced to the first Law and Development movement of the 1960s and 1970s, when American lawyers were tasked with crafting legal development assistance projects in Third World countries. Informed by the Modernisation Theory, this legal transplantation project aimed to catalyse the modernisation and economic development process in the Third World using Western legal institutions.<sup>660</sup> Kenyan nationalists, in the midst of negotiating independence from British colonial rule, benefitted, for example, from the technical-legal assistance of the American lawyer and jurist, Thurgood Marshall, who is credited with drafting the first Bill of Rights in the 1963 Constitution of Kenya.<sup>661</sup>

Marshall's contribution has been critiqued for the constitutional emphasis of formal equality between the economically dominant and oppressive minority settler community and the economically dispossessed colonial natives, and also the protection of property rights, which entrenched rights gained through historical injustices.<sup>662</sup> This legal transplantation experiment failed, and has remained a continuing legacy of Kenya's inability to address colonial and post-colonial historical injustices, despite their present manifestations in inequality in resource distribution, in a heavily agricultural economy.

The well documented failure of the Law and Development movement in Kenya and other countries has been attributed to the misplaced faith in the universality of specific Western legal institutions, including the sanctity of private property rights, and the functional role of these institutions in economic development.<sup>663</sup>

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<sup>660</sup> David M Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *The Yale Law Journal* 1, 6.

<sup>661</sup> See generally Mary L Dudziak, 'Working toward Democracy: Thurgood Marshall and the Constitution of Kenya' (2006) 56 *Duke Law Journal* 721.

<sup>662</sup> *ibid* 776. The author questions whether Marshall's emphasis on formal equality was one of form over substance in the rule of law. See also, Mutua, '(Book Review) Exporting American Dreams' (n 151) 1150. Mutua critiques both Dudziak's interpretation of Marshall's contribution, and the latter's emphasis on formal equality between the colonial settlers and the Kenyan natives. He contends that Marshall sought to secure for Kenyan colonial natives the same equal protections that he sought for marginalised blacks in the United States, while failing to appreciate that this protection would enhance racial equality in the US but freeze white privilege in Kenya and doom any real chance at social transformation.

<sup>663</sup> See generally, David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 1974 *Wisconsin Law Review* 1062.

### 3.3. The Rule of Law in Structural Adjustment Programs in Kenya

The failure of this legal theorisation of the development process coincided with the rise of neoliberalism in the 1970s, and the prominence of neoclassical economic theories of development.<sup>664</sup> Therefore, when Kenya and other developing countries experienced economic upheavals occasioned by the 1970s foreign exchange shocks, the IMF and the World Bank fashioned financial aid packages conditioned on domestic economic policy reforms, known as Structural Adjustment Programmes (SAPs).

As discussed extensively in Chapter 4, some of the loan conditionalities included micro-economic reforms such as the liberalisation of Kenya's financial markets, through the removal of interest rate caps, deregulation of the lending market, reduction of reserve requirements, removal of credit controls and foreign exchange controls.<sup>665</sup> These SAPs were based on the McKinnon-Shaw Hypothesis, which theorised that interest rate controls distort financial markets by preventing market intermediaries such as banks from efficiently pricing and allocating loans, resulting in negative real interest rates on deposits and loans. Consequently, this results in low rates of mobilising savings, which discourages the accumulation of financial wealth, and hence, prevents financial deepening.<sup>666</sup> In this theorisation of financial market development, law was reduced to a framework for facilitating private market transactions, and did not play the ideological, discursive and constitutive role that it would later be given in the development process.<sup>667</sup>

The SAPs administered by the BWIs and implemented by Kenyan policy makers did not realise the economic growth or development that had been projected by neoclassical theory. In fact, the economic policy reforms, including the scale-back of government involvement in the economy, including the provision of social services such as health and education, deepened the negative impact of the economic problems on the poor segments of the country.<sup>668</sup> As

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<sup>664</sup> Krever (n 134) 296.

<sup>665</sup> Nicholas M Odhiambo, 'Interest Rate Reforms, Financial Deepening and Economic Growth in Kenya: An Empirical Investigation' (2009) 43 *The Journal of Developing Areas* 295, 296–297.

<sup>666</sup> See McKinnon (n 537); See also Shaw (n 510).

<sup>667</sup> Krever (n 134) 297.

<sup>668</sup> Sylvia Wairimu Kang'ara, 'When the Pendulum Swings Too Far: Structural Adjustment Programs in Kenya' [1998] *Third World Legal Stud.* 109, 116. The author notes that the effects of SAPs, including the rollback of essential social services, was harsher on the poor and vulnerable segments of the Kenyan society, and exacerbated by the absence of a welfare system that is common in Western liberal economies. See also Joseph Kipkemboi Rono, 'The Impact of the Structural Adjustment Programmes on Kenyan Society' (2002) 17 *Journal of Social Development in Africa* 81.

replicated in other developing countries and transitional states in Eastern Europe, the failure of these neoclassical economic policy prescriptions, generated debate and opposition to the BWIs' programs.<sup>669</sup>

### **3.4. The Rule of Law in the World Bank's Governance Agenda**

It is within this context of the policy failure of the SAPs modelled on neoclassical economic theory, in Kenya and other countries, that the rule of law was once again reintroduced by the World Bank as an ideological basis for economic development policies and processes. The rise of New Institutional Economics (NIE) in the late 1980s provided much needed cover to the BWIs from the criticisms of their policy failures. Developed by Douglas North and Robert Coase, NIE modified the neoclassical economic theorisation of naturally-occurring markets, and theorised that well-functioning markets required institutions, that is, "humanly devised constraints that structure political, economic and social interaction".<sup>670</sup> These institutions include informal constraints such as sanctions, taboos, customs, traditions, and codes of conduct, and formal constraints such as constitutions, laws and property rights. NIE argues that institutions provide the incentive structure for economic growth by creating order, reducing uncertainty, defining choice sets, determining transaction and production costs, and the profitability and feasibility of engaging in economic activity.<sup>671</sup>

In response to the criticisms of the failure of their neoliberal policy reform prescriptions in Kenya and other developing countries, the World Bank created a new agenda – that of 'Governance' – and argued that the failures of the SAPs were due to the absence of proper governance structures, including the rule of law, in these countries.<sup>672</sup> In its 1992 annual report, the World Bank set out the case for its advocacy for rule of law reforms in Third World countries as the basis for economic reforms. In this report, the Bank clarified that the connection of the rule of law with efficient use of resources and productive investment, is the aspect most

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<sup>669</sup> See, for example, university academics' and students' contestation of reduced government financing of higher education, in Alamin Mazrui and Willy Mutunga, 'The State Versus Academic Unions in Postcolonial Kenya' in Silvia Federici, Constantine George Caffentzis and Ousseina Alidou (eds), *A Thousand Flowers: Social Struggles Against Structural Adjustment in African Universities* (Africa World Press 2000); See also James Nduko, 'Students' Rights and Academic Freedom in Kenya's Public Universities' in Silvia Federici, Constantine George Caffentzis and Ousseina Alidou (eds), *A Thousand Flowers: Social Struggles Against Structural Adjustment in African Universities* (Africa World Press 2000).

<sup>670</sup> North (n 130) 97.

<sup>671</sup> *ibid.*

<sup>672</sup> Krever (n 134) 305.



important to economic development, and hence to World Bank assistance.<sup>673</sup> This was to be followed by subsequent elaboration of various overlapping and conflicting conceptions of the rule of law, and its role in the economic development process.

### **3.5. The World Bank's Conception of the Rule of Law**

There are at least four complementary, overlapping and at the same time contradictory conceptions of the rule of law inherent in the World Bank's discourse on development and its law reform projects. These include the common dichotomy of institutional/formalistic and substantive conceptions, and, within both, a further dichotomy of the functional role of law as either instrumental or intrinsic.<sup>674</sup> The institutional or formalistic conception, identified more with Joseph Raz, emphasizes the efficiency of the legal system in terms of eliciting compliance, through characteristics internal to the legal order, such as its generality, notice or publicity, prospectively, clarity, stability and congruence, due process, judicial independence, and access to justice.<sup>675</sup> The formalistic conception is not concerned with the normative content of the law. On the other hand, the substantive conception of the rule of law, expounded most notably by Dworkin and Bingham, is more concerned with the normative content of the law than the form of law, and emphasizes the protection and enforcement of moral rights and fundamental freedoms, including democratic rights.<sup>676</sup>

In the instrumental conception, the rule of law is merely a mechanism, means or instrument for achieving certain non-legal goals within society. The institutional/formalistic aspects of the rule of law - specifically the rationality of the legal system - were characterised by Weber as the desirable legal attributes instrumental to achieving capitalist economic development.<sup>677</sup> On the

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<sup>673</sup> World Bank, 'Governance and Development' (n 130) 28–30. The report also acknowledged that a fairer legal system is, in a general sense, conducive to balanced development that facilitates growth and responds to needs of the poor. However, it endorsed the formalistic conception of the rule of law, which emphasizes the efficiency of the legal system rather than its content.

<sup>674</sup> Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 258.

<sup>675</sup> Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (OUP 2009) 214–218.

<sup>676</sup> Ronald Dworkin, *A Matter of Principle* (OUP 1985) 11–12; Lord Bingham, 'The Rule of Law' [2007] *The Cambridge Law Journal* 67, 69–82. While Bingham includes the formal aspects in his conception of the rule of law, he also includes substantive aspects such as protection of human rights, and the adherence to International Law.

<sup>677</sup> Trubek, 'Max Weber on Law and the Rise of Capitalism' (n 411) 724. Weber argued that legal formalism, to the extent that it claims to be autonomous (and hence has an objective internal adjudicative logic), general and universal, is deemed to be legally rational, or to embody legal rationality, accounts for the prevalence of capitalist economic organisation in Western society.

other hand, Hayek identified the protection of individual freedom as a substantive aspect of the rule of law, and which was instrumental to human capability to plot and plan their future in liberal market capitalism.<sup>678</sup> Thus, in these two instances, legal rationality and individual rights are but instruments for achieving a more important goal – establishing liberal market capitalism.

In the intrinsic conception, the rule of law is not merely an instrument or means to another goal, but is actually a goal in itself. This means that the characteristics or content of the rule of law are themselves values and end-goals to be aspired to. For example, AV Dicey's conception of the formalistic aspects of the rule of law as one of the two fundamental principles of the UK unwritten constitution (alongside Parliamentary supremacy), upholds aspects such as: no punishment without written law; no retrospective law; no discretionary power; and equality before the law.<sup>679</sup> On the other hand, Amartya Sen argues that certain substantive aspects of the rule of law, such as freedom, are in themselves constitutive of the development process, and are therefore goals in themselves, rather than mere instruments or means.<sup>680</sup>

### **3.6. Ideological Power of the Rule of Law in the Governance Agenda**

The various complementary, overlapping and contradictory conceptions of the rule of law have been deployed by the World Bank and the IMF as powerful ideological and rhetorical tools for legitimising present reform programmes in Kenya, including the Financial Sector Assessment Programs (FSAPs) and Article IV consultations, which have significant social, political and economic implications.<sup>681</sup> These policy reform prescriptions are universalised as appropriate in Kenya as they are in Western contexts, and are reified from politics and society, by being cast as merely institutional, economically efficient and neutral.<sup>682</sup>

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<sup>678</sup> Raz (n 675) 221.

<sup>679</sup> See generally Albert Venn Dicey and Emyln Capel Stewart Wade, *Introduction to the Study of the Law of the Constitution*, vol 10 (Macmillan & Co 1939).

<sup>680</sup> See generally, Amartya Sen, *Development as Freedom* (OUP 2001) 3. The author argues that development should also be seen as a process of expanding the real freedoms that people enjoy, rather than the narrower views of development that concentrate on gross national product, rise in personal incomes, industrialisation, technological advancement, and social modernisation.

<sup>681</sup> The FSAP is a joint IMF/World Bank financial sector surveillance program, launched after the 1990s emerging markets financial crises, to identify emerging financial sector vulnerabilities and help identify financial sector development needs, which would then be addressed through technical assistance programs. The consultations between the BWIs and respective States would also be undertaken under the Article IV provisions of the IMF treaty, which provides for dialogue with its borrower clients. See World Bank, 'Financial Sector Assessment Program: IEG Review of the Joint World Bank and IMF Initiative' (The World Bank 2006).

<sup>682</sup> Santos (n 674) 266.

The indeterminacy and lack of clarity in the concept of the rule of law has muddled the use of this concept by policy makers and regulators, when justifying policy reforms, and undermined the efforts of political actors to question the underlying premises of some failed rule of law reforms, such as land titling, for example. In addition, policy makers and market stakeholders with various agenda find means of defending certain policies, as a result of the malleability of the rule of law concept.<sup>683</sup> For example, the CBK, National Treasury and the Kenya Bankers Association (KBA) have been able to deflect the blame for high interest rates from lenders to the weakness or non-existence of financial markets institutions such as collateral registries, high collateralisation costs, credit rating agencies, and judicial institutions.<sup>684</sup> This is despite the evidence of market failure, including an oligopolistic banking market structure, lenders' cartel-like behaviour, and regulatory capture of the CBK and the National Treasury.<sup>685</sup>

Santos also argues that the rule of law, as an economic development project, has persisted despite its failures and the many criticisms levied on it, because of multiple reasons that point to the ideational power of the concept. First, the discourses and practices of rule of law projects, and the common intellectual backgrounds of the stakeholders have augmented professional networks and relationships, epistemic communities, and also revolving doors between BWI and Kenya government bureaucrats, which are integral for the maintenance of the projects.<sup>686</sup> The ideational commitments to epistemic communities of lawyers and economists, for example, shape the policy paradigms of the Kenyan regulators and policy makers on the role of the government in the lending market. The current CBK governor, Dr Patrick Njoroge, is a former senior official at the IMF. Henry Rotich, the current Cabinet Secretary for the National Treasury, is also a former economist at the CBK, who has also been attached to the IMF Nairobi office, and has also consulted for its technical assistance arm, East AFRITAC. These professional and epistemic commitments make these financial sector regulators unlikely to adopt radical policies that depart from the BWIs' policy prescriptions.

Second, at the domestic level, various social groups in Kenya continue to champion the rule of law uncritically because, in its conceptual indeterminacy and multiplicity, the concept appeals to their separate interests.<sup>687</sup> Due to Kenya's history of constrained access to justice, and the

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<sup>683</sup> *ibid* 282.

<sup>684</sup> Deloitte Consulting Limited (n 600).

<sup>685</sup> Sanya and Gaertner (n 591) 17; Wagh and others (n 534) 39.

<sup>686</sup> Santos (n 674) 298.

<sup>687</sup> *ibid* 298.

abuse of State power, the formal conception of the rule of law appeals to a majority of Kenyans concerned with abuse of State discretion. The substantive conception of the rule of law, which emphasizes the protection of individual rights and freedoms, is also largely popular due to the history of State infringement of civil liberties. Property rights provide a shelter to the propertied group from redistributive State policies that have been recommended but not implemented by various government task forces and commissions on land. However, absolute protection of property rights is less popular with the un-landed, due to the economic inequality caused by illegal and inequitable appropriation of both public and private land by individuals and social groups. Various epistemic and social communities, including lawyers, judges and civil society organisation, also have reason to champion the rule of law for various ideological and practical interests.

The BWIs' concept of the Rule of Law as applied specifically to the liberalisation of financial markets in Kenya and other countries has emphasized the following aspects: first, there must be legal and political guarantees of civil liberties and property rights; second, there must be an efficient judicial system which reduces transaction costs and limits predatory behaviour; third, there must be legal security, that is, legal certainty, stability, predictability and prospective laws, which allow planning for future goals. These elements of the rule of law, the IMF argues, give borrowers and lenders the confidence to contract in the financial markets.<sup>688</sup>

Consequently, these elements of the rule of law have informed the various policies that the IMF and World Bank have championed in Kenya through the FSAPs, Article IV consultations, the Financial and Legal Sector Technical Assistance Programme (FALSTAP), and the specific ways they have been translated into legislation, regulations and policies by the Kenya government. These include the following measures for reducing interest rates: the removal of costly banking regulations, including interest rate caps; removing hindrances to enforcement of collateral; encouraging bank transparency on loan charges; the privatisation of State-owned banks as a means of State withdrawal from the lending market; and information sharing between banks and regulators.<sup>689</sup>

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<sup>688</sup> Ralph Chami, Sunil Sharma and Connel Fullenkamp, *A Framework for Financial Market Development* (International Monetary Fund 2009) 13–14.

<sup>689</sup> Hansard Editor, 'Proceedings of the Reading of the Finance Minister's 2004 Budget Speech, during the 9th Parliament' (Kenya National Assembly 2004) Official Hansard Report 1814; Ms Enrica Detragiache and Asli Demirgüç-Kunt, *Financial Liberalization and Financial Fragility* (International Monetary Fund 1998) 4.

#### **4. The Rule of Law's Restriction of Kenya's Interest Rate Regulatory Debate**

The ideological nature and role of the Rule of Law is through the abstraction of its partial and limited perspectives on equality, autonomy, and liberty, into universal, rational, transcendental and totalizing perspectives that are valid prerequisites in all social and economic conditions. This is evident in the four aspects of the Rule of Law.

##### **4.1. Sanctity of Property Rights in Debt Contracts**

The ideology of the 'sanctity of private property' rights sees the property rights as antecedent or forerunners to the State, and therefore more fundamental than any State claims.<sup>690</sup> Within BWI orthodoxy, the deepening and development of financial markets in developing countries is predicated on legal and political guarantees of property rights, as one of the elements of the Rule of Law.<sup>691</sup> This ideology has been rationalised through the Law and Finance Theory (LFT) research rubric developed by La Porta and others, who draw a causal linkage between legal systems on the one hand, and financial development, and supply of external credit and economic growth. LFT concludes that countries with a common law legal system have more developed financial systems with willing creditors, due to their comparatively stronger creditor rights protections, including property rights.<sup>692</sup>

This theory has been challenged on various grounds, one being its establishment of weak causality between legal origins/legal traditions, and financial development. Fohlin, for example, argues that since the English financial system was imported into the countries under study, alongside the importation of the common law legal system, the causal impact of the latter on financial development cannot be separated from that of English financial institutions.<sup>693</sup> A second challenge to the links between protection of formal property rights and financial development has arisen from the observation that Asian countries such as China have experienced periods of rapid economic growth and financial sector development, under a developmental State model that lacked the property rights protections under common law

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<sup>690</sup> Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (n 397) 10.

<sup>691</sup> Chami, Sharma and Fullenkamp (n 688) 13–14.

<sup>692</sup> Rafael La Porta and others, 'Legal Determinants of External Finance' (1997) 52 *The Journal of Finance* 1131; Rafael La Porta and others, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113.

<sup>693</sup> Caroline Fohlin, 'Economic, Political, and Legal Factors in Financial System Development: International Patterns in Historical Perspective' (Social Science Research Network 2000) SSRN Scholarly Paper ID 267674 <<https://papers.ssrn.com/abstract=267674>> accessed 8 August 2017.

systems.<sup>694</sup> A third challenge is that the law reform projects undertaken in developing countries have so far failed to yield the expected economic development.<sup>695</sup>

The ideology of the sanctity of private property, based on the LFT rationalisation, has informed the reforms formulated by Kenyan financial policy makers, regulators and legislators, aimed at entrenching the rule of law and property rights, as a means of deepening the financial sector and the availability of credit. This includes protection of property rights through preserving certainty in, and ensuring the enforcement of financial contracts such as debt instruments.<sup>696</sup> In addition, Kenya's negative Financial Sector Assessment Program (FSAP) reports prepared jointly by the BWIs, as part of the Article IV consultations, have also compelled amendments to insolvency laws aimed at preserving creditor's property rights in debt contracts.<sup>697</sup> This has shifted Kenya's insolvency regime from a communitarian philosophy aimed at recognising the wider stakeholder interests in the event of firm liquidation, to one asserting the Creditors' Bargain.<sup>698</sup>

The ideology of the sanctity of property rights therefore reifies the debt contract as a juridical relationship between a creditor and debtor; the creditor owns the property rights in the debt contract, which is a 'chose in action'.<sup>699</sup> The rule of law therefore takes a reductionist approach to the problem of high interest rates, high indebtedness and constrained access to credit, regarding these issues as juridical rather than political-economy issues.<sup>700</sup> This reductionist approach precludes 'redistribution of private property' in the form of interest rate regulation, as political options for addressing high indebtedness or lack of affordable credit. Hence, despite the popularity of interest rate caps or other political forms of intervention to lower the cost of

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<sup>694</sup> Rodrik (n 135).

<sup>695</sup> Santos (n 674) 254.

<sup>696</sup> Njuguna S Ndung'u, 'Governor's Remarks at the Launch of the Study Report on the Cost of Collateral in Kenya' (Launch of the Study Report on Cost of Collateral in Kenya, Nairobi, 24 March 2010).

<sup>697</sup> International Monetary Fund, *Kenya: 2001 Article IV Consultation-Staff Report; Staff Supplement; and Public Information Notice on the Executive Board Discussion* (International Monetary Fund 2002).

<sup>698</sup> For a discussion of communitarian theory of bankruptcy law, see Karen Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Wash. ULQ 1031. For a discussion on the Creditors' Bargain, see Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 The Yale Law Journal 857. The Creditors' Bargain thesis argues that bankruptcy law should respect the creditor's contractual and proprietary rights and expectations that motivated them to grant credit in the first place.

<sup>699</sup> The expression 'chose in action' means 'a thing recoverable by action', as contrasted with a 'chose in possession', which is a thing of which a person may have physical possession. The meaning has expanded over time to include all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. See *R v Hallam and Blackburn* [1995] Crim LR 323, CA.

<sup>700</sup> Ilsep Ahn, 'Deconstructing the Economy of Debt: Karl Marx, Jürgen Habermas, and an Ethics of Debt' 6 *Trans-Humanities Journal* 5, 5.

credit, the CBK, the National Treasury and other financial policy makers and regulators read from the same script as the IMF and World Bank, opposing Parliament's legislative attempts.<sup>701</sup>

The contradiction and concealment inherent in the ideology of sanctity of private property are two-fold. First, the rule of law naturalises property rights (including financial instruments such as debt contracts), concealing the fact that they are a product of the constitutive power of the law, which defines property rights into existence. Consequently, Kenyan judges, regulators and policy makers find it untenable to define other alternative kinds of property rights, duties, privileges and entitlements between lenders and borrowers in law. The English Common Law provisions of finance law continue to police the nature of the lending contract, exerting a restrictive constitutional form of influence on the cognitive possibilities of judges, regulators and policy makers, despite the Common Law's inferiority to Kenyan constitutional and legislative provisions. The rule of law ideologically obscures the fact that specific patterns of rights, allocation and entitlement are historically and socially contingent, and that even the history of the Western developed economies is one of repeated inventions and experimentations with different concepts of property.<sup>702</sup>

Second, the reification of 'financial assets as private property' from the State obscures the fact that property rights exist only as long as they are accredited, legitimated and enforceable by the State, against any general or specific third party.<sup>703</sup> Money (and by extension a debt contract) is as much tangible as it is intangible, its value pegged on rhetoric, faith expectation, and the multiple assurances of the State to maintain the stability of the monetary system through various measures.<sup>704</sup> First, the State creates fiat money, which, as legal tender, is the most common form of credit. Second, the CBK guarantees the liquidity of commercial banks and the financial markets by acting as a lender of last resort, having licensed the banks to create electronic money, and lend money they do not have, through leveraging. Third, since the emergence of systemic risk concerns and the frequent financial crises, banks have benefitted

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<sup>701</sup> Patrick Njoroge, 'Banking Sector Reforms Will Reduce Cost of Credit' *Business Daily* (Nairobi, 2 August 2016) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Banking-sector-reforms-will-reduce-cost-of-credit/539548-3329136-lxgpv9/index.html>> accessed 21 September 2016; Brian Ngugi, 'IMF Calls on Kenya to Scrap Interest Rate Capping Law' *Business Daily* (Nairobi, 15 April 2017) <<http://www.businessdailyafrica.com/news/IMF-pressure-Kenya-interest-rate-cap/539546-3890742-sc66p0z/index.html>> accessed 22 June 2017; Michira (n 585).

<sup>702</sup> David W Kennedy, 'Some Caution About Property Rights as a Recipe for Economic Development' (Harvard Law School 2009) Working Paper 3.

<sup>703</sup> Deakin and others (n 54) 192–193.

<sup>704</sup> Bill Dunn, 'Money and Finance', *Global Political Economy* (Pluto Books 2009) 223.

from an almost guaranteed assurance of taxpayer-funded bail-outs. Within this context, the argument for property rights in debt contracts preceding the State, and the discounting of redistributive policies in interest rates markets, are untenable.

The rule of law holds out property rights in debt contracts as distinguished from public property, and unproblematically conceptualises them as universal, apolitical, asocial, natural, and rational. Sanctity of property rights as a policy framework has thus become a self-referencing feedback loop of policy rationale, used to adjudicate issues of inequality in neoliberal capitalism, which issues have been partly created by the structure of property rights. Aside from the high interest rates problem, the touting of sanctity of property rights as a policy goal in Kenya has prevented the State from confronting widely-acknowledged resource distribution challenges, such as illegally and fraudulently-acquired land titles. For example, after decades of inequitable, illegal and fraudulent alienation of public and private land by a minority of citizens, successive government task forces and commissions have investigated and offered recommendations for resolving the issue.<sup>705</sup> One of the main reasons for the governments' reluctance to revoke land titles has been its impact on the financial sector, since banks have collateralised these properties.<sup>706</sup> While it is reasonable to take into account the concerns of the financial sector, which may lose their collateral, it is noteworthy that these concerns are prioritized over the adverse impact that land inequality has caused to the poor citizens. In fact, due to the priority granted to the sanctity of private land titles, the Ndung'u Land Commission report documented the tactic of collateralising fraudulently alienated land as one of the strategies used by Kenyan lawyers in legitimising legally-void land titles.<sup>707</sup>

This substantive notion of the rule of law adopted by the BWIs (in specific instances), and which emphasizes the protection of property rights (at the expense of other socio-economic rights), has thus been used to protect the owners of credit finance (in this instance, the lenders) from redistributive policies. Legislation has only been deemed to have been legitimately used to substantively interfere with the rights of parties to a contract, in the establishment of a credit information sharing system. As discussed more substantively in Chapter 6, the Kenyan

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<sup>705</sup> See, for example, Republic of Kenya, 'Report of the Commission of Inquiry into Illegal/Irregular Allocation of Land' (Government Printers 2004); See also, Republic of Kenya, 'Final Report of the Truth Justice and Reconciliation Commission' (Government Printers 2013).

<sup>706</sup> Africa Centre for Open Governance, 'Mission Impossible? Implementing the Ndung'u Land Report' (Africa Centre for Open Governance 2009) 24.

<sup>707</sup> See Ambreena Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya' (2012) 50 *The Journal of Modern African Studies* 467. See also Republic of Kenya, 'Report of the Commission of Inquiry into Illegal/Irregular Allocation of Land' (n 705).



Parliament and the financial regulators have used legislation to dispossess borrowers of their rights to privacy, to the commercial use of their credit information, and to sue lenders in tort, and licensed it to credit referencing bureaus and banks, in a bid to commodify, and facilitate the market for, credit information.

As noted by Tshuma, the World Bank's concept of the rule of Law, passed down to developing countries such as Kenya, only legitimises State coercion of individuals and the use of law to usurp the will of individuals, in the establishment of markets. This is where there is need for the commodification of all means of production to facilitate liberal market capitalism, especially where commodification cannot occur naturally, since it entails traumatic consequences for the parties that are dispossessed in the process.<sup>708</sup> This demonstrates the contradiction inherent in the ideology of the sanctity of private property, as conceptualized in the World Bank's Rule of Law programs.

#### **4.2. Individual Liberty to Contract**

The ideology of liberty asserts freedom from interference with the person or property, and, similar to private property rights, is deemed to precede the establishment of the State. This implies that the State can only interfere with individual rights and freedoms in the course of protecting equal liberty for all individuals.<sup>709</sup> The concept of individual liberty constructs the separate spheres of the public and the private, and, borrowing from the assertions of liberalism, recognises the economic benefits of free choice.<sup>710</sup> This paradigm was recognised in the *Thuku Kirori* case, where the Kenyan High Court stated:

“a liberalised market envisages competition where the consumer is presented with a variety of choices from which he may pick the most suitable for his needs subject only to his capacity to access them; this must be what the doctrine of laissez-faire is all about. Competition does not clog but rather oils the engine of a liberalised market economy.”<sup>711</sup>

This ideology has underpinned the financial market and specifically interest rate liberalisation policies advocated by the BWIs, Kenya's financial market policy makers and regulators, and the

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<sup>708</sup> Lawrence Tshuma, 'The Political Economy of the World Bank's Legal Framework for Economic Development' (1999) 8 *Social & Legal Studies* 75, 75.

<sup>709</sup> Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (n 397) 10.

<sup>710</sup> See Hayek, as quoted in Joseph Raz, 'Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195, 220–221.

<sup>711</sup> *Thuku Kirori & 4 others v County Government of Murang'a* [2014] eKLR (High Court of Kenya at Murang'a).

local banking sector. As discussed above, the BWI FSAP regulatory prescriptions, supported by the Legal Theory of Finance (LTF) research findings, advocate the removal of interest rate regulations, and the enforcement of credit contracts by the courts, as necessary preconditions for the availability of credit in the economy.<sup>712</sup> The ideology of individual liberty rests on the assumption that all parties to a credit agreement, whether powerful banks or uneducated individuals, make the best decisions that result in optimal lending activity in the credit markets. By uncritically invoking concepts such as ‘responsibility’, ‘intention’ and ‘fault’ (which are borrowed from a range of liberal philosophical and sociological claims), the rule of law presupposes the active will of the legal subject in entering debt contracts.<sup>713</sup>

The ideological aspect of this claim is that it constructs a partial, limited conception of liberty as freedom of the person and property only from interference by the State and the law, while excluding interference from private persons. The first ideological element relates to the nature of debt finance in the private sphere. The construction of a private sphere where individuals are free to own property, such as debt contracts, for example, homogenises property rights (debt contracts) to consist of neutral control over objects, rather than the reality of control over human subjects (in this case, debtors), distorting the social and political nature of debt contracts.<sup>714</sup> The private sphere is thus not necessarily a sphere of liberty. More critical conceptions see debt finance as the art of manipulating ends, a creditor’s governance of the debtor’s future, and the colonisation of the individual debtor’s purpose. In this context, the spurious end-goal of debt satisfaction can usurp an individual debtor’s reason for being.<sup>715</sup>

The ideology of individual liberty therefore conceals the illiberal power of debt, even within the unregulated private sphere. It thus ignores the coercive power of creditors’ property rights in debt contracts, and how the uncritical elevation of these rights in liberal market capitalism infringes on other fundamental rights and freedoms, including socio-economic rights. BWIs have deliberately excluded socio-economic rights from their conception of rule of law and good

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<sup>712</sup> See International Monetary Fund, *Kenya: 2001 Article IV Consultation* (n 697).

<sup>713</sup> Cotterrell, ‘Feasible Regulation for Democracy and Social Justice’ (n 397) 14.

<sup>714</sup> Weitzer (n 646) 145.

<sup>715</sup> Stephen Connelly, ‘Critical Finance Law’ <<http://criticallegalthinking.com/2013/11/11/critical-finance-law/>> accessed 4 May 2017.

governance, arguing that these rights are in the sphere of the political, over which the BWIs allegedly have no jurisdiction, rather than the economic, which is their main mandate.<sup>716</sup>

The second ideological aspect is that while liberty is defined as freedom from legal interference, it is the same culprit (the law) that has the power to define the boundaries of this liberty. Liberty thus becomes an empty concept. Hale argues that property rights are best conceptualised as delegations of State authority to a minority of private individuals. Consequently, since property rights embody the legally constituted power of the State, individuals in non-regulatory Laissez Faire markets are subject to coercive power similar to regulated markets. By this logic, it is discernible that the private sphere of unregulated credit agreements is not necessarily a sphere of liberty and the exercise of free choice, especially by borrowers. They are subject to the legally-constituted and State-maintained coercive and disciplining power of capital, especially in an increasingly financialised economy. With the limited conception, the Rule of Law fails to conceptualise liberty more broadly, as a “general absence of constraints on legitimate activities or as freedom for fulfilment”.<sup>717</sup> Chapter 6 of this study explores, for example, how the legal construction of a debtor information market in Kenya through the establishment of licensed Credit Reference Bureaus (CRBs) touts credit scoring and reporting as a free market solution to the problem of information asymmetry and high interest rates, while ideologically concealing the legally-deepened power asymmetries in favour of banks.

The third ideological aspect is that the Rule of Law rationale for protecting the private sphere from State interference or power ignores or is blind to the manifest exercise of private power in the private sphere, characterised by power asymmetries and other types of inequality. For example, formal-liberal law fails to recognise the way the identity and capacity of certain individual borrowers is confined to a private sphere in which they are disempowered. In Kenya’s context, this would include certain financially marginalised groups including women, rural folk, the uneducated, and the poor.<sup>718</sup> In such context, the Rule of Law’s emphasis on protection of liberties in the private sphere from State interference fails to address the

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<sup>716</sup> Kang’ara (n 668) 133. The author discusses the failure of BWIs to embrace a substantive realisation of human rights through their structural adjustment programs, despite their core mission of economic development.

<sup>717</sup> Cotterrell, ‘Feasible Regulation for Democracy and Social Justice’ (n 397) 10.

<sup>718</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya, ‘The 2016 FinAccess Household Survey’ (Financial Sector Deepening (FSD) Kenya 2016) 5–8. According to the report, the financial marginalised and unempowered individuals in Kenya include women, rural populations, the less educated, the poor, the unemployed, and individuals from certain regions, including Western Kenya and the Coastal region, who have lower access to credit.

inequities and power hierarchies inherent in consumer credit agreements, rendering the weaker party marginal to the operation of law, by assigning their identity to the private sphere.<sup>719</sup>

In Kenya's lending market, banks have historically maintained an inordinately powerful role in credit contracting, including fixing non-negotiable, high interest rates, and in most instances maintaining the contractual discretion to vary the rate of interest by any margin, which may only ex post be deemed reasonable or unreasonable based on the courts' discretion. Kenyan courts have of course taken a restrained approach towards borrowers' prayers for judicial variation of contractual interest rates, opining that they are reluctant to interfere with, or rewrite contracts, unless the borrower pleads and proves that the contract is either harsh, illegal, fraudulent, or unconscionable.<sup>720</sup>

In this context, it is discernible that the partial, limited conception of liberty ideologically restricts the options available to Kenyan financial sector policy makers and regulators for addressing the problem of high interest rates and high indebtedness in Kenya, when financial sector reform projects are framed within, or undergirded by the rule of law.

#### **4.3. Minimalist State Interference in the Credit Market**

The ideology of the minimalist State asserts that the State exists to preserve, and prevent the interference with, the free interaction of citizens by means of contract and property, which interaction is deemed a 'spontaneous' mechanism of civil society.<sup>721</sup> This assertion, forming one of the direct linkages between liberalism and the Rule of Law, is one of the underlying premises of the World Bank and IMF financial liberalisation programs in Kenya, which have sought to deepen the financial markets and increase access to finance, through the roll-back of State involvement in the sector. At the core of this ideology is the argument that the market has far superior information compared to the State, whose interventions can only be sub-optimal and distortive of the efficient, independent markets.

The most definitive of the Kenya government's policy recommendations for lowering the high lending rates, spelt out in the 2004 budget speech, were fundamentally shaped by the legal

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<sup>719</sup> Cameron Stewart, 'The Rule of Law and the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 Macquarie Law Journal 135, 149.

<sup>720</sup> See *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR (The Court of Appeal at Nairobi).

<sup>721</sup> Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1997) 258.

ideology of the minimalist State. These policies included: the repeal of the 'Donde Act' legislative caps on interest rates; the reduction of bank regulations to reduce cost of regulatory compliance; the privatisation of government-owned banks; and the increased autonomy of the CBK monetary policy making.<sup>722</sup>

Granted, the Kenya government's 'developmental State' economic model that followed the 1963 independence from British colonial rule was blighted by corruption, which derailed the same economic development blueprint that succeeded in East Asian countries. Nevertheless, it is notable that the private sector itself is dominated by political elites with direct connections to State officers, and in fact private banks owned by State officers act as conduits for laundering proceeds of State corruption. Hence the premises underpinning the roll-back of State intervention in the interest rate markets – that of efficient and optimal free markets - are not supported by the context.

The ideology of the minimalist State also harbours certain inconsistencies, contradictions and complexities that have sustained a bias for neoliberal markets. The ideology reifies the financial markets as an economic sphere that is free of the social and the political, which distinction should be maintained through, for example, making the monetary policy making organs and processes of the CBK independent and autonomous. As has been discussed extensively in Chapter 4, the view of Kenya's banking sector as apolitical is untenable, considering the legitimate and illegitimate political patronage, and taxpayer subsidies that have historically accounted for private banks' profits.

In addition, 'independent' CBK monetary policy making decisions and processes have historically been used to fund incumbent ruling parties in general elections, and also to rig financial markets in favour of politically-connected private banks. The rationalisation of monetary policy making as 'technical', even in instances of 'real autonomy' and the absence of illegal influences, still fails the claim to technocracy and political neutrality. This is because CBK interventions to alter interest rates, exchange rates, liquidity, and inflation are still tied to political and social interests, as these interventions navigate various biases and interests: labour versus capital; exporters versus importers; financial capital versus industry; and local versus transnational capital.<sup>723</sup>

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<sup>722</sup> Hansard Editor, 'Finance Minister's 2004 Budget Speech' (n 689) 1814.

<sup>723</sup> Dunn (n 704) 208. The author argues that money and finance are usually presented as complex, technical matters, and are depoliticised by the assertion of central bank autonomy, making even the most drastic

The ideology also naturalises the financial markets as phenomena pre-existing the State, and seeks to maintain this ‘natural’ functioning through the removal of interest rate caps and other ‘redundant’ consumer regulations, and also the withdrawal of government from the market, through the privatisation of State-owned banks.<sup>724</sup> This ideology conceals the integral role of the State and law in constituting financial markets. As discussed above, the State has historically underpinned the financial markets by legislating into existence various financial assets, and by guaranteeing these assets. In addition, it conceals the historical role of the State in spurring economic development and enterprise in some of the developed countries boasting a Rule of Law constitutional foundation, include State-sponsored imperial excursions and modern military engagements in search of new markets and free or discounted raw materials.<sup>725</sup> In addition, by narrativizing financial deepening and economic development as predicated entirely on market liberalisation, the rule of law discourse obscures alternative development models such as the East-Asian story, in which a ‘developmental State’ model achieved a commendable measure of financial and economic development without financial market liberalisation, and other rule of law prescriptions such as private property rights and protection of specific forms of property rights.<sup>726</sup>

Thus, the ideological imperative for State withdrawal from financial markets fails to take into account the reason for the establishment of government owned banks immediately after independence; parastatal commercial banks were meant to finance local or indigenous businesses, which at that time were ignored by the foreign-owned banks that dominated the market.<sup>727</sup> This foreign domination of Kenya’s banking sector persists to date, with a 45% market share.<sup>728</sup> In fact, the large foreign banks only concentrated on lending to large corporate borrowers and the government, until Equity Bank, a new entrant in the sector, demonstrated the profitability of the lower rung of the market by lending to small-scale traders and farmers.

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monetary policy with distributional consequences seem inconsequential, while finance takes on the appearance of a transcendental power.

<sup>724</sup> This ideology has been passed down by the BWIs to the Kenya government. See, for example, the Finance Minister’s 2004 proposals on reducing interest rates, in Hansard Editor, ‘Finance Minister’s 2004 Budget Speech’ (n 689).

<sup>725</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 271) 167–168. Anghie notes that one of the objectives of colonial administrators under the Mandate System was to convert colonial natives into capitalist consumers and introduce them into the market system. See also, Harvey (n 3) 15, 27, 39. Harvey notes the violent imposition of neoliberal economics, such as the explicit and implicit US military interventions in Chile, Argentina, and Iraq.

<sup>726</sup> See generally Rodrik (n 135).

<sup>727</sup> Brownbridge, *Government Policies and the Development of Banking in Kenya* (n 584) 4.

<sup>728</sup> Sanya and Gaertner (n 591) 17; Wagh and others (n 534) 39.

The utility of maintaining government-owned bank presence in such a context of market domination by foreign banks is especially underscored when account is taken of the implications of the conceptualisation of credit worthiness and default probability using credit scoring technologies calibrated in foreign lending markets. Foreign banks may refrain from lending to lower segments of the borrower market, due to the inability to contextualise their credit scoring models to the Kenyan context.<sup>729</sup> This is discussed in further detail in Chapter 6. The privatisation of government banks as a means of deepening the local financial markets therefore does not address the problem of unaffordable credit, and in fact further disadvantages the borrowers.

### **Litigating the Minimalist State's Regulation of Interest Rates**

The impact of this ideology on financial sector regulators and policy makers was demonstrated in the CBK's response to the *Albert Ruturi* case<sup>730</sup> In 2001, in response to Parliament's enactment of interest rate caps (known as 'the Donde Act'),<sup>731</sup> the Kenya Bankers Association (KBA), challenged the constitutionality of the legislation at the High Court, on the basis that it created retrospective criminal offenses.<sup>732</sup> The second limb of the suit is of more interest in the present discussion. The CBK requested to be enjoined in the suit, and in support of the KBA's position, petitioned the Court to declare the Donde Act unconstitutional, and thus void. The basis of the CBK's petition was that the interest rate capping measures offended the statutory objectives of the CBK to 'foster the liquidity, solvency, and proper functioning of a stable market-based financial system' and the government's liberalization policy 'which is for optimum growth and development free from administrative interference.' The CBK also argued that "it did not make economic sense to control interest rates, and yet leave out of control

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<sup>729</sup> Micro-Finance Risk Management LLC, 'The Potential for Credit Scoring for SME Lending in Kenya' (Financial Sector Deepening (FSD) Kenya 2008) Report Commissioned by FSD Kenya's GrowthFin Programme 23. The authors recount the decision of CitiGroup, a US bank, to close the SME division of its Kenyan subsidiary, as its credit scoring model declared the sector of high credit risk, despite the patent profitability of the sector.

<sup>730</sup> *Albert Ruturi, J.K. Wanywela & Kenya Bankers Association V The Minister of Finance & Attorney General and Central Bank of Kenya* (n 564).

<sup>731</sup> Central Bank of Kenya (Amendment) Act No. 4 of 2001, Laws of Kenya. The amendment introduced a section 39(1) to the Central Bank of Kenya Act, which provided that: "(1) the maximum rate of interest which specified banks, or specified financial institutions may charge on loans or advances shall be the 91-day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest 91-day Treasury Bill rate, plus four per-centum... (2) the minimum rate of interest which specified banks, or specified financial institutions may pay on deposits held in interest-earning accounts shall be seventy per-centum of the 91-day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest 91-day Treasury Bill rate..."

<sup>732</sup> *Albert Ruturi, J.K. Wanywela & Kenya Bankers Association V The Minister of Finance & Attorney General and Central Bank of Kenya* (n 564).

other forces in the economy, because this would lead to distortions and misallocation of productive resources.” A notable argument was that the interest rate capping measures would go against Kenya’s financial liberalization policy, and “put the country at odds with other liberal economies with which we deal.”<sup>733</sup>

The CBK’s argument was not supported by any legal provision, as its statutory objectives under the Central Bank of Kenya Act<sup>734</sup> can be repealed by any latter statute such as the Donde Act. Rather, the argument was based on a liberal ideology of the minimalist role of the State in market economies. Rejecting the CBK’s invitation to adjudicate on the legality of regulating a liberalised interest rate market, the Constitutional Court held as follows:

“Attractive arguments as they are, we do not consider it appropriate for the court to comment on, or decide, them, because these are questions of policy. If the Government wishes to introduce controls, or if the government is unable to defeat motions and Bills initiated by the Opposition parties to introduce controls, and a section of the Kenyan people or some interested group does not like such control measures being introduced, then it is a matter which goes beyond the realms of courts. A statute reversing a given economic policy, or introducing a new commercial or economic regime may have political repercussions for the political party in power, but it does not of itself thereby become an unconstitutional statute. Such a statute may influence the voting at a national election time, but it remains a valid statute within the constitution of Kenya. Some people want a State controlled economy; others do not want any form of control, and desire a free enterprise. That is for economic policy makers. The court cannot go into this arena. No constitutional provision is violated.”<sup>735</sup>

By refusing to concretise in court jurisprudence, the liberal bias of the rule of law, the court opened up the arena of economic policy making to political actors in the form of Parliament. The court, however, voided the interest rate caps for violating the rule against retrospectivity, an element of the formalistic conception of the rule of law, and entrenched in section 77(4) of the (now repealed) Constitution of Kenya.<sup>736</sup>

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<sup>733</sup> *ibid* 68, 79, 80.

<sup>734</sup> Cap 491, Laws of Kenya.

<sup>735</sup> *Albert Ruturi, J.K. Wanywela & Kenya Bankers Association V The Minister of Finance & Attorney General and Central Bank of Kenya* (n 564) 84.

<sup>736</sup> Constitution of Kenya 1965 (Repealed), Laws of Kenya.



## **The Rule of Law's Restriction of Democratic Policy Making**

Despite the High Court's endorsement of the political nature of economic policy making, the rule of law development programs continue to restrict democratic policy making, because of their structural linkage with BWIs' loan conditionalities, and the lenders' indeterminate and contradictory conceptions of the rule of law. The donor community maintained a markedly contradictory stance towards Kenya's compliance with the Rule of Law, in these circumstances. Having opposed the interest rate caps, and called for the repeal of the democratically-legitimated Donde Act as a conditionality for the resumption of Fund and World-Bank funding, the IMF lauded the Constitutional Court's decision in *Albert Ruturi* declaring the Act null and void.<sup>737</sup> However, on the other hand, it also threatened to withhold external financing after the same Constitutional Court declared some IMF-backed statutes passed by Parliament as unconstitutional, and also when the democratically elected Parliament rejected some IMF-sponsored legislation, on grounds of non-compliance with the Rule of Law. These included the Kenya Anti-Corruption Act, the Anti-Corruption and Economic Crimes Bill, and the Public Service Code of Ethics Bill.<sup>738</sup> In these circumstances, the Parliamentarians expressed their frustration at the BWIs' nonchalant stance on the problem of high interest rates in Kenya, and their readiness to undermine democratic governance processes and the rule of law in Kenya, to achieve the liberalization of the Kenyan financial markets.<sup>739</sup>

### **4.4. Formalism in the Rule of Law**

The fourth ideology is the procedural essence of the Rule of Law, which is the notion of general application of the law to legal subjects and objects, and the requirements that the law should be clear prospective, and stable.<sup>740</sup> While these attributes are, on face value, desirable for any legal system, they also exhibit partial and limited perspectives on social and economic life. Two elements of the formalist conception are relevant to the discussion on interest rate regulation: general application of law, or formal juridical equality; and retrospective application of law.

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<sup>737</sup> International Monetary Fund, *Kenya: 2001 Article IV Consultation* (n 697) 15.

<sup>738</sup> *ibid.*

<sup>739</sup> See, for example, the contribution of Hon. Mugalla, in Hansard Editor, 'Proceedings of the Parliamentary Debate on the Finance Minister's 2001 Budget Speech, during the 8th Parliament' (Kenya National Assembly 2001) Official Hansard Report 1324.

<sup>740</sup> Raz (n 710).

## Formal Equality of Juridical Subjects

Formal juridical equality is ideological due to its inability to recognise that legal equality is only equitable and just, when the legal subjects themselves enjoy symmetry of power and equal chances in the market-place, as between themselves.<sup>741</sup> Feminist scholarship argues, for example, that equality and generality as aspects of the Rule of Law perpetuate the male bias of law and its disregard of the oppression of women in the private sphere.<sup>742</sup> While objectivity, neutrality, and acceptability are desirable aspects of the Rule of Law, there is no attention given, for example, to the gendered distribution of factors of production such as land and capital, and hence these procedural aspects can also entrench particular inequitable distribution of economic, social and political goods.<sup>743</sup>

This formal equality under the law also bears an affinity for financial market liberalism. By relying on the rationalisation that unfettered markets, freedom of contract and individual choice generate optimal economic outcomes, formal equality under the law ideologically fashions the individual credit consumer as rational, utility-maximising, prudent, responsible, and trustworthy, and in no need of consumer protection regulations. While the lending market is composed of powerful, oligopolistic corporate lenders alongside less-powerful, individual borrowers, the rule of law's formal equality treats them as presumptively equal legal persons. In this instance, the constitutive and performative power of law is evident: the corporate lender is interpellated as the neoliberal subject with private property rights, individual liberties, and the beneficiary of juridical equality with natural persons.

Consequently, the courts adjudicating disputes in lending contracts presume the free bargains, and parity of arms, which in reality do not exist in most instances. Formal equality in the rule of law therefore plays a significant role in sustaining the systemic economic advantages generated by the neoliberal capitalist economic system. By obfuscating unequal property relations and capacities through juridical equality, the rule of law fails to confront whether individuals actually have access to credit finance, which enables them to set and realise the economic goals, as expected of them under neoclassical economic theory.<sup>744</sup>

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<sup>741</sup> Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (n 397) 12.

<sup>742</sup> Stewart (n 719) 136.

<sup>743</sup> Hilary Charlesworth, 'The James Crawford Biennial Lecture Series on International Law: Comment' (2003) 24 *Adelaide Law Review* 13, 14.

<sup>744</sup> Christine Sypnowich, *The Concept of Socialist Law* (Oxford University Press UK 1990) 67.

### **Retrospective Legislation: Financialization of the Rule of Law?**

Despite Kenyan financial sector policy makers' ideological attachment to the neoliberally-biased conception of the rule of law, they have in specific instances endorsed the violation of the legal concept where it has been in opposition to the interest of creditors. Prior to the 1989 liberalization of interest rates, the Banking Act provided under section 44 of the Banking Act that "No institution shall increase its rate of banking or other charges except with the prior approval of the [Finance] Minister".<sup>745</sup> However, between 1992 and 2006, the CBK did not enforce the banks' compliance with this provision, and the lenders took advantage of the regulator's acquiescence.

Subsequently, banks institutionalised the practice of retaining, in the credit instruments, a contractual provision granting them a unilateral right to vary interest rates by any margin, without consulting the borrowers, which provision was abused in excessively unreasonable rate hikes. However, the legal implications of the banks' increase of interest rates without the Finance Minister's approval was that any rate increases since 1992 were therefore illegal and the courts could compel the banks to refund the lenders. Indeed, in 2004, Rose Florence Wanjiru, a borrower, filed a class action suit asking the court to declare all interest rate increases since 1992 without the Finance Minister's approval, illegal, and for an order requiring all Kenyan banks to compensate their borrowers for illegal charges levied for the last 13 years, since 1991.

In response to this suit, the government introduced, within its Finance Bill before Parliament, a provision to repeal Section 44 of the Banking Act.<sup>746</sup> The amendment also sought to retrospectively regularize/legalize all the charges and interest rates levied by the banks without the Finance Minister's prior approval since 1991, by deleting section 44 and inserting a clause that deemed all the interest rate increases and charges to have been approved by the Minister, and therefore legal. Despite the clause being rejected by Parliament and removed from the Final Bill sent to President Mwai Kibaki for assent, he vetoed the Finance Bill and sent it back to Parliament with a memorandum. The President argued for the retrospective measure on the basis that an order requiring banks to refund their customers the illegal interest rate charges

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<sup>745</sup> See section 44 of the Central Bank of Kenya Act, Cap. 499 of the Laws of Kenya.

<sup>746</sup> This proposed repeal was based on the argument that section 44 was obsolete in so far as it had not been enforced since 1991, and that the newly proposed measures (including increased external financing, reduced government's domestic borrowing, and reduced CBK cash ratio) would more effectively result in market-led interest rate decreases.

would occasion a huge compensation crisis that would threaten the financial stability of the banking sector. This was apparently because such an order would affect the financial results that the banks have declared for 13 years, and consequently, the taxes charged on the profits, which taxes the government would have to refund the banks.<sup>747</sup> Parliament, however, refused to enact the provision.

The government's contradictory stance towards retrospectivity of interest rates legislation was called out by Parliamentarians, who pointed out that in the same Memorandum to Parliament, the President had objected to the retrospective application of a statutory *In Duplum* Rule, which would have limited the amount of interest charged on a loan to the principal amount.<sup>748</sup> Yet in the instance of section 44, the Executive was willing to legislatively expropriate borrowers of their rights to sue lenders for compensation for unlawfully-charged interest rates.

The government's rationalization of the retrospective measure in this instance demonstrates the financialization of the rule of law, to the extent that the application of the concept is not based on its intrinsic value, but rather on its utility in sustaining and protecting the profits of creditors.<sup>749</sup> Banks' shareholder interests are privileged over and above the legal claims and economic interests of aggrieved borrowers, under the guise of safeguarding the financial stability of the banking sector. The economic concept of "financial stability", itself a contested concept, has therefore been enrolled in legal rationalizations by Kenyan policy makers and regulators, in using retrospective law to defeat attempts to secure justice for borrowers that have been exploited by Kenyan banks in the levying of unconscionable and oppressive interest rates.

## 5. Conclusion

This chapter has explored the fourth research sub-question: how has the ideological and performative power of legal ideas and related practices reproduced regulatory neoliberalism in Kenya's interest rate markets? It has examined the role of the 'Rule of Law' as legal ideology, and unpacked its concealed constitutive and performative power in the liberalization of

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<sup>747</sup> Hansard Editor, 'Proceedings of the Parliamentary Debate on the Banking (Amendment) Bill, during the Session of the 9th Parliament' (Kenya National Assembly 2005) Official Hansard Report 395.

<sup>748</sup> See contribution by Hon. Paul Muite in *ibid*.

<sup>749</sup> Thomas I Palley, 'Financialization: What It Is and Why It Matters', *Financialization* (Palgrave Macmillan UK 2013) 17. The concept of financialization here refers to the privileging of shareholder value above other non-financial aspects of the economy, e.g. the real economy. It also transfers income from the real sector to the financial sector, and contributes to increased income inequality and wage stagnation.

financial markets in Kenya. It has also explored the nature of the rule of law as part of the ideational infrastructure of contemporary financial markets in Kenya, and its entrenchment of neoliberal transnational regulatory standards in the financial sector through various Bretton Woods Institutions' loan conditionalities and reform programs.

The discussion has demonstrated the ideological and constitutive power of the rule of law, as it underpins the actions of Kenyan policy makers and regulators, and financial markets actors, in the debate regarding making credit affordable. While it plays a useful, though dispensable, role in financial market deepening and economic growth, the partial perspectives of the rule of law also open it up to useful critique of its role. The discussion has explored and critiqued two roles played by the rule of law, embodying ideological, constitutive and performative power, in Kenya's and other developing countries' financial markets.

First, the Rule of Law reproduces neoliberal financial market capitalism and the attendant inequalities and power asymmetries that sustain high interest rates and high indebtedness, through its conceptual linkages with neoliberalism. These linkages include the formalistic conception's emphasis on formal juridical equality of lenders and borrowers, and the substantive conception's instrumentalization of liberty and property as a means to optimal markets.<sup>750</sup> In addition, neoliberal philosophical and sociological claims about responsibility, intention, and fault, and neoclassical economic assumptions about efficiency, individual entrepreneurial activity, sanctity of property and contractarian principles as drivers of economic growth, undergird the ideology of the rule of law.<sup>751</sup> These liberal conceptions have cast regulatory interventions in the interest rates market as against the rule of law.

Second, the ideological rendering of the rule of law in financial market development limits the options and possibilities available for Kenyan and other Third World States to realise fairer and affordable credit markets. The rule of law weakens their ability to articulate and advocate for transnational regulatory policies that benefit their citizens in various ways. Formal juridical equality conceals the power asymmetries between lenders and borrowers, and the inequitable terms within lending contracts, as evidenced by the Kenyan courts' reluctance to interfere in contractual arrangements.<sup>752</sup>

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<sup>750</sup> Raz (n 675); Tshuma (n 708) 75, 86.

<sup>751</sup> Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (n 397) 14; Graham Harrison, *The World Bank and Africa: The Construction of Governance States* (Routledge 2004); Krever (n 134) 288, 317.

<sup>752</sup> Sypnowich (n 744) 67.

In addition, the rule of law dichotomies of public/private, political/economic, and State/market, has depoliticised inherently political issues such as high interest rates, and removed them from the domain of political action to that of technocratic action, thus precluding certain policy choices.<sup>753</sup> The BWIs' ideological rendering of the rule of law as autonomous, technical, apolitical, neutral and rational, and its deployment as a framework for financial markets and general economic development, has also limited political options.<sup>754</sup> When concepts, such as sanctity of property rights, are used to address inequitable resource distribution problems they helped create, the regulatory process gets stuck in a vicious feedback loop, as evidenced by the land reforms impasse in Kenya. The rule of law ideology limits the use of legislation to shape individual choices, except where it involves facilitating market exchange, e.g. in the establishment of credit information sharing.<sup>755</sup>

The inevitable conceptual indeterminacy, inconsistency and contradiction inherent in the ideology of the rule of law also limits the market reform process by making it difficult to criticise the resulting BWI-backed policies, despite their harsh consequences on the poor and vulnerable in Kenyan society.<sup>756</sup> Another consequence of this indeterminacy is that it appeals to the distinct and related interests of various social and economic groups, thus rendering it indispensable, even to the groups that fall victim to the rule of law's partial perspectives.<sup>757</sup> Thus, a deconstruction of the sanctity of property rights for equitable redistributive goals equally signals the potential deconstruction of civil and political rights. The ideational power of the rule of law has also enrolled Kenyan regulators and policy makers into epistemic communities that shape their development policy paradigms on the nature of social and economic life, and the options and possibilities for regulation.<sup>758</sup>

The ideology of the rule of law has thus sought to swing the regulatory paradigm from that of an overly regulated and State-steered local financial market, suffering the malaise of poor governance and corruption, to that of an unregulated market with high interest rates, high indebtedness and constrained access to credit, with negative distributional consequences to the poor segments of society.<sup>759</sup> In this liberalised financial sector, capital increasingly takes on

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<sup>753</sup> Tamanaha (n 656) 540.

<sup>754</sup> Santos (n 674) 288; Krever (n 134) 318.

<sup>755</sup> This theme is explored in Chapter 6.

<sup>756</sup> Santos (n 674) 288.

<sup>757</sup> *ibid* 298.

<sup>758</sup> *ibid* 295–296.

<sup>759</sup> Kang'ara (n 668).

a transcendental power, decoupling itself from the real economy of production, and standing on its own as a singular status, or absolute power.<sup>760</sup> This trend of financialization of the Kenyan economy, whereby the banking sector continues to make record profits while the rest of the largely agricultural economy performs poorly, in the context of high interest rates and high indebtedness, therefore problematises the ideological basis for interest rates and financial markets liberalisation.

The uncritical advocates for the Rule of Law in this regard have been charged with peddling outdated abstractions rather than engage in contextualised analysis. Critics contend that the Rule of Law is politically and socially outdated, since it is a creature of the 19<sup>th</sup> century *laissez faire* economy that has since disappeared, and with it, the descriptive and prescriptive force of the Rule of Law.<sup>761</sup>

Without a doubt, the rule of law makes a significant contribution to the realisation of equitable, and fairer capitalist economies in Kenya and other developing countries. This, however, is limited by the ideological and partial perspectives on social and economic life that deter certain policy and regulatory actions. Ideology critique and the deconstruction of the ideological elements of the rule of law is therefore necessary to make visible the concealed inequalities, domination and power asymmetries in liberal market economies, and to take progressive steps in addressing them, while fortifying the concept of the rule of law.

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<sup>760</sup> Connelly (n 715).

<sup>761</sup> Stewart (n 719) 136.

## CHAPTER SIX

### Technification: The Ideological and Performative Effect of Credit Information Sharing Technologies in the Liberalisation of Kenya's Interest Rates Market

#### 1. Introduction

The previous chapters have examined the ideological and performative power of economic, legal, and technological ideas, practices and related institutions in constituting market relations, shaping identities and respective capacities that either enable or constrain the actions of financial market stakeholders in the global economy. Chapter 3 examined the regulatory role of these ideas within the Bretton Woods Institutions (BWIs). The case studies under chapters 4 and 5 have also examined the ideological and performative roles of neoclassical economics and formal-liberal Rule of Law doctrines, respectively, in framing the debate on high interest rates and high consumer indebtedness as economic-legal rather than political problems, and consequently restricting regulatory options for realizing fairer interest rate markets in Kenya. This chapter is the third instalment of the Kenya case study, and explores the third aspect of the fourth research sub-question: how has the ideological and performative power of technological ideas, artefacts and related practices, reproduced regulatory neoliberalism in Kenya's interest rate markets?

The chapter examines the technification of the interest rates market, that is, the enrolment, adoption or imposition of technical methods into the overarching process of economisation and juridification of the lending market.<sup>762</sup> Technification has occurred in the adoption and operationalisation of credit scoring and credit reporting technologies and practices as a policy and regulatory response by Kenyan banking regulators and policy makers, and the banking sector, in addressing the problem of high interest rates and high consumer indebtedness. The discussion demonstrates the nature of credit scoring and reporting (or Credit Information Sharing) technologies as Socio-Technical Assemblages or *Agencements* (STAs) of regulatory neoliberalism, neoclassical economic theories, formal-liberal legal norms, and technological

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<sup>762</sup> Çalışkan and Callon (n 330) 2. The authors point out that one of the key agents in the economization process is the technical arrangements that enhance the capacities of human agents for action and cognition. See also, Manuel Tironi, 'Modes of Technification: Expertise, Urban Controversies and the Radicalness of Radical Planning' (2015) 14 Planning Theory 70.



rationalities and related practices.<sup>763</sup> As STAs, these CIS technologies are material and discursive assemblages that have an agential power to intervene in the constitution and performance of the lending market, through their enrolment of human and non-human market actors (including lenders, borrowers, Credit Reference Bureaus, and local and transnational banking regulators and policy makers) in their ideational infrastructure.

The discussion demonstrates the neoliberal ideological scripting of CIS technologies in conceptualising 'credit default risk', and legitimating unduly high interest rates and high indebtedness as a private problem of financially imprudent, untrustworthy and unethical debt consumers, while prescribing interest rate deregulation and consumer credit information sharing as the best regulatory solutions. As an ideological discourse, technology and practice, CIS conceals its deepening of power asymmetries between lenders and borrowers, and reproduction of high interest rates and inequalities in access to affordable credit in Kenya. The discussion covers the CIS developments up to the legislation of interest rate caps in September 2016. Since the impact of interest rate caps is still not clear, their effect on CIS and the banking sector, generally, are not covered.

The Chapter is organised into four further sections. Section 2 explores CIS as a methodologically problematic mathematical and computational method for rendering uncertainty of credit default calculable and knowable. It argues that Kenyan bankers and regulators have deployed CIS as a means of privatizing the issue of high interest rates as an individual, trustworthiness issue, rather than a public issue amenable to regulatory measures. Section 3 examines CIS as a socio-technical assemblage of legal, neoclassical economic, and technological Ideas and practices. It argues that the embedding of these ideas and practices within CIS has given it ideological and performative power that has constructed and sustained the liberalized interest rates market, and also deepened the power asymmetries between lenders and borrowers. Section 4 explores the progressive potentialities of re-constituting the interest rate markets. It argues that the contradictions and indeterminacies inherent in the legal, economic and technological ideas within CIS can be exploited towards deconstructing regulatory

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<sup>763</sup> The notion of Socio-Technical Assemblages or Agencements (STAs) emanates from Science and Technological Studies (STS), and more specifically Actor-Network Theory, and refers to the hybrid collectives (composed of humans, ideas, discourses, materials, technologies, texts, routines and practices) in which action (including its reflexive dimension which produces meaning) takes place. See Çalışkan and Callon (n 330) 9.

neoliberalism, and constituting equitable, accessible and affordable lending markets. Section 5 contains the main conclusions and suggestions for further research.

## **2. Credit Information Sharing as a Policy Response to High Interest Rates**

### **2.1. The Mechanics and Methodology of Credit Information Sharing**

Credit Information Sharing (CIS) or 'credit scoring and reporting' in Kenya refer to a three-pronged process. The first aspect is the sharing of both positive and negative consumer credit data by credit providers among themselves and/or with Credit Reference Bureaus (CRBs). The second aspect is the weighting (by CRBs) of these consumer attributes into a single figure measuring their creditworthiness, known as a 'credit score'. The third aspect is the subsequent circulation by CRBs of these standardised, agglomerated and individualised profiles of consumer behaviour (credit reports), to lenders, service providers, customers etc.<sup>764</sup> The rationale for CIS is that it reduces the information asymmetry prevalent between lenders and borrowers, which may lead to adverse selection, credit rationing and moral hazard.<sup>765</sup> Therefore, CIS enables lenders to reduce non-performing loan portfolios (NPLs) and engage in optimal lending to 'creditworthy' consumers.

#### **Credit Reports**

Once CRBs receive the raw data on standardised templates, they distil this information into a single credit report that captures the consumer's credit information. This information is used primarily to: calculate the customers' capability to pay a loan by comparing the customers' current loans and recurring utility payments vs. income; and assess a clients' credit behaviour by reviewing the customers' repayment history, including timely payments, pre-payments and over-payments.<sup>766</sup> The credit report may also contain a credit score, a single digit that captures the credit worthiness and character of a credit consumer.

#### **The Development of Credit Scores**

The credit score - the measure of an individual's credit-worthiness - is distilled using credit scorecards, which have evolved into automated statistical tools, algorithms or models used to predict the behaviour of new credit applications, based on the performance of previous credit

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<sup>764</sup> World Bank, 'General Principles for Credit Reporting' (The World Bank 2011) 70193 7.

<sup>765</sup> *ibid* 1.

<sup>766</sup> Geraldine O'Keeffe, Marie Valdez and Karibu Nyaggah, 'Credit Information Sharing in Kenya: A Guide for Credit Providers' (Kenya Credit Information Sharing Initiative 2012) 40.

applicants. In addition, it predict the performance of existing loan accounts, using past experience of accounts with similar characteristics.<sup>767</sup> To this extent, credit scoring entails a “probabilistic conception of risk defining what is meant by the credit worthiness of an individual consumer”.<sup>768</sup> The first step in the construction of a credit score is the identification of specific attributes or risk factors, usually used by credit appraisal officers at face-to-face credit application stages, including character, capital, condition, collateral and capacity.<sup>769</sup> This entails applying subjective judgment and interpretation of data.<sup>770</sup>

The second step involves the collection of standardised/templated samples of historical (up to 7 years back) consumer credit profiles from credit providers, including: identification, employment, account, guarantor, bounced cheque, and credit application data, and also collateral registry and fraudulent activities data.<sup>771</sup> Notably, the data templates are designed to collect information relating to or concerned with the calculable effects of default, rather than the causes of the default, thus failing to differentiate between defaults caused by illness or loss of employment, and default resulting from moral hazard.<sup>772</sup>

The third step entails using statistical computing techniques (e.g. algorithms) to analyse the historical data, and isolate the consumer characteristics which measure the probability that a credit consumer will default on his or her loan obligations.<sup>773</sup> These include residential status, marital status, occupation, years on a job, number of previous loans, and previous

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<sup>767</sup> Micro-Finance Risk Management LLC (n 729) 3.

<sup>768</sup> Donncha Marron, “Lending by Numbers”: Credit Scoring and the Constitution of Risk within American Consumer Credit’ (2007) 36 *Economy and society* 103, 103.

<sup>769</sup> Micro-Finance Risk Management LLC (n 729) 4.

<sup>770</sup> Thomas Wainwright, ‘Elite Knowledges: Framing Risk and the Geographies of Credit’ (2011) 43 *Environment and Planning A* 650, 657. The author argues that ‘each [score card designer] can view the meaning of the data in different ways, and the interpretation is open to negotiation: ignoring some types of data and variables over others, viewing customers through calculative frames’.

<sup>771</sup> Central Bank of Kenya and Kenya Bankers Association, ‘Credit Reference Bureau Data Specification Document’ <<https://www.centralbank.go.ke/wp-content/.../KBA-Data-Specification-Document.pdf>> accessed 9 July 2017; Central Bank of Kenya and Kenya Bankers Association, ‘Credit Reference Bureau Data Standards Manual’ <<https://www.centralbank.go.ke/wp-content/.../08/KBA-Data-Standards-Manual.pdf>> accessed 9 July 2017. These two guidelines have been developed by the Central Bank of Kenya and the Kenya Bankers Association in accordance with Section 18 of the Credit Bureau Regulations, 2013, which outlines the nature of information to be shared.

<sup>772</sup> Steve Gatembu Kairu and Anne Amadi, ‘Kenya Credit Information Sharing Initiative: A Proposed Mechanism for Alternative Dispute Resolution’ (Financial Sector Deepening (FSD) Kenya 2014) Commissioned Report 9. The authors noted that the Kenyan CIS infrastructure and regulations do not provide a classification of the kinds of default, and therefore do not respond to the circumstances leading to the default. Consequently, the strict application of the law raises the perception of unfairness.

<sup>773</sup> Metropol, for example, used discriminant analysis in its first documented construction of a credit score in Kenya. See Micro-Finance Risk Management LLC (n 729).

delinquencies.<sup>774</sup> As noted by Marron, credit providers use these statistical techniques to reduce the combined body of borrowers into a “coherent entity demonstrating attributes as though they were intrinsic to it, independent from the actions of the individual consumers composing it”.<sup>775</sup>

The fourth step (the crux of the credit scoring exercise) involves weighting the identified default prediction attributes, by scores, to form a ‘credit score’. Hence a higher total of scored attributes signifies a good, creditworthy borrower, while a lower total of scored attributes signifies a bad, un-creditworthy borrower. As noted by Leyshon and Thrift, this process is the heart of the construction of financial inclusion and exclusion, good and bad borrowers, trustworthy and untrustworthy consumers.<sup>776</sup> For example, during phase 1 of the Kenyan CIS project CRBs and banks applied binary classifications of good and bad credit applicants, thereby excluding millions of consumers from the credit market.<sup>777</sup> Graduated credit scores were adopted after advocacy by consumer groups and Parliament.

The fifth step involves the validation of the scoring model using a larger sample of historical credit consumer information, to ensure that score card continues to discriminate accurately between creditworthy and uncreditworthy consumers. This leads to the last step where, based on the result of the validation exercises, the scoring model may be recalibrated by including or removing some attributes, or adjusting and reassigning particular scores to them. The credit scoring mechanism is then tested against past data to see if the scoring mechanism could have accurately predicted the performance of previous loan applications. At a minimum, 7 years of historical data is needed to be able to create a reliable credit scoring mechanism.<sup>778</sup>

Kenya’s unique financial culture, including the prevalence of SIM-based mobile banking and digital lending, has inspired mobile-based credit scoring innovations, including mobile -based applications, which use customers’ phone data, including call and SMS records, mobile money

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<sup>774</sup> Credit Information Sharing Association of Kenya, ‘Credit Scoring’ [2016] CIS Kenya Digest.

<sup>775</sup> Marron (n 768) 106–107.

<sup>776</sup> Andrew Leyshon and Nigel Thrift, ‘Lists Come Alive: Electronic Systems of Knowledge and the Rise of Credit-Scoring in Retail Banking’ (1999) 28 *Economy and Society* 434, 448. The authors observe that ‘credit scoring systems, in becoming the obligatory point of entry to the retail system, have set new conventions for deciding who is “good” and who is “bad” consumer, producing new patterns of inclusion and exclusion’.

<sup>777</sup> George Ngigi, ‘CBA Blacklists 140,000 Safaricom Loans Defaulters’ *Business Daily* (Nairobi, 26 January 2014) <<http://www.businessdailyafrica.com/markets/CBA-blacklists-140-000-Safaricom-loans-defaulters/539552-2161116-rj8i3kz/index.html>> accessed 5 July 2017.

<sup>778</sup> O’Keeffe, Valdez and Nyaggah (n 766) 41.

transaction history and social media data, to determine a credit score and loan amount.<sup>779</sup> As is discussed in further detail in section 3, these innovations are not without criticism, especially with regard to high interest rates attached to the loans, exploitation of credit behaviour through unsolicited ‘temptation and push’ loans, and the opaque commodification of credit consumer data.<sup>780</sup>

Once the score card has been designed, individuals are ascribed credit scores by CRBs based on the credit information distilled from the data templates shared by credit providers, and condensed into their credit reports. This entails matching an individual’s attributes to the historical population attributes for probability of credit default. As Metropol Corporation Kenya state, “the more traits you share with people who have proven to be good credit risks, the higher your score”.<sup>781</sup> Through this statistical method, default is regulated within populations of borrowers by exposing consumers to new kinds of visibility, and making them amenable, as risks, to new kinds of regulation.<sup>782</sup>

The credit report, together with the credit score, then becomes available, at a fee, for circulation to subscribers, including the credit providers who circulated the initial individual credit information, and also the credit consumers, the subjects of the credit reports and scores. The credit providers use the credit reports and credit scores to evaluate the creditworthiness of their credit consumers, while the latter use the credit reports to discover and contemplate their financial, ethical, and moral standing in the eyes of credit providers, utility providers, potential employers, landlords, and a growing list of third-party consumers of credit reports. A favourable standing compels the consumer to maintain the attributes hailed by credit providers and CRBs, while a negative standing compels the consumer to take action to address their failings.

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<sup>779</sup> Michelle Kaffenberger and Patrick Chege, ‘Digital Credit in Kenya: Time for Celebration or Concern?’ <<http://www.cgap.org/blog/digital-credit-kenya-time-celebration-or-concern>> accessed 3 July 2017; See also, Tamara Cook and Claudia McKay, ‘How M-Shwari Works: The Story So Far’ (Consultative Group to Assist the Poor (CGAP) and Financial Sector Deepening (FSD) Kenya 2015) 10.

<sup>780</sup> Kaffenberger and Chege (n 779).

<sup>781</sup> Metropol Corporation, ‘Scores’ <<https://www.metropol.co.ke/personal/scores/>> accessed 11 July 2017.

<sup>782</sup> Marron (n 768) 104.

## 2.2. Credit Information Sharing as a Policy and Regulatory Response to High Interest Rates

Credit Information Sharing in Kenya was first mooted in 1999 as a response to the problem of Non-Performing Loans (NPLs), leading to the legislation of licensing provisions for CRBs.<sup>783</sup> In 2004, the Government touted CIS as a policy measure in its proposals for the reduction of NPLs and high lending rates, a deregulation-oriented policy statement that included: the removal of costly banking regulations; removing hindrances to enforcement of collateral; encouraging bank transparency on loan charges; and information sharing between banks and regulators.<sup>784</sup>

The statutory establishment of CIS was rationalized on economic arguments that high indebtedness and high interest rates were caused by the high risk premiums due to information asymmetry.<sup>785</sup> The rationale emanates from Akerlof's theory of asymmetric information, which posits that information asymmetry incentivises the seller to sell goods of less than average market quality, leading to adverse selection.<sup>786</sup>

In 2009, CBK governor Njuguna Ndung'u, outlined the four ways CIS would resolve the problem of high interest rates in Kenya: developing 'information capital', to reduce information asymmetry and search costs, developing new collateral technology, to replace predominantly physical collateral; resolving problems of moral hazard and adverse selection on the part of borrowers and banks, respectively; and facilitating 'risk-based pricing' of credit, thereby leading to an 'individualised' risk premium in interest rates, thereby availing lower interest rates to creditworthy customers.<sup>787</sup>

Banks, CRBs, and other stakeholders have also underscored the specific benefits of credit scoring as risk management systems: they are objective, standardised consistent and

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<sup>783</sup> Central Bank of Kenya, 'Bank Supervision Annual Report 1999' (Central Bank of Kenya 2000) 13–14 <[www.centralbank.go.ke](http://www.centralbank.go.ke)>. The CBK noted that the causes of the high lending rates in Kenya were: high domestic debt, effect of the cash ratio, inefficiencies in the banking sector, high levels of non-performing loans, perceived risk by the investors, and lack of competition in the banking sector. See also section 31(3) and (4) of the Banking Act, Cap. 488, Laws of Kenya.

<sup>784</sup> Hansard Editor, 'Finance Minister's 2004 Budget Speech' (n 689) 1814.

<sup>785</sup> Deloitte Consulting Limited (n 600) 29. In this KBA-commissioned report, Deloitte identifies information asymmetries as accounting for high credit risk premiums in Kenya. The report notes as follows: 'The fact that banks do not have as much information about borrowers as the borrowers have about themselves means that banks risk giving loans to some customers at rates which do not cover their risk. Increased credit information reduces this risk by allowing banks to better distinguish between high and low risk borrowers'.

<sup>786</sup> George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics* 488.

<sup>787</sup> Njuguna Ndung'u, 'Credit Information Sharing to Enhance Financial Sector Development' (Launch of the Banking Credit Information Sharing Implementation Project, Nairobi, 27 August 2009) <[www.bis.org/review/r090922a.pdf](http://www.bis.org/review/r090922a.pdf)> accessed 4 July 2017.

transparent measurements of risk; they enhance automation of decision-making; they enable quantification of risk (default probability), which permits portfolio management and risk-based pricing.<sup>788</sup> CIS enables faster and efficient decision-making, financial stability, reduced cost of credit, reduced credit risk, increased credit accessibility, and financial discipline.<sup>789</sup> CIS has also been legitimated as necessary infrastructure for financial inclusion, poverty reduction, economic opportunity, financial stability and economic development.<sup>790</sup>

Based on these policy rationales, the CBK and the Ministry of Finance spearheaded a stakeholder rollout of CIS. In July 2008, the Minister of Finance gazetted regulations governing the licensing, operation, and supervision of banking sector CRBs. Consequently, in 2009, the CBK, Kenya Bankers Association (KBA), banks, and civil society and donor institutions, including Financial Sector Deepening (FSD) Kenya, set up the Kenya Credit Information Sharing Initiative (KCISI) as a project office to “champion the establishment of a credit reporting mechanism in Kenya’s banking sector, and coordinate the sharing of information among banks through all licensed CRBs”<sup>791</sup> Other donor groups such as USAID also provided technical assistance and funding to the project. Since 2010, three transnational CRBs – TransUnion (formerly CRB Africa), Metropool CRB, and CreditInfo CRB – have entered the Kenyan market and have been licensed to operate. After initial pilot projects conducted under the auspices of KCISI, negative customer credit information sharing was commenced among banks.

In 2014, with the amendment of Section 31 of the Banking Act and the gazettelement of new Credit Reference Bureau regulations, the scope of institutions legally mandated to share with CRBs customer information concerning non-performing loans or other negative information was widened to include licensed Micro-Finance Institutions (MFIs), SACCO societies, Cooperative Societies, and public utility companies. In addition, under Section 18(2) of the 2014 regulations, banks were legally mandated and compelled to share positive customer credit information alongside negative information, while under section 18(3), the other non-banks institutions were legally authorised to exchange positive information with CRBs, with prior written consent of customers concerned.

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<sup>788</sup> Micro-Finance Risk Management LLC (n 729) 3.

<sup>789</sup> TNS RMS East Africa, ‘A Baseline Survey Technical Report on Local Public Opinion on the Credit Information Sharing Mechanism’ (Financial Sector Deepening (FSD) Kenya 2014) Report Commissioned by FSD Kenya 17.

<sup>790</sup> Agata Szydłowska, ‘Credit Reference Bureau Phase II Final Evaluation Report’ (Financial Sector Deepening (FSD) Kenya 2015) Commissioned Report 3.

<sup>791</sup> Gabriel Davel, Tshangwane Serakwane and Mark Kimondo, ‘Kenya Credit Information Sharing Initiative: A Progress Report 2008-2011’ (Financial Sector Deepening (FSD) Kenya 2012) Commissioned Report v.

### 2.3.The Challenges of Credit Scoring and Information Sharing as Credit Risk Management Tools

The practices of statistical calculation of probability of default risk of individual credit consumers through population analysis is subject to certain challenges or difficulties that have far-reaching implications, especially in the context of reduction of an individual's character to a single figure, and the use of this figure to regulate the individual's life changes.

First is the indeterminacy and stochastic nature of risk, meaning that it is impossible to know the future actions of any one individual, even with statistical models..<sup>792</sup> Second, the inaccurate assumptions underpinning the statistical models, e.g. equal co-variance in discriminant analysis, and inaccuracies and inadequate sample sizes e.g. in logistic regression, may result in statistical inaccuracies.<sup>793</sup> For example, discriminant analysis has the potential to further entrench certain discriminatory biases underpinning the scoring models, and therefore technologically systematise and generate patterns of exclusion within a population.<sup>794</sup>

Third, using agglomerated, historical consumer credit information to measure future individual default risk is vulnerable to data risk e.g. sample bias, as historical data consists of only credit consumers who were actually accepted as credit-worthy, and is therefore not representative of the whole range of new or future applicants that a lender will encounter. Fourth, the use of historical data in this manner entails a temporal risk, whereby the model data is fixed in time, while borrower populations in the real world change.<sup>795</sup>

Fifth, credit scoring models are also ill-equipped to discriminate between various situations and contexts that may elicit similar default probability indicators, but which are causally distinct, e.g. Kenyan scoring models failing to differentiate between a credit default resulting from illness or loss of employment, and default resulting from moral hazard.<sup>796</sup> Consequently, the individuals in both instances would be assigned the same credit scores as to their

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<sup>792</sup> Dawn Burton, 'Credit Scoring, Risk, and Consumer Lendingscapes in Emerging Markets' (2012) 44 *Environment and Planning A* 111, 115. The author refers to the 2008 credit crisis as an example of the failure of consumer behavior predictive models. See also, Marron (n 768) 114. The author argues that "the effectiveness of a credit scoring model can thus be judged only macroscopically on how well it distinguishes, at the level of the population of consumers and across numerous cases, the distinctive sub-groupings of 'good' and 'bad' consumers.

<sup>793</sup> Marron (n 768) 114.

<sup>794</sup> Wainwright (n 770) 659.

<sup>795</sup> Marron (n 768) 114–115; Burton (n 792) 116.

<sup>796</sup> Kairu and Amadi (n 772) 9. The authors noted that the Kenyan CIS infrastructure and regulations do not provide a classification of the kinds of default, and therefore do not respond to the circumstances leading to the default. Consequently, the strict application of the law raises the perception of unfairness.



trustworthiness. Burton and others have also questioned the ability of credit scoring to construct risk models that “endure linearly through time in neoliberal economies” and have noted the destabilization of linear life experiences (which are central to the logic of default prediction models) by, for example, temporary labour markets, or the so-called ‘gig economies’.<sup>797</sup>

In addition, where a credit scoring model has a homogenous conception of population, its application by a large creditor across a large territory fails to take into account economic characteristics peculiar to specific regions of the territory, and therefore, the regional-sub-population differences. The scoring model therefore ends up coming up with relatively inaccurate credit risk scores.<sup>798</sup>

The risks of homogenous conception of population are especially underscored in instances of the transplantation by transnational financial institutions of credit risk management tools such as scoring technologies from developed economies to developing economies.<sup>799</sup> For example, when Citigroup, a transnational bank with a presence in Kenya, applied its global scoring model (that applied 60% of the weight to financial ratios) to the Kenyan Small and Medium Enterprise (SME) sector without taking into account the local situation, 90% of the portfolio resulted in a negative score. Consequently, Citigroup decided not to enter the Kenyan SME sector, and closed down its SME banking division, despite the sector being well-performing.<sup>800</sup> This demonstrates the power of particular subjective discourses of risk that are embedded in technological and statistical credit scoring models and particular institutions, and which control the paradigms through which institutions view certain economic systems.

### **Emerging Market Infrastructural Challenges**

The use of credit scoring models that give significant weight to specific risk indicators such as bankability, residence, occupation, income, and addresses, also faces specific challenges in emerging markets and developing economies such as Kenya. First, credit scoring on the basis of credit consumers’ bank account information suffers the challenge of a large unbanked (more

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<sup>797</sup> Dawn Burton and others, ‘Making a Market: The UK Retail Financial Services Industry and the Rise of the Complex Sub-Prime Credit Market’ (2004) 8 *Competition & Change* 3; Wainwright (n 770) 659.

<sup>798</sup> Marron (n 768) 114.

<sup>799</sup> Burton (n 792). The author argues that risks should be understood through a richer reading of social and cultural analysis and interpretation. He focuses on emerging markets as an example of understanding the social and cultural constructed nature of risks and credit scoring, by assessing technological expertise, legal systems, culture, norms, beliefs and social relations of financial institutions in specific places.

<sup>800</sup> Micro-Finance Risk Management LLC (n 729) 23.

than 58% as at 2016), and financially-excluded Kenyan population (about 24.6% as at 2016), and the practice of a cash-based economy, and SIM-based mobile money banking and remittance, even among the banked population.<sup>801</sup> Credit providers in Kenya have of course sought to meet this challenge through the rollout of mobile phone-based digital lending, and the application of mobile phone use data in credit scoring.<sup>802</sup> However, this innovative method of credit risk management faces the challenges of peculiar habits of phone-sharing (despite the legally-mandated registration of SIM cards) in Kenya, including in the transfer of funds. Consequently, credit scoring individuals using mobile phone data gives an inaccurate picture.

Second, credit scoring on the developed economy model which places significant weight on employment in the formal economy where income can be accurately traced and verified, also faces challenges when applied to an emerging market economy like Kenya where, as at 2016, only 12% of the population was on salaried employment, and the majority of the population derive their livelihood from the informal sector.<sup>803</sup> In addition, the scoring model may not capture the total financial or earning capacity of even the salaried population who, on average have about two sources of income (the additional sources derived from the informal sector).<sup>804</sup>

The third challenge in applying credit scoring models in Kenya has been due to the metric of traceability, which requires the collection of verifiable personal details and address, largely from official identification documents such as a government issued identification card (ID), and utility bills such as water and electricity bills. Access to these documentation by potential borrowers is still a challenge, as only 56% of the population has access to electricity connectivity<sup>805</sup>, while less than 27% has access to metered water connections within their homes.<sup>806</sup> According to Metropol Kenya, these traceability factors are “considered to ensure

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<sup>801</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya (n 718) 6. As at 2016, the financially included segment of the Kenyan population was 73.3%, having increased by 50% over the last 10 years, largely due to the introduction of mobile phone-based banking and its adoption by prudentially-regulated banks. However, the percentage of the population with bank accounts remains below 42.3%.

<sup>802</sup> See generally, Kaffenberger and Chege (n 779); On credit scoring of mobile-phone-based digital borrowing, see Cook and McKay (n 779).

<sup>803</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya (n 718) 3.

<sup>804</sup> *ibid.*

<sup>805</sup> Ben Chumo, ‘Kenya’s Electricity Access Rate Now at a Historic 60 per Cent’ *Daily Nation* (Nairobi, 23 July 2016) <<http://www.nation.co.ke/oped/Opinion/kenya-electricity-access-rate-now-at-a-historic-sixty-percent-/440808-3307998-p0whfa/index.html>> accessed 13 July 2017.

<sup>806</sup> World Health Organization and United Nations Children’s Fund, ‘Progress on Drinking Water, Sanitation and Hygiene: 2017 Update and SDG Baselines’ (World Health Organization 2017) WA 670 67.

improved chances of recoverability in the event of default”.<sup>807</sup> Consequently, a systemic lack of access to public utility services such as water and electricity connections, especially to marginalized populations, further pushes them to the periphery of credit access, due to corresponding lower scores of creditworthiness.

The limitations of credit scoring systems discussed above stand in stark contrast to the narrative of credit scoring and reporting as an accurate, scientific, objective, transparent, uniform and consistent statistical exercise of measuring the probability of individuals defaulting on their credit obligations. This view is further entrenched in its users by the automation, and embedding of credit scoring techniques in complex, algorithmic, computing models. However, the basis of assigning credit scores to individuals is less accurate, or even knowable, to most of the users of credit scores and reports.

### **3. The Reproduction of Inequitable Lending Markets Within CIS**

#### **3.1. CIS Infrastructure as Socio-Technical *Agencements***

The notion of Socio-Technical Assemblages or *Agencements* (STAs) emanates from Science and Technological Studies (STS), and more specifically Actor-Network Theory, and refers to the hybrid collectives (composed of humans, ideas, discourses, materials, technologies, texts, routines and practices) in which action (including its reflexive dimension which produces meaning) takes place.<sup>808</sup> CIS infrastructure in Kenya is conceptualised as an STA, to the extent that it is a hybrid infrastructure composed of neoliberal ideas and discourses, neoclassical economic theories, formal-liberal legal norms, technological rationalities and related mathematical, statistical, and computing technologies and practices. In addition, this hybrid collective enrolls lenders, borrowers, Credit Reference Bureaus, local and transnational banking regulators and policy makers, and other financial markets stakeholders, in its infrastructure.

Analysing CIS infrastructure as STAs enables an appreciation of the plurality of ideas, ideologies, discourses, practices and devices that aid in economic valuation and calculation, and make possible the constitution of a particular understanding of credit risk, and how to make it predictable and calculable.<sup>809</sup> It also enables an understanding of the construction of the market for credit information, and the credit market, based on the tools of economic

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<sup>807</sup> Metropol Corporation (n 781).

<sup>808</sup> Çalışkan and Callon (n 330) 9.

<sup>809</sup> *ibid* 12.

calculation and valuation, such as credit scores. By isolating and analysing the workings of various valuation and calculation tools, such as economic and legal theories, it is possible to further understand the construction and sustenance of relations of domination within the credit market, and how inequitable credit markets are reproduced within CIS.

Where certain analyses of the credit market may simply see competition or confrontation between autonomous elements of the CIS infrastructure, the concept of an STA discovers a different reality. The affirmation of the autonomy and rationality of various economic and legal ideas, techniques and technologies within CIS and the credit markets conceals and legitimates the power asymmetries between lenders and borrowers, and high interest rates.<sup>810</sup> The CIS infrastructure formats the minds and bodies of individual stakeholders, and the bureaucracies and systems of institutions, reducing them to disciplined actors that fit smoothly into the risk management logic of neoliberal capital.<sup>811</sup>

To become durable, establish hegemony, reproduce, and even change, the inherently inequitable neoliberal credit markets are anchored in materiality such as CIS infrastructure, which structure and manufacture irreversibility to ensure their perpetuation.<sup>812</sup> In the present discussion, CIS technologies and practices in Kenya's banking sector operationalise the neoliberal free market ideologies embedded in neoclassical economic ideas, formal-liberal legal norms, and technological rationality, and have in fact contributed to the deepening of power asymmetries between lenders and borrowers, and the reproduction of high interest rates, high indebtedness and financial exclusion, as discussed below.

### **3.2. Neoclassical Economic Ideology in CIS Technologies and Practices**

Neoclassical economic ideas reproduce power asymmetries and inequality in the Kenyan lending market by appropriating and operationalising assumptions about the homo economicus – the rational, utility-maximising individual – in the discourse and practices of creditworthiness in CIS.

In capitalist credit markets, Marron contends, the future is permeated with uncertainty due to the complexity of social life, the dis-embeddedness of transactions from social relations, and a

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<sup>810</sup> *ibid* 13.

<sup>811</sup> Michel Callon, 'An Essay on the Growing Contribution of Economic Markets to the Proliferation of the Social' (2007) 24 *Theory, Culture & Society* 139, 145.

<sup>812</sup> Çalıřkan and Callon (n 310) 384.

heightened dependence upon the self-governing potential of individuals.<sup>813</sup> Consequently, capitalist credit markets are built upon instrumental rationality and the capacity for foresight, in which risk is a probabilistic analysis of the recursiveness of events, and hence calculation of future default.

The 'good' credit consumer is thus defined as a rational and socially-responsible, prudent, forward-thinking, and responsible subject.<sup>814</sup> This is demonstrated, for example, in the KCISI messaging campaign that encourages credit consumers to "obtain their credit reports on a regular basis so that they can see for themselves how responsible and compliant behaviour in handling their financial affairs can enhance their credit scores and facilitate access to credit".<sup>815</sup> This responsabilizing discourse is further defined in the various credit scoring algorithms and credit reports, which define normative expectations that set apart the 'normal' consumer from the 'deviant', untrustworthy consumer. The 'normal' consumer, preferred by the credit providers, is defined by CISA Kenya as a married, home-owner, having worked in the same job for 10 or more years in a full-time salaried employment at a manager or executive level, and having taken 5 or more previous loans, with no previous delinquencies. On the other hand, the 'deviant' credit consumer is a tenant who is single, and has been on a job for less than a year, or is unemployed, and has no previous loan, or is an average delinquent.<sup>816</sup>

This responsabilizing discourse within the credit scores and reports acts upon the credit consumers, defining them as subjects within loan agreements, as docile bodies who meet their repayments.<sup>817</sup> The threats of blacklisting by banks, the circulation of negative credit scores and reports, and their exclusion from the credit market (for up to 5 years, in Kenya), are evolving into control mechanisms that compel compliance to behaviour deemed rational and responsible by the credit providers. This includes individual consumers carefully cultivating their credit histories to conform to the classification of prudent, responsible, trustworthy customers, rather than deviant customers. As disciplining and moralising technology, CIS compels credit consumers to not only keep up to date with their credit repayment obligations, but also to regularly consume even more credit.

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<sup>813</sup> Marron (n 768) 104.

<sup>814</sup> Burton (n 792) 113.

<sup>815</sup> Martin Slough and Sukhwinder Arora, 'Credit Reference Project Phase II Mid Term Review' (Financial Sector Deepening (FSD) Kenya 2013) Commissioned Report 19.

<sup>816</sup> Credit Information Sharing Association of Kenya (n 774).

<sup>817</sup> Paul Langley, 'Equipping Entrepreneurs: Consuming Credit and Credit Scores' (2014) 17 Consumption Markets & Culture 448, 455.

The algorithmically constructed creditworthy consumer mirrors the neoliberal entrepreneurial subject in neoclassical economics – the *homo economicus* – who is, by definition, able to provide for their own security and freedom in the face of an uncertain future through a whole host of rational and calculative practices and techniques designed to enable the seizing of opportunities.<sup>818</sup> The individual’s credit score, then, embodies a measurement of the entrepreneurial abilities of the credit user.<sup>819</sup> This responsabilizing discourse has consequently constructed the issue of high interest rates and lack of access to credit as a private problem of the credit consumer, which is to be resolved not by public regulatory action but rather the consumer’s compliance to the normative and calculative imperatives within credit scores and reports. This is exemplified by CBK governor Njuguna Ndung’u’s remark that low interest rates “can *only* be achieved when financiers have better information with which to evaluate credit risk”.<sup>820</sup> Consequently, the discourse and practice of “risk-based pricing” of loans through the use of credit scores and reports, seeks to transfer the debate on high interest rates and high consumer indebtedness from the public, political, regulatory arena, to the private, ostensibly apolitical, contractual arena.

The responsabilizing, neoliberal discourse of the socially-responsible ‘credit subject’ ideologically conceals at least two facts of the nature of the Kenyan credit market. First, the credit market is characterised by an asymmetrical power relation favouring the lender, whereby a one-sided borrower responsibility is viewed as the norm – a tenet which, Knights and Vurdubakis argue, is central to the profits and powers of lenders.<sup>821</sup> This power asymmetry has been central to the exploitation of Kenyan borrowers by banks, through unconscionable lending terms. The CIS infrastructure, while touted as the policy solution to high interest rates and high indebtedness, actually deepens this power asymmetry through the disciplining power of credit scores and reports.

Second, as argued by Langley, the performance of the subject position of the responsible and entrepreneurial borrower is necessarily partial and incomplete, and especially difficult for those with low incomes.<sup>822</sup> The construction of the ‘normal’ borrower as disconnected from

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<sup>818</sup> *ibid* 460.

<sup>819</sup> *ibid* 459.

<sup>820</sup> Sarah Kanaiya and Amos Omollo, ‘2nd Regional Credit Information Sharing Conference: Unlocking Access to Affordable Credit’ (Association of Kenya Credit Providers 2013) Conference Report 8.

<sup>821</sup> David Knights and Theo Vurdubakis, ‘Calculations of Risk: Towards an Understanding of Insurance as a Moral and Political Technology’ (1993) 18 *Accounting, Organizations and Society* 729.

<sup>822</sup> Paul Langley, ‘Financialization and the Consumer Credit Boom’ (2008) 12 *Competition & Change* 133, 143.

the realities of the uncertainties, difficulties and systemic subjectivities inherent in liberal market economies, including high unemployment rates, low wages, and casual labour contracts, especially in the gig-economy, makes it difficult to comply with the disciplinary imperatives of responsible borrowers as constructed in the credit scoring and reporting systems. The average Kenyan credit consumer is then stuck in the ‘uncreditworthy’ classification, and through the technique of ‘risk-based pricing’, is subjected to high interest rates and potentially high indebtedness. The neoclassical economic assumption of the existence of the *homo economicus* – the rational, utility-maximising individual borrower exhibiting prudence, forethought, and personal responsibility - reproduces inequality in access to affordable credit.

### **3.3.The Ideology of Legal Formalism in CIS Technologies and Practices**

Four related formal-liberal legal ideologies are also at work within credit scoring and reporting technologies, and contribute to the reproduction of power asymmetries and inequality in the Kenyan lending market, and consequently, high interest rates and indebtedness: the legally abstracted legal subject with rights and duties; individual liberty and freedoms; equal contractual bargaining power in the private sphere; and the moralisation and ‘ethification’ of the debtor.

#### **3.3.1. The Abstract Legal Subject**

Legal formalism ideologically abstracts distinct individuals within communities into autonomous legal subjects with equal rights and duties, thereby universalising and contributing to the constitution of the *homo economicus*. This legal abstraction is also achieved through the statistical methodology of credit scoring, which entails treating individuals not as subjects, the bearers of particular aptitudes or moral qualities, but rather as objects, agglomerations of particular, quantifiable attributes. For example, the credit reports, and scoring of risk attributes do not differentiate between defaults caused by illness, loss of employment, or even bereavement, and defaults caused by moral hazard.<sup>823</sup> By making visible the risk attributes of individual credit consumers at the level of populations rather than the individual, credit scoring masks or ignores the individual identities and categories which have been the victims of

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<sup>823</sup> Kairu and Amadi (n 772) 9.

marginalisation, high interest rates and high indebtedness in the Kenyan lending market.<sup>824</sup> Consequently, by this abstraction and risk-pricing of loans, credit scoring and reporting may actually perpetuate these disadvantages in the credit market, within these specific groups.

### 3.3.2. Individual Liberty

The second related legal ideology that runs through CIS technologies and practices is individual liberty or freedom, interwoven in the discourse of equality of opportunity in the neoliberal economy, and captured in the responsabilizing language of cultivating one's credit score in pursuit of financial and other types of freedom. This is evident, for example, in the web campaigns of Tala, a Kenyan credit scoring tech-vendor: "we are ... passionate about extending financial freedom to the billions of underserved people around the world".<sup>825</sup> In 2016, Tala Kenya ran a campaign on the national holiday commemorating Kenya's Independence with the slogan "Financial freedom: 4 lessons from Tala customers - Celebrating financial freedom for Kenya's Madaraka Day".<sup>826</sup> Another East African digital lender and credit reporting outfit – L-Pesa Microfinance – also promises "Financial Freedom with L-Pesa Digital Credit Score Certificate".<sup>827</sup>

However, the contradiction inherent in the operationalisation of this discourse of freedom within CIS technologies is that individual freedom and security no longer refer to thrift, prudence, and the absence of debt, but rather the responsible and entrepreneurial meeting, management and manipulation of continuous, outstanding obligations.<sup>828</sup> The concept of freedom has been financialized to mean 'disciplined indebtedness' rather than thrifty absence of debt. As Rose Kinuthia, the Acting CEO of TransUnion Kenya stated, "The more you borrow and pay, the more you are viewed as a low-risk customer".<sup>829</sup> Indeed, the credit scoring algorithms of CRBs such as Metropol also reward perpetual indebtedness and the timely meeting of obligations with high credit scores, and penalises individuals who have never taken

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<sup>824</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya (n 718) 5–8. The categories with constrained access to credit in Kenya include women, rural populations, those without formal employment, the less educated, and those in the Western and Coastal regions of the country.

<sup>825</sup> Tala, 'About' (TALA) <<http://tala.co/about/>> accessed 14 July 2017.

<sup>826</sup> Tala Kenya, 'Financial Freedom: 4 Lessons from Tala Customers' <<https://medium.com/tala/financial-freedom-4-lessons-from-tala-customers-24924b97fcd3>> accessed 16 July 2017.

<sup>827</sup> 'Financial Freedom with L-Pesa Digital Credit Score Certificate – L-Pesa Fintech Blog' <<http://blog.l-pesa.com/index.php/2016/10/05/financial-freedom-with-l-pesa-digital-credit-score-certificate/>> accessed 16 July 2017.

<sup>828</sup> Langley (n 822) 133.

<sup>829</sup> Tala Kenya, 'How Positive Credit Reporting Can Help You Grow' <[https://medium.com/@tala\\_KE/how-positive-credit-reporting-can-help-you-grow-931e09f271f4](https://medium.com/@tala_KE/how-positive-credit-reporting-can-help-you-grow-931e09f271f4)> accessed 11 July 2017.



out a loan, or those who close a long-running credit account in a bid to reduce their indebtedness, with lower credit scores.<sup>830</sup> This peculiar logic of credit scoring systems therefore disciplines and compels individuals to take up and maintain timely payments of credit they do not need, merely to maintain favourable creditworthy scores.<sup>831</sup>

This peculiar logic of credit scoring systems was questioned in *Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & another* [2016] eKLR, where the Petitioner requested the High Court to declare that “in the sense that a new borrower has no known history, such a person is discriminated against by having been given higher interest rates by mere reason of unknown history.”<sup>832</sup> This, she argued, amounted to discrimination on the ground of not having borrowed before. The High Court rejected this argument, finding no grounds for discrimination, on 2 main premises. First, credit agreements are voluntary, not legally mandated, and are already regulated by the CBK, and the courts will only interfere in instances of human rights violations. Second, the court argued, whereas every individual may be in need of a loan, not everyone may meet the loan application criteria. Therefore, when an individual’s credit history does not favour them in getting a loan, it cannot be said that he or she is being discriminated.<sup>833</sup>

The classification of lending contracts as voluntary or private relationships in the context of Kenya’s lending market, characterised by high interest rates, high indebtedness, and the introduction of statutory CIS, is problematised by two observations. First is the increasingly colonising power of CIS, in its logic of creditworthiness being transplanted to other non-credit relationships such as employment and tenancies, as a result of the statutory expansion of subscribers and users to credit reports.<sup>834</sup> In fact, the continued future feasibility of CRBs in Kenya has been anchored on the statutory deepening of this market, through the widening of

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<sup>830</sup> Metropol Corporation (n 781).

<sup>831</sup> Liz Pulliam Weston, *Your Credit Score: How to Improve the 3-Digit Number That Shapes Your Financial Future* (FT Press 2011) 58. The author debunks the naturally logical myth that closing credit accounts will help an individual’s credit score. She notes that closing credit accounts hurts the borrower by first, making one’s credit history look younger than it is, and second, reduces the total credit available to the individual account holder. Consequently, closing revolving credit accounts hurts rather than helps one’s credit score.

<sup>832</sup> *Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & the Attorney General* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts)) 23, Para. 41.

<sup>833</sup> *ibid* 26, Para 47-49.

<sup>834</sup> Section 30 of the CRB Regulations (2014) allows third parties to obtain directly from a CRB, a credit report of a customer, with their consent, for purposes of: assessment of credit facility; employment, underwriting insurance; determination of the customer’s eligibility for a license or benefit granted by the government; assessment of credit or repayment risks associated with an existing credit obligation; or legitimate need for information in connection with business transactions initiated by the customer or other lawful transaction or matter concerning the customer. This last general purpose provides a wide ambit for uses of credit scores and reports.

the uses of credit reports, so as to improve the demand side of bureau services.<sup>835</sup> The power of CIS to impact on the life chances of credit consumers is amplified.

Second, the disciplining logic of CIS, which compels perpetual indebtedness so as to qualify for other credit and non-credit life chances, potentially removes modern credit contracts from the ambit of voluntary and private relationships.

### 3.3.3. Equal Bargaining Power

The ideology of equal bargaining power in the private sphere is exemplified in Kenyan courts' legal assumption of parity in bargaining power (in interest rate related credit disputes), and their reluctance to interfere in or rewrite the contractual rate of interest.<sup>836</sup> This is despite the courts' *obiter dicta* observations on the deeply asymmetrical power relationships.<sup>837</sup> The courts have, however, developed common law grounds for intervention, including harsh, illegal, fraudulent, and unconscionable contracts as grounds for rewriting interest rate clauses.<sup>838</sup> The logic of the Efficient Markets Hypothesis underpinning CIS embraces this equal bargain ideology. It implies that the bridging of information asymmetries between the lender and borrower (in favour of the latter) optimises the contractual negotiations and leads to an optimal, risk-based pricing of loans, as reflected in the contractual interest rate. This assumption is captured in Finance Minister Henry Rotich's, comments, touting CIS as empowering credit consumers to negotiate for better interest rates using their credit reports.<sup>839</sup>

This rationalization conceals the impact of CIS in deepening the inherent power asymmetries between lender and borrower, in favour of the former. As noted by the Kenya Credit Providers Association (KCPA), power asymmetries in lending relationships may be accentuated by CIS, through predatory lending, unsolicited marketing using borrower credit data, using threats of

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<sup>835</sup> Kanaiya and Omollo (n 820) 9, 25.

<sup>836</sup> See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR (The Court of Appeal at Nairobi).

<sup>837</sup> See the colourful comments of Ogola J., in *Captain JN Wafubwa v Housing Finance Company of Kenya* [2012] eKLR (The High Court of Kenya at Nairobi (Milimani Commercial Courts)). The Court stated that 'Banks in Kenya reign large. I am reminded of a predator who after killing the prey is not satisfied to leave the carcass to the vultures, but becomes both the predator and the vulture, killing the prey and gleaning the meat from the carcass to ensure the prey is really dead. I am also reminded of a robber killing his victim and not only attending his funeral, but insisting on carrying the casket to the grave to confirm that his victim is dead and buried.'

<sup>838</sup> See *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (n 720).

<sup>839</sup> Credit Information Sharing Association of Kenya, 'CIS for Innovation and Financial Inclusion: "Mikopo Kisasa"' (Credit Information Sharing Association of Kenya 2016) Conference Report 7.

CRB blacklisting for debt collection, and denial of employment and other economic opportunities, practices which have elicited CBK intervention.<sup>840</sup> The Kenyan banks have been accused of abusing CIS in “the desire to recover everything lost”, by blacklisting consumers for non-default issues such as ledger fees on dormant accounts and account closing charges, legally unenforceable loan agreements, and micro-loan amounts of as little as Kshs. 100 (£0.70).<sup>841</sup>

In addition, despite the various consumer protection provisions included in the CRB regulations and the Consumer Protection Act, the bureaus remain accountable to relatively uninformed and uninfluential borrowers on the one hand, and powerful stakeholders on the other hand, including banks, technology vendors and regulatory authorities, who can impose their will on the bureaus.<sup>842</sup> Despite progressive judicial reforms to improve access to justice for Kenyans, court processes remain inordinately long, tedious, and expensive for consumers to challenge unconscionable interest rate provisions of loan contracts, and inaccurate credit reports.<sup>843</sup> Consequently, the ideology of equal bargaining power as expressed through the CIS mechanism preserves the asymmetrical and exploitative power relations between credit providers and consumers in Kenya.

#### **3.3.4. Moralisation of the Borrower**

Ideological-legal moralisation of the borrower’s debt obligations makes uneven the power relations between borrower and lender, and accounts for the profits and powers of lenders in capitalist societies.<sup>844</sup> This moral regulation of the defaulting debtor as ‘deviant’ is reflected in Kenya’s adoption of English bankruptcy laws and traditions, in which law is a central mechanism for the moralisation of debtors, and the shunning of bankrupts through exclusion from credit and non-credit social opportunities,<sup>845</sup> and also the committal of judgment debtors to civil

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<sup>840</sup> Davel, Serakwane and Kimondo (n 791) vi. For the CBK’s intervention, see Central Bank of Kenya, ‘Submission of Credit Information to Licensed Credit Reference Bureaus’ <[https://www.centralbank.go.ke/uploads/banking\\_circulars/1456582762\\_Banking%20Circular%20No%204%20of%202016%20-%20The%20Banking%20Amendment%20Act%202016.pdf](https://www.centralbank.go.ke/uploads/banking_circulars/1456582762_Banking%20Circular%20No%204%20of%202016%20-%20The%20Banking%20Amendment%20Act%202016.pdf)> accessed 16 July 2017; Rashid Ahmed and Simon Karunditu, ‘Kenya Credit Providers Association: Roadmap 2010-2015’ (Financial Sector Deepening (FSD) Kenya 2010) 5.

<sup>841</sup> See Ngigi, ‘Pain of Kenyans Blacklisted for Amounts as Small as Sh100 in Mobile Loans, Bank Fees’ (n 616).

<sup>842</sup> Kanaiya and Omollo (n 820) 24.

<sup>843</sup> Kairu and Amadi (n 772) 1.

<sup>844</sup> See generally, R Gelpi and F Julien-Labruyère, *The History of Consumer Credit: Doctrines and Practices* (Springer 2000).

<sup>845</sup> Division 15 of the Insolvency Act (No. 8 of 2015), Laws of Kenya, for example, provides for certain restrictions on the bankrupt, including engaging in certain businesses. Other election law provisions, including Article 99 of the Constitution, prohibit bankrupt persons from vying for elective State offices.

jail.<sup>846</sup> This discourse of legal moralisation has been entrenched in the logic of CIS, which touts the credit score and the credit report as measures of an individual's creditworthiness, trustworthiness, morality and ethics.

For example, Section 2 of the CRB regulations (2013) defines a credit report as a measure of a person's "creditworthiness, credit standing, credit capacity, character, or general reputation", to be used to gauge eligibility for credit and non-credit opportunities.<sup>847</sup> This is despite the disclaimers included by CRBs in their credit reports, to the extent that the credit information does not reflect on the solvency, financial standing, or the stability, honesty or motives of any party or general creditworthiness<sup>848</sup> This moralisation of the debtor is mainstreamed in the discourse on CIS infrastructure and practices, as exemplified by the comments of Equity Bank's Chief Operating Officer, Dr Kipng'etich, that:

"AKCP will also promote good citizenship as it supports the implementation of Chapter 6 of the Constitution of Kenya which necessitates ethical behaviour by all those seeking appointment to or holding public office. A clean report from the CRB will thus become one way the public can assess the ethical standing of the affected persons".<sup>849</sup>

This discourse disciplines the borrower by indicating that affordable loans through reasonable interest rates are predicated on the borrower's morality, which is captured in their credit score and credit report. As the proposed motto of AKCP stated: "Keep your credit score healthy and enjoy lower interest rates".<sup>850</sup> The use of CRB reports as a measure of individual character in granting access to non-credit related opportunities such as public service jobs has been litigated in the case of *Trusted Society of Human Rights Alliance & Others v Judicial Service Commission & the Attorney General*, where the Applicants asked the court to declare that the

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<sup>846</sup> See sections 39 and 40 of the Civil Procedure Act, Cap. 21, Laws of Kenya, which provide for the arrest and detention of judgment-debtors, on a decree-holder's application. The constitutionality of these provisions was litigated in the case of *Beatrice Wanjiku & Another v Attorney General & Another* [2012] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts)), where the High Court declared that they were not incompatible with the International Law provisions of the Article 11 of the United Nations International Covenant on Civil and Political Rights (ICCPR) which provides that "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". The court held that imprisonment of contractual debtors is compatible with the Article 11 of the ICCPR as long as the statutory and procedural aspects of Sections 38 and 40 are complied with.

<sup>847</sup> Section 8 of the Credit Reference Bureau Regulations (2013)

<sup>848</sup> O'Keeffe, Valdez and Nyaggah (n 766) 66.

<sup>849</sup> Kanaiya and Omollo (n 820) 12.

<sup>850</sup> *ibid.*

use of credit reports for vetting applicants for judicial positions was illegal, as they were extraneous requirements not found under the constitutional and statutory framework.

Odunga J., rejecting the Application, held that the requirement of furnishing CRB reports is meant to determine the applicant's integrity, honesty and high moral character in professional and personal life, respect for professional duties, and the ability to understand the need to maintain propriety and the appearance of propriety.<sup>851</sup> This appreciation of the credit report as a measure of morality was reaffirmed by another High Court in the case of *G.B.M. Kariuki v Director of Criminal Investigations & 3 others*, where Aburuli J. stated that credit reports, among other clearances, were "handmaidens in determining the applicant's integrity"<sup>852</sup>

Looked at in the totality of the workings of economic and legal rationalities, there stands out an ideological contradiction in this moralization of debtors' contractual responsibilities. Free-market credit agreements, rationalized by economic theory and contract law as necessarily free from social and ethical considerations, are partially moralised as one-sided ethical agreements, where the moral or ethical responsibilities and sanctions attach only to borrowers and not lenders. Yet as demonstrated in *Captain J.N. Wafubwa v Housing Finance Company of Kenya*, courts, while noting the unethical contractual behaviour of banks in obiter remarks, are precluded from enforcing ethics and morality in their judgments.<sup>853</sup>

While, on the one hand, neoclassical economic theory and legal theory reify free market contractual agreements as essentially economic, and necessarily asocial and apolitical, on the other hand, they simultaneously enforce the borrower's moral responsibilities using legally-backed sanctions. This is exemplified, as discussed earlier, by the amplification of the consequences of a debtor's credit default in one bilateral credit agreement, through the reporting of the default to a CRB, the downward adjustment of the individual's credit score, and their penalisation by all other subscribers to CRB reports, through increased interest rates, reduced access to credit, reduced chances of employment, and other unrelated transactions. This CIS mechanism thereby makes a travesty of privity of contract, a supposedly sacrosanct legal principle underpinning neoliberal markets.

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<sup>851</sup> *Trusted Society of Human Rights Alliance & Others v Judicial Service Commission & the Attorney General* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Commercial Courts)) 222, Para 334.

<sup>852</sup> *GBM Kariuki v Director of Criminal Investigations & 3 others* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts)) 12, Para 15.

<sup>853</sup> *Captain J.N. Wafubwa v Housing Finance Company of Kenya* (n 837).

### 3.3.5. The Minimalist State

Lastly, the ideology of the minimalist State, underpinning the formalist doctrine of the Rule of Law, runs through the deployment of CIS in Kenya, albeit with contradictions. The neoliberal argument that markets have superior information compared to the State, and therefore the latter's involvement in the regulation of credit markets results in sub-optimal regulatory schemes, inefficient markets, and constricted access to credit, underpinned the banking sector's opposition to legislation of interest rate caps.<sup>854</sup> CIS steps in as a market mechanism that discursively privatizes the problem of high interest rates, and responsabilizes borrowers to put in individual effort to gain favourable credit scores for lower costs of credit.

The contradiction inherent in this ideological economic and legal argument is the significant role that the Kenyan State, through Parliament, the CBK and the National Treasury, have played in ensuring information symmetry by establishing CIS on a statutory basis. As admitted by Equity Bank's Dr Kipng'etich, the rollout of CIS has necessarily been approached as a public rather than a private issue, through the intimate involvement of the State at all levels.<sup>855</sup>

First, Parliament has necessarily interfered with the constitutional rights of credit customers to privacy of their information, by enacting section 31 of the Banking Act, which allows banks to legally share customer credit information among themselves, through CRBs, rather than relying on individual consent clauses.<sup>856</sup> This has infringed on borrowers' individual liberties which, under the classical Rule of Law doctrine, reside in the private sphere, and predate the State, and should only be interfered with on the basis of protecting wider public interest.<sup>857</sup>

Second, Parliament, through the Treasury Cabinet Secretary, has divested individual borrowers of their proprietary rights to their private credit information, by legalizing the commodification

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<sup>854</sup> See Memorandum of Understanding from Kenya Bankers Association (n 587).

<sup>855</sup> Kanaiya and Omollo (n 820) 12. Dr Kipng'etich praised the CIS initiative as 'a public solution to a public problem, and as a positive move away from the tendency by Kenyans to develop private solutions to public problems.'

<sup>856</sup> The Banking Act, Cap. 488, Laws of Kenya.

<sup>857</sup> The constitutionality of the sharing of credit customers' information was first litigated in *Barbra Khaemba v Cabinet Secretary, National Treasury & Anor* (n 832) 23, Para 41. On whether the limitations to credit consumers' privacy under the Credit Reference Bureau Regulations (2008) infringed the right to privacy, Lenaola J. held as follows: "I am in this regard satisfied that the said Regulations do not infringe on the right to privacy as the said limitation, in my opinion, is to facilitate and promote an efficient loan system with financial institutions having the necessary information in regard to loan applicants".

of their data by CRBs and banks, and vesting the proprietary rights over the data and any derivative works from the data, in the CBK.<sup>858</sup>

Third, the State has, by characterising CRBs as agents of the CBK, shielded them from liability resulting from damages caused by the inaccurate characterization of credit consumers in their credit scores and reports. While, in the case of *Barbra Georgina Khaemba*, the case of discrimination was directed against the defendant bank, a similar case would not be entertained against CRBs either, as Section 19 of the CRB Regulations (2013) protects them from liability for their inaccurate statistical prediction of individuals' default risk. This is despite their significant impact on life chances, and despite the weaknesses and inaccuracies of credit scoring and reporting practices discussed in section 2 above.

Fourth, the State has sought to make the CRB or credit information sector profitable through the statutory expansion of the uses of credit reports to include non-credit relationships such as employment and other unrelated contractual and non-contractual relations.<sup>859</sup>

During the inception, rollout and operationalization phase of the Kenyan CIS, the CBK and National Treasury played a significant, indispensable role beyond their statutory functions, by providing funding, infrastructure, legitimacy, research, and administrative and bureaucratic facilitation to the KCISI and AKCP, to the extent that FSD Kenya, a key donor and technical partner in the project, echoed concerns that the banking industry was relying excessively on the CBK leadership.<sup>860</sup>

The contradiction inherent in the operationalisation of the related economic and legal ideologies of financial market deregulation and minimalist State regulation of interest rates and high indebtedness is relevant for two reasons. First, it underscores the discursively concealed, significant role of the State in constructing a 'free', efficient, lending market with information symmetry. The optimization of market pricing of loans within private credit contracts has necessitated their discursive classification as a public issue, pre-empting the significant involvement of the State, and the infringement of the rights to privacy and property of credit customers, in the 'private sphere'. Second, the contradiction demonstrates the indeterminacy of the legal ideology of the minimalist State, and potentialities for the progressive involvement

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<sup>858</sup> See Section 47 of the Credit Bureau Regulations (2013).

<sup>859</sup> Section 30 of the CRB Regulations (2013) provides for the access to CRB credit reports by third parties, with the consent of customers.

<sup>860</sup> Davel, Serakwane and Kimondo (n 791) vi.

of the State in constructing 'fair' and affordable lending markets, in favour of the borrower that has seemingly been marginalised in the operationalisation of the CIS.

### **3.4. The Ideology of Technological Rationality in CIS Technologies and Practices**

The CIS infrastructure in Kenya embodies two aspects of the ideology of technological rationality, which has undergirded CIS as a policy choice for dealing with the problem of high interest rates within an unregulated interest rate market: technological determinism or autonomy; and efficiency-rationality of automated and statistical credit scoring and reporting techniques. Technological rationality has also co-constituted and contributed to the ideological power of economic and legal ideas discussed above, in deepening power asymmetries within lending contracts, and reproducing high interest rates and high indebtedness.

As discussed more substantively in chapter 2, technological determinism posits that technical development is independent of external factors, that is, technologies have an autonomous functional logic that can be explained without reference to society.<sup>861</sup> Consequently, social institutions and their related arrangements and progress must adapt to the imperatives of technology, entailing, for example, trade-offs between technological efficiency and social values.<sup>862</sup>

This ideology of technological determinism has permeated the discursive introduction of credit scoring and reporting technologies and practices in Kenya. Due to their foundation in mathematical/statistical methods and computing algorithms, CIS has appropriated the 'scientific' attributes of neoclassical economics and natural science, deemed as objective, neutral, uniform and consistent, apolitical and asocial.<sup>863</sup> Consequently, CIS has been black-boxed, rendered opaque, rational, authoritative and thereby incontestable by the apparent scientific and simple logic of the generated single figure that describes individual credit worthiness.<sup>864</sup> The ideology of technological autonomy has deflected the attention of credit consumers and even regulators and policy makers, from the origination of the design of CIS

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<sup>861</sup> Feenberg, 'Subversive Rationalization' (n 40) 304; Ropohl (n 389) 86.

<sup>862</sup> Feenberg, 'Subversive Rationalization' (n 40) 304.

<sup>863</sup> Burton (n 792) 114.

<sup>864</sup> IPSOS Public Affairs, 'Stakeholder Awareness of the CIS Mechanism in Kenya' (Financial Sector Deepening (FSD) Kenya 2015) Report Commissioned by FSD Kenya 4. The black-boxing of CIS was one of the concerns captured from the public survey: there was insufficient information about how credit scoring and information sharing worked, pointing to the need for additional enhanced and directed communication. See also Marron (n 768) 111.



technology in the social interests of CRBs, banks and other stakeholders, rather than the autonomous logic of technology.

An example of the entrenchment of this ideology of CIS autonomy was demonstrated in banks' and CRBs' reliance on technological determinism to argue against interest rate caps, since they would restrict and standardize the profit margins levied on specific borrowers, irrespective of their risk profiles, resulting in banks restricting their lending to low risk or collateralised borrowers.<sup>865</sup> This argument derived from the binary logic of the credit scoring technologies that had been deployed by Kenyan banks since 2010, and which critically classed borrowers into two profiles: good and bad lenders, rather than a continuum of high risk and low risk borrowers.<sup>866</sup> This binary logic of the credit scores was therefore distilled into a technological rationality that constructed a particular market of good and bad borrowers, and consequently laid out the restricted possibilities that were available to financial markets regulators and policy makers, in addressing the problem of high interest rates. Hence regulatory options were being restricted to what fits with the technical design of the credit scoring models.

There were also other critical design choices in the early phases of the CIS rollout, which inordinately deepened the power asymmetries in lending agreements, and maintained high rates. They included the data sharing template that accommodated only negative credit consumer information, and the automatic blacklisting of individuals for default and non-default related disputes - CIS designs which were deemed mere inefficiencies within an otherwise objective and neutral infrastructure. The concealing move of technological determinism or autonomy, in this instance, is that the infrastructure designs reflect the interests of capital, that is, credit providers. It also reflects the asymmetrical nature of lending agreements in liberalised financial markets, as a technological rather than a social preference.

The technological bias towards creditors stems from the non-representation of borrowers in the CIS initiative. While it may be argued that the regulators were present to safeguard consumer interest, that is not evident in the process and design of CIS, which has side-lined the democratic participation of credit consumers, despite the project being touted by both industry

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<sup>865</sup> George Ngigi, 'Banks Urge Uhuru to Dismiss Bill Capping Interest Rates' *Daily Nation* (Nairobi, 28 July 2016) <<http://www.nation.co.ke/business/Banks-call-on-Uhuru-to-dismiss-proposed-law-on-interest-rates/996-3319776-mit13pz/index.html>> accessed 26 September 2016.

<sup>866</sup> Ngigi, 'CBK Puts Banks on Notice for Abuse of Credit Bureaus' (n 614).

players and the courts as a public interest infrastructure.<sup>867</sup> Credit customers have been relegated to docile bodies that simply comply with the disciplinary imperatives of capital, disguised as technological imperatives, while having no decisive input to the core discursive logic of credit risk management.<sup>868</sup> However, the relevant legal provisions on consumer protection, including rights to correct personal information, data security, privacy standards, and the periods of blacklisting, do not confront the abstracting, population-level methodologies of credit scoring, which are rife with inaccuracies that are further amplified by the colonising trend of CIS.

The second technological ideology that has driven CIS rollout not only in Kenya but also in other jurisdictions, is the idea of the scientific, statistical, automated credit scoring models as rational, as compared to the previous credit appraisal and risk management techniques used by lenders to manage credit relationships. The Weberian conception of technological rationalization, discussed in Chapter 2, has entailed emphasis of five features in the context of CIS: calculability, that is, quantification of borrower behavioural uncertainty into probability of credit risk; efficiency of the means of risk management as an end in itself; predictability of borrower and creditor behaviour and relationship; substitution of non-human (CIS) for human (embodied loan appraisal) technology, to optimize control over individuals borrowers; and the irrationality of rationality, that is, where highly-rational systems dehumanise social relationships and cause individuals to lose meaning in their lives.<sup>869</sup>

This rationalization of the lender-borrower relationship in Kenya is observed in the context of the transformation of the interactions between lender and borrower, and also the institutional restructuring of lenders' bureaucracies, systems and processes, to the logics of the CIS infrastructure. First, as discussed in section 2, the embodied visibility of the individual borrower who visits the credit officer's desk for a face-to-face interview, and the credit officer, who visits the borrower's home or business premises to inspect his dwellings or business premises, have

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<sup>867</sup> See *Jamlick Gichuhi Mwangi v Kenya Commercial Bank Ltd & another* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts)); The case quotes the English case of *Carol Ann Gatt v Barclays Bank plc & Mark Williams* (2013) 97 (Jan) ER D (EWHC 0002 (QB)) where the court held as follows: "In the modern world, it is plainly in the public interest that such authoritative credit information can be obtained and relied on by banks and other financial institutions, provided it is done in a lawful and duly-regulated manner which respects the rights of the general public and the individuals affected".

<sup>868</sup> See Slough and Arora (n 815) 26 In this CIS evaluation report, credit consumers are allocated the role of being entitled to see and object to the contents of their credit reports, while other stakeholders have more substantive, constructive roles.

<sup>869</sup> George Ritzer, *Expressing America* (SAGE 1995) 133–135.

been replaced by a statistical representation of the individual as a population trend, and a numerical figure, a credit score that captures the individual's trustworthiness, morality, ethics, or creditworthiness, and ultimately, life chances.<sup>870</sup> This automated, mathematical system rationalises uncertainties into calculable, predictable, and efficiently manageable risk of default.

Second, lenders' institutional infrastructures, bureaucracies and processes have been rationalized where Kenyan credit providers have been compelled to reformat their credit information management systems (including which information they seek from borrowers, how they discursively interpret this information, how they document and transmit this information to CRBs) to conform to the imperatives of the CIS infrastructure, including the statutory Data Sharing Template. Most banks were forced to overhaul their IT systems to be compatible with the discursive scripting of the CIS infrastructure's understanding of credit risk and its indicators, since, at the inception of information sharing, CRBs were rejecting a high percentage of borrower files due to incompatibility with their information management systems.<sup>871</sup> A notable aspect of the discourse of risk as captured in the CIS system is that it emanates from various local and transnational sites of ideational formation and diffusion, including the BCBS, which, for example, defines the meaning of foundational risk management concepts such as 'default'.<sup>872</sup>

The technological rationalization of CIS as efficient, objective, scientific, and superior to other risk management and regulatory solutions, has legitimised credit scoring and reporting as the optimal policy for addressing the problem of high interest rates in a deregulated lending market, and of interest rates fixed as a result of risk-based pricing of loans, as fair and equitable. This ideology of technological rationality, however, conceals the many problems associated with the practice of credit scoring, discussed in section 2.3 above. These include indeterminism and irreducible stochasticity, methodological risk, data risk, temporal risk, decontextualization, and the many infrastructural challenges in 'Third World' countries, which impact on the accuracy of the credit scoring practices. For example, the subjectivity and designer bias embedded in credit scoring algorithms have been exposed where individuals have requested

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<sup>870</sup> Burton (n 792) 114 The author argues that the financial savings of lenders from abolishing embodied credit appraisal processes have come at considerable social cost, and have contributed to the dehumanisation of society.

<sup>871</sup> Szydłowska (n 790) 15.

<sup>872</sup> Jamal E Rahal and Grace Mungai, 'Credit Scoring for SME Banking' (Financial Sector Deepening (FSD) Kenya 2015) Project Technical Note 6.

credit reports from different CRBs and digital lending scoring systems, and have received starkly different reports.<sup>873</sup>

### **3.5. The Reproduction of High Interest Rates, High Indebtedness and Power Asymmetries by CIS**

Credit scoring and reporting technologies and practices have been touted by Kenyan banking regulators and policy makers, the banking sector, and the credit reporting industry as an appropriate policy response to the problem of high interest rates, high indebtedness, within a deregulated financial market. This section has examined the neoclassical economic theories, formal legal doctrines, and technological ideologies underpinning the CIS infrastructure, and their agential power in cognitively, normatively, and materially constituting the lending market. On this basis, it is argued that credit scoring and reporting technologies and practices may actually reproduce high interest rates and high indebtedness and deepen the power asymmetries between lenders and borrowers in Kenya's lending market, in four ways.

First, the statistical methodologies of credit scoring do not treat individual credit consumers as qualitatively different subjects with qualitatively different aptitudes, moral and ethical qualities and risk attributes, but rather as objects abstracted from populations of borrowers, as agglomerations of particular quantifiable risk attributes.<sup>874</sup> This methodology conceals the categories of financial and economic marginalisation that may in fact require affirmative action or special consideration. These include, for example, women, rural populations, the less educated, the poor, the unemployed, and individuals from certain regions, including Western Kenya and the Coastal region, who have lower access to credit.<sup>875</sup> The statistical abstraction of these inequalities in the credit scoring methodologies sustains or reproduces them, to the extent that these categories of borrowers are assigned lower credit scores and subjected to higher interest rates.

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<sup>873</sup> See, for example, Mbugua Njihia, 'Human Biases May Hurt Progress of Financial Tech' *Business Daily* (Nairobi, 15 June 2016) <<http://www.businessdailyafrica.com/corporate/Human-biases-may-hurt-progress-of-financial-tech/539550-3250980-qa750mz/index.html>> accessed 9 July 2017; See also Varick Schwartz, 'Credit Scoring in Kenya: Observations and Comparisons from the Field | Kiva' <<https://fellowsblog.kiva.org/fellowsblog/2012/08/30/credit-scoring-in-kenya-observations-and-comparisons-from-the-field>> accessed 17 July 2017.

<sup>874</sup> Marron (n 768) 111–112.

<sup>875</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya (n 718) 5–8.

Second, credit scoring and reporting methodologies construct the ‘good’ credit consumer as a socially-responsible subject, having attributes such as prudence, forethought, and personal responsibility.<sup>876</sup> In addition, these technologies moralize the debt obligations, casting the borrower who does not live up to the attributes of a good credit consumer as immoral, untrustworthy, uncreditworthy, and therefore to be excluded from credit and other life chances.<sup>877</sup> By making borrowers see themselves and others through the logic of the market, this disciplining discourse individualises the responsibility for access to affordable credit and the opportunity to consume. It also suggests that inequality in financial opportunity and life chances is the result of individual will and morality rather than structural conditions of capitalist society.<sup>878</sup>

Consequently, abstracted and subsequently individualised credit scores disguise the structural conditions or causalities of individual behaviour, and suggest that all economic behaviour is a result of personal choice, and an indicator of moral worth.<sup>879</sup> For example, the reality of Kenya’s economy, in which the majority of credit consumers live ‘precarious’ financial lives characterised by an informal economy, unemployment, poor access to banking services and public utility accounts, etc, are concealed in the characterisation of the ‘good’ borrower. Consequently, credit scoring models lock borrowers in systemically generated risk classifications which they cannot easily act upon, thereby denying them even the mobility promised for those who can take steps to improve their credit scores.

Third, credit scoring and reporting practices entail the statistical splitting, sorting, and differentiated classification of individual borrowers according to populations, or ‘classification situations’ that fundamentally shape their life chances.<sup>880</sup> This is especially as a result of credit scoring’s increasing colonisation of credit, financial, employment, and many other economic and non-economic aspects of individuals’ lives, including access to public services. While credit scoring and reporting offer the promise of increasing financial access to the marginalized through risk-based pricing of loans, they also create new economic classes, or amplify gaps in economic opportunity, by attaching different interest rates and loan structures to different

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<sup>876</sup> Burton (n 792) 113.

<sup>877</sup> Langley (n 817) 453.

<sup>878</sup> Julian Jürgenmeyer and Karoline Krenn, ‘Classification Situations: A New Field of Research for Valuation Studies?’ (2016) 4 *Valuation Studies* 177, 179.

<sup>879</sup> *ibid* 180.

<sup>880</sup> Marion Fourcade and Kieran Healy, ‘Classification Situations: Life-Chances in the Neoliberal Era’ (2017) 42 *Historical Social Research / Historische Sozialforschung* 23, 23.

credit scores. This results in a growing pattern or gap between the economically advantaged and disadvantaged.<sup>881</sup> For example, excessively high interest rates to certain populations of borrowers can continue to be justified or legitimated on the basis of risk-based pricing.

Fourth, credit scoring and reporting technologies are performative, to the extent that, in statistically determining the creditworthiness of an individual, they become self-fulfilling prophecies, creating the financial condition that they claim to merely indicate. For example, where a scoring model designates an individual as uncreditworthy, irrespective of the accuracy of the score, the model raises the cost of future credit financing for the individual, or may even exclude them from the credit market, thereby increasing the individual's likelihood of financial difficulty, and further deteriorating their credit score.<sup>882</sup> Similarly, the designation of an individual as creditworthy (irrespective of its accuracy), and the assignment of a high credit score, decreases their future cost of credit, resulting in more favourable financial conditions that make their performance of future debt obligations easier, and improves their credit score further. This positive, self-referential feedback loop can performatively create vicious or virtuous cycles which may trap some borrowers in perpetual poverty, or lock in the privileges of some borrowers, while accentuating their respective disadvantages and advantages.<sup>883</sup>

Due to the positive, self-referential feedback loop that is created, the degree of performativity of the credit scoring model actually increases, as further deterioration of an uncreditworthy individual's financial conditions, or the flourishing of a creditworthy individual's credit status, make the scoring models even more accurate. The application of the credit scores and reports to non-credit aspects of individuals' lives, such as insurance premiums, employment opportunities, welfare benefits, and other life chances, further amplifies the performative power of these risk classification technologies and their inaccuracies, entrapping credit consumers in prophesied cycles of either poverty or privilege, high interest rates and high indebtedness, or affordable credit.<sup>884</sup> As Citron and Pasquale argue, when scoring systems have the potential to take a life of their own, contributing to or creating the situation they claim merely to predict, it becomes a normative matter, requiring moral justification and rationale.<sup>885</sup>

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<sup>881</sup> *ibid.*

<sup>882</sup> Danielle Keats Citron and Frank A Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 *Washington Law Review* 1, 18.

<sup>883</sup> Akos Rona-Tas, 'The Off-Label Use of Consumer Credit Ratings' (2017) 42 *Historical Social Research / Historische Sozialforschung* 52, 52.

<sup>884</sup> *ibid.*

<sup>885</sup> Citron and Pasquale (n 882) 18.

#### 4. Performing Equitable Credit Markets within CIS Technology

Since inception, the technologies and practices of credit scoring and reporting have necessarily been steeped in a permanent process of “failure, contestation, and regeneration”, owing to the flaws and challenges inherent in their ontologies, epistemologies, and methodologies of risk.<sup>886</sup> Competing innovations continue to make use of increased computing power and big data to fine-tune the accuracy of credit scores. The Kenyan credit information market has, undoubtedly, been the arena of many innovations aimed at recalibrating the conventional risk attributes in credit scoring models, to correspond to the country context. These include the introduction of digital lending and credit scoring on the basis of mobile phone data.<sup>887</sup> However, despite these efforts, the competing innovations do not challenge the fundamental flaws in the discourse of risk management by credit scoring. First, the innovations remain steeped in statistical methods that seek to calculate individuals’ probability of credit default based on population trends.<sup>888</sup> Second, credit scoring and reporting remains concerned with the calculable effects of default, rather than the causal effects.<sup>889</sup> Third, credit information sharing remains a disciplinary mechanism that places in the hands of lenders immense control over borrowers, creating an inordinately asymmetrical power relationship with borrowers, yet credit scoring models remain opaque, unaccountable and incontestable.<sup>890</sup>

This situation calls for a radical rethink of the ideologies underpinning credit information sharing in Kenya and elsewhere. A starting point could be the analysis and exploitation, for progressive politics of equitable markets, of the contradictions and indeterminacies inherent in the economic, legal and technological ideologies underpinning CIS in Kenya. Within the ideology of legal formalism, for example, there are contradictions relating to the legitimated legislative interference with the credit consumers’ proprietary rights to their data, privacy rights, and the right to legal recourse, in a bid to construct ‘free’ and information-efficient lending markets. This may provide an avenue for the legal deconstruction of proprietary rights, trade secrets and other intellectual property rights of CRBs and other credit scoring firms to their credit scoring models, which contribute to the opacity and unaccountability of scoring

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<sup>886</sup> Marron (n 768) 114.

<sup>887</sup> Kaffenberger and Chege (n 779); Cook and McKay (n 779).

<sup>888</sup> Marron (n 768) 114.

<sup>889</sup> *ibid*; Burton (n 792) 115.

<sup>890</sup> Citron and Pasquale (n 882) 10.

models with such significant impact to individuals' life chances.<sup>891</sup> One avenue may be the open-sourcing of the algorithms underpinning credit scoring and reporting models that benefit from State market-making, and allow the participation of scoring subjects in auditing and contributing to the design of the CIS infrastructure.<sup>892</sup>

Within both legal formalism and neoclassical economic ideology, there are contradictions relating to the legal and economic moralisation of debtor behaviour, in the bid to individualize responsibility for access to affordable financing.<sup>893</sup> Individualisation of this responsibility is meant to preserve the efficient price-mechanism of the 'private sphere' of deregulated financial markets from the distorting influences of politics, ethical concerns and interest rate regulation. The borrower's behaviour is socialized and moralised, while the lender's behaviour is simultaneously reified from social and political considerations. This contradiction may provide an avenue for the legal construction of a market for ethical lender behaviour, with equally dire consequences for unethical lending.

For example, Kenyan banks benefit immensely from many ideologically concealed aspects of the State's construction and sustenance of a stable monetary system. These including a license to 'create money' in the form of fractional reserve banking, privileged participation and profiting from the Treasury Bills market, borrowing from the CBK, and membership in a State-maintained national payments infrastructure.<sup>894</sup> Access to these public benefits should be tied to certain criteria for ethical lending, especially to the systemically marginalized borrowers. Another scheme for constructing a market for ethical lending is the stabilisation and establishment, rather than privatization, of State-owned development banks that lend at fairly

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<sup>891</sup> Brenda Reddix-Small, 'Credit Scoring and Trade Secrecy: An Algorithmic Quagmire or How the Lack of Transparency in Complex Financial Models Scuttled the Finance Market' (2011) 12 UC Davis Business Law Journal 87, 89. The author argues that "the use of risk models creates problems when the models' mathematical algorithms are combined with rigid proprietary protections, governmental ineptitude, and a lack of marketplace transparency". This combination creates conditions for market crises such as the 2008 credit crunch.'

<sup>892</sup> For a discussion on open-source risk models, see Erik F Gerding, 'Code, Crash, and Open Source: The Outsourcing of Financial Regulation to Risk Models and the Global Financial Crisis' (2009) 84 Washington Law Review 127, 189. The author proposes the promotion of open-source risk models by regulators, and also discusses the potential draw-backs of such an approach including model homogeneity and concentration of methodological risk.

<sup>893</sup> Marron (n 768) 111–112; Jürgenmeyer and Krenn (n 878) 179–180.

<sup>894</sup> Chami, Sharma and Fullenkamp (n 688) 14. The IMF notes, for example, that the national payments system is a public good. In addition, it admits that the various guarantees that taxpayers give to enable the efficient working of the monetary system requires that they are also protected through financial regulations.



competitive yet fair and affordable rates to the categories of borrower populations marginalized by high interest rates and poor credit scores.

Within the ideology of technological rationality, there are contradictions relating to the opacity and black-boxing of credit scoring and reporting models through automation, design, and also claims to trade secrets and other intellectual property claims, alongside the discursive branding of CIS as a transparent, efficient, neutral objective technology that resolves the problem of information asymmetry between lenders and borrowers.<sup>895</sup> This contradiction, and the claims of technical efficiency as the overarching design factor in achieving market information symmetry, may provide an avenue for the technological construction of a radically transparent lending market, where lender credit information is as transparent as borrower credit information.

Attempts at this scenario were made with the sharing of borrowers' positive credit information (since 2014), a prospect that Kenyan banks vehemently opposed, on the grounds that competing banks will poach each other's clients.<sup>896</sup> A deliberate consumer-biased design for sharing both borrower credit information and lender information may hold the promise for confronting the power asymmetries favouring lenders in the present CIS infrastructure in Kenya. For example, the currently existing publication by the CBK of average lending rates in a bid to promote transparent pricing credit by commercial banks, can be extended to other critical lending charges and terms.

## **5. Conclusion**

This chapter has explored the third aspect of the fourth research sub-question: how has the ideological and performative power of technological ideas, artefacts and related practices, reproduced regulatory neoliberalism in Kenya's interest rate markets? It has examined the technification of the interest rates market, that is, the enrolment, adoption or imposition of technical methods (specifically the Credit Information Sharing infrastructure) into the overarching process of economisation and juridification of the lending market. In this effort, the discussion has examined the ideological and performative power of the CIS infrastructure

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<sup>895</sup> See generally, Citron and Pasquale (n 882).

<sup>896</sup> Davel, Serakwane and Kimondo (n 791) 10.

and its role in the reproduction of regulatory neoliberalism, and deepening of lender-creditor power asymmetries, in Kenya's interest rate market.

Section 2 has examined the mathematical, statistical and computational methods that are used to build the credit-worthiness of an individual borrower, by reducing for credit providers the combined body of borrowers into a "coherent entity demonstrating attributes as though they were intrinsic to it, independent from the actions of the individual consumers composing it".<sup>897</sup> In addition, it has examined CIS adoption by Kenyan financial markets participants, policy makers and regulators, as a policy and regulatory solution to the problem of high interest rates, while maintaining the deregulation of financial markets.

Some of the challenges emanating from the establishment of CIS include: the indeterminacy and stochastic nature of risk; the inaccurate assumptions underpinning statistical models, e.g. equal co-variance in discriminant analysis, and inadequate sample sizes; the bias in historical consumer credit data; temporal risk; and the failure to differentiate reasons for default. Others include emerging market challenges such as huge segments of financially excluded and unbanked individuals, a small formal economy, and inadequate traceability infrastructure such as metered public utility systems. The argument presented is that by adopting CIS, regulators and bankers have sought to cast the problem of high interest rates and high indebtedness as a private rather than a public issue attracting regulatory action.

Section 3 has conceptualized the CIS infrastructure as a socio-technical assemblage (STA), and isolated the ideological origins of the discursive conception of credit risk, in three sources: neoclassical economics, legal formalism, and technological rationality. For example, the algorithmic construction of the creditworthy consumer mirrors the neoliberal entrepreneurial subject in neoclassical economics – the *homo economicus* – who is, by definition, able to provide for their own security and freedom in the face of an uncertain future through a whole host of rational and calculative practices and techniques designed to enable the seizing of opportunities.

In addition, four related formal-liberal legal ideologies are also embedded within CIS technologies: the legally abstracted legal subject with rights and duties; individual liberty and freedoms; equal contractual bargaining power in the private sphere; and the moralisation and 'ethification' of the debtor. Lastly, CIS embodies two aspects of the ideology of technological

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<sup>897</sup> Marron (n 768) 106–107.

rationality: technological determinism or autonomy; and efficiency-rationality of automated and statistical credit scoring and reporting techniques. Technological rationality has also co-constituted and contributed to the ideological power of economic and legal ideas discussed above, in deepening power asymmetries within lending contracts, and reproducing high interest rates and high indebtedness.

The discussion has developed the argument that these three ideologies have legitimated and performed liberalized interest rate markets, and regulatory neoliberalism. By analysing the ideological and performative impacts of these three ideational disciplines as calculative and valuation tools in credit risk management, the discussion has shown the tendency of CIS to sustain the power asymmetries between Kenyan lenders and borrowers, and also to sustain high interest rates, indebtedness, and ultimately, inequitable access to affordable credit.

More fundamentally, the discussion demonstrates how the embedding of neoliberal hegemony in technological devices, and the deployment of these technological devices (such as CIS technologies) as not only market devices but also policy and regulatory tools, reproduces and sustains the inequitable liberalised credit markets, and, through its self-referencing logic, limits the crafting of other regulatory experiments to construct equitable and affordable credit markets. The discussion also demonstrates the potential for the spread of transnational neoliberal regulatory hegemony through technological transfer or diffusion from the global North to the global South.

## CHAPTER SEVEN

### **Conclusion: Implications of the Ideological and Performative Power of the Ideational Infrastructure of Financial Markets on Third World Contestation**

#### **1. Research Questions and Theoretical Approach**

This thesis has examined the ideological and performative role of ideas and their related technologies and practices in the reproduction of transnational regulatory neoliberalism in the globalized financial markets and related transnational and national regulatory institutions, and specifically in Third World countries. The study was premised on the observation that Third World contestation of transnational financial regulatory neoliberalism has registered both progress and challenges, but regulatory neoliberalism and the globalization of financial markets grows more resilient, despite periodic setbacks.

The main research question explored was as follows:

How has the ideational infrastructure of global financial markets impacted on the regulatory reforms within the transnational and Third World financial regulatory orders?

This research question has been explored through a series of related sub-questions addressed in the six chapters:

1. Why has the Third World's historical contestation failed to radically transform the transnational financial regulatory order?
2. To what extent can interdisciplinary ideology critique and performativity theory form theoretical assemblages within TWAIL praxis of resetting the international financial regulatory order to speak for Third World concerns?
3. How has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism within the IMF and World Bank?
4. How has the ideological and performative power of economic, legal and technological ideas and related practices reproduced regulatory neoliberalism in Kenya's interest rate markets?

While noting the significance of other factors in the reproduction of transnational regulatory neoliberalism, the thesis identified and focused on the ideological and performative power of neoclassical economic theories, doctrines of legal formalism, technological ideas, artefacts, and their related practices, which form the ideational infrastructure of contemporary financial markets. The discussion examined how these ideas and related practices construct meaning, relationships and institutions, allocate identities, interests and capacities, define problems and their solutions, and enable and constrain action. These actions are realised through various ideological strategies, including universalization, reification, naturalization, rationalization, and narrativization. In addition, the regulatory role of ideas is enabled not only by their impact on human cognition, but also their performative effect, that is, where the ideas enact their respective claims into reality.

The main argument explored in this study is that the ideational infrastructure of the financial markets legitimates, constitutes and performs neoliberal financial markets and regulatory neoliberalism, within the transnational and national financial regulatory institutions. This ideational infrastructure ideologically legitimates and performs regulatory neoliberalism as the only rational regulatory paradigm, while concealing its reproduction of inequality and power asymmetries. It also restricts the regulatory possibilities available to Third World policy makers and regulators for addressing the externalities of neoliberal financial markets, including, as explored in the Kenya case studies, high interest rates and high indebtedness.

The breadth of the research questions necessitated an eclectic theoretical approach that drew from Critical Theory (including Critical Legal Studies, Critical Realism, and Critical Theory of Technology), Actor-Network Theory (ANT), and Economic Performativity Theory. This eclectic approach demonstrated the insights that traditional theoretical frameworks deployed in analysis and critique of transnational financial regulatory institutions from a Third World perspective, including Marxist Approaches to International Law (MAIL) and Third World Approaches to International Law (TWAIL), can levy from ANT and Performativity Theory. These insights include the agential, performative and regulatory role of ideas, discourses, texts, metrics, artefacts, and computing technologies within financial markets, and their role in making durable the power structures produced by legal and economic ideologies.

The role of the ideational infrastructure of financial market in reproducing regulatory neoliberalism was explored not only across three disciplines – law, economics and technology – but also across the global regulatory level, that is, the BWIs, and the local regulatory level of

Kenya's financial markets policy makers, regulators and legislators. This analysis stressed the co-constitutive nature of economic, legal and technological ideas and practices, and the need for an integrated analytical approach in exploring the resilience of regulatory neoliberalism.

## **2. Chapter Conclusions**

Chapter 1 examined the Third World's historical contestation of transnational regulatory hegemony, noting how transnational financial institutions, in turn, opposed, recapitulated to, or co-opted Third World demands in a manner that increased the regulators' authority and jurisdiction, and in fact reproduced neoliberalism in the resisting countries. In addition, it also demonstrated how TWAIL had to change its theories, methodologies and practices, in response to the mutation and reinvention of hegemonic power, from military and economic power, to discourse and expertise, diffused private corporate law-making power, and material reorganization of the global financial markets.

The discussion examined the re-emergence and resilience of transnational regulatory neoliberalism after successive revolutionary moments, including the 2008 financial crisis, noting that its reproduction was secured by, among other structural reasons, the durability of the neoliberal ideational infrastructure of the globalised financial markets. The ideological and performative power of this ideational infrastructure, which has extended into Third World economies, defining State, bureaucrats', elite, and citizens' interests and worldviews, has deflated these countries' national regulatory reforms, and their contestation of the transnational financial regulatory order.

Against the backdrop of these findings, Chapter 2 proposed an eclectic theoretical framework that captures the ideological and performative nature and role of the multifaceted ideational infrastructure of financial markets in reproducing transnational and national regulatory neoliberalism. The facets examined included neoclassical economic theories, doctrines of legal formalism, technological ideas, and their related practices. To explore the co-constitutive ideological aspects of economics, law and technology, the discussion applied Critical Legal Theory, Critical Realism, and Critical Theory of Technology. These frameworks share certain arguments, including that the respective claims of law, economics and technology to neutrality, objectivity, rationality and autonomy, are mere ideological claims that conceal historical and contemporary political interests and relations of domination. In addition, these ideological

claims restrict the imagination and operationalization of more equitable social and economic arrangements.

However, noting that the power of ideas is not restricted to their ideological impact on cognition, the chapter also applied performativity theory, to demonstrate how economic, legal and technological ideas, practices and artefacts also contribute to realising the world they describe. This insight, emanating from the Actor-Network Theory school, augments Critical Theory's ideology-critique, and challenges TWAIL practitioners to examine not only the power of expertise in shaping global economic, political and social life, but also how this ideational power is embedded in technologies that are diffused into quotidian life of Third World citizens. Another insight that Performativity Theory brings to TWAIL is the potential for harnessing the ideological and performative, yet indeterminate and contradictory nature of ideas underpinning hegemonic regulatory neoliberalism, in counter-hegemonic praxis.

Chapter 3 applied the insights on the ideological and performative power of the ideational infrastructure of financial markets, in examining the role and functioning of BWIs, and their relationship to Third World countries. The discussion outlined the different types of power exercised in different stages of the life of the BWIs, including their establishment, operationalization, and expansion into the Third World. The discussion, while appreciating the significance of the structural power and influence of the US in structuring the BWIs and influencing its historical and current regulatory role, noted that the structuralist explanation of Western hegemony over-estimates structural power and under-estimates the power of the ideational infrastructure of financial markets.

The discussion demonstrated how, over time, the expert neoclassical economic and rule of law theories on economic growth, development, and financial market deepening, have decoupled from their originators' interests, and exercised an independent ideological and performative power upon IMF and World Bank bureaucrats, and in their relations with Third World countries. In addition, the discussion also demonstrated how these neoliberal economic and legal rationalities have been embedded and made durable in various technologies circulated by BWIs, including algorithmic-driven macro-econometric models and the Debt Management and Financial Analysis System (DMFAS). The chapter concluded that BWIs should be conceptualized as neither benevolent development institutions nor inescapably exploitative mechanisms for global capitalism, but rather sites for active and continuous ideological and performative intersection and contestation.

Chapter 4 shifted the site for the origination and application of expert ideas to the Third World, where it examined the manifestation of the ideological and performative power of neoclassical economic ideas in the deregulation and re-regulation of interest rates in Kenya's consumer lending market. The discussion demonstrated the role of neoclassical economic theories, including the McKinnon-Shaw Hypothesis and the Efficient Markets Hypothesis (EMH), in ideologically committing Kenya's financial markets policy makers and regulators to interest rate liberalization, despite evidence of policy failure, and the rise of market lending rates. In addition, the discussion also demonstrated the performative power of macro-econometric models deployed by the CBK (with the guidance of the BWIs) in fixing the policy paradigms of all market actors, thereby establishing macroeconomic governability on the basis of deregulatory economic theories and policies.

By reviewing the rhetoric of Parliamentarians, regulators and policy makers, economic experts and other stakeholders during the 20-year interest rate de-regulatory debate, the discussion also examined how neoclassical economics' claim to scientificity, neutrality, rationality and autonomy, was used to depoliticize the issue of banks' exploitative lending rates. While noting the potential for politicization and deconstruction of financial market liberalization theories, as was achieved by Kenyan Parliamentarians, the chapter concludes that these efforts are only sustainable if made durable. This durability necessitates establishing an economic paradigm that combines collective action with individual calculation and optimization; and building a sustainable reservoir of local development capital and weening the economy of dependence on transnational capital.

Chapter 5 examined the second pillar of the ideational infrastructure for establishing and operationalizing liberalized financial markets in Kenya – the Rule of Law. It traced the post-colonial legal transplantation of rule of law discourses from the UK and the US into Kenya, and their re-embedding under various BWI-sponsored law reform projects aimed at deepening the financial markets. The discussion examined how the ideological aspects of the rule of law, co-constituted by the New Institutional Economics, were used by Kenyan regulators and banking sector to conceal the inherently inequitable, exploitative and asymmetrical nature of lending agreements in Kenya, and to deflect the blame for unconscionably high interest rates to the government.

The chapter further examined the ideological and constitutive nature of four doctrines of the rule of law: sanctity of property rights, individual liberty to contract, the minimalist State, and



formal equality under the law. The deconstruction of the legal ideologies simultaneously demonstrated the constitutive power of law, which was conceptualised as legal performativity. The discussion demonstrated the role of rule of law doctrines in restricting how the problem of high interest rates is conceived by policy makers and regulators, and what regulatory options are available to them, while reproducing the inequalities and power asymmetries inherent in the liberalized lending market. The discussion concluded that the task of politicization and deconstruction of the ideology of the rule of law can be strategically used in the reconstruction of a just and equitable economy.

Chapter 6 examined the third pillar of the ideational infrastructure of neoliberal financial markets in Kenya – financial technologies. It examines Credit Information Sharing (CIS) infrastructure as both a regulatory and private sector response to the problem of high interest rates in Kenya. The discussion conceptualized CIS infrastructure as a socio-technical assemblage (STA) of co-constitutive neoclassical economic theories of efficient markets, neoliberal rule of law theories of individual rights, duties and responsibilities, ideologies of technological autonomy and determinism, and also social market actors, including regulators, lenders, and consumers. The chapter demonstrated how this ideational infrastructure embodies both ideological and performative power, which acts upon regulators, lenders and borrowers, and conceives the issue of high interest rates as a private challenge to be met by responsible lending, rather than a public issue wrought by the nature of globalized financialization.

It also demonstrated the performative power of CIS infrastructure, to the extent that credit scoring tends to lock in and enhance the privileges of credit consumers with positive credit scores, while worsening the position of those with negative scores. This performativity of credit scores lies in their concealing of identities of financial exclusion and structural causes of credit default, shaping life chances by fixing privileges and conditions of deprivation, and acting as self-fulfilling prophecies. The chapter argued that the discourse of risk as embedded in the scripting, design and algorithmic logic of CIS infrastructure reproduces regulatory neoliberalism and the inequalities and power asymmetries inherent in Kenya's lending market. The discussion concluded by calling for similar performative projects for the benefit of consumers, including lenders' information-sharing among consumers, the open-sourcing, nationalization, or public audit of the credit scoring models, and the legal construction of a market for ethical lender behaviour.

### **3. Key Findings**

The key finding of this thesis is the significance of the ideological and performative power of neoliberal economic, legal and technological ideas and practices underpinning the cognitive infrastructure of the financial markets, in the reproduction of regulatory neoliberalism in transnational and Third World financial regulatory institutions. This is articulated in four related insights.

#### **Transformation of Neoliberal Hegemony in Financial Markets**

First, since the initial contestation of the imperial and colonial project, the hegemonic liberal logic underpinning the relationship between the Third World, the developed economies, and International Law continues to react dynamically to resistance and contestation. As discussed in Chapter 2, it has metamorphosed and reinvented itself from brute force and coercive authority, to discursive and ideological power. This has been demonstrated in the BWIs' appropriation of the discourses of economic development, human rights, poverty, governance, and the rule of law. Neoliberal hegemony and its logic have diffused to unaccountable non-State institutions such as transnational corporations (TNCs), academia and media, while assimilating Third World hegemonic elites, and incorporating new centres of accumulation, including technological systems and practices.<sup>898</sup>

In addition, regulatory neoliberalism has also transformed from legal to material hegemony, where power has been redistributed through the material reorganization of the economy, as demonstrated by the financial markets' creation of synthetic financial assets that governments have been compelled to recognize, due to systemic risk concerns.<sup>899</sup> As demonstrated in Chapters 4 and 6, power has also been redistributed through the diffusion of financial technologies and practices such as macro-econometric models and credit information sharing technologies, in which neoliberalism has been embedded.

#### **Agential Power of the Ideational Infrastructure of Financial Markets**

The second insight is the significant power of the ideational infrastructure underpinning the financial markets, which has been under-emphasized in contrast to the structural aspects of global hegemony, including the economic, military, and market power of the US and its

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<sup>898</sup> Taylor (n 72) 6.

<sup>899</sup> Wigan (n 35) 118.

developed economy allies such as Britain, France, and Germany.<sup>900</sup> As explored especially in Chapter 3, ideas and related practices underpinning financial market liberalization, including the Mckinnon-Shaw Hypothesis, and the New Institutional Economics theories, are over time decoupled from their originators, and the originators' objectives and interests. Consequently, they acquire the 'relatively-autonomous', neutral and apolitical nature of expertise and technique, which is embedded in financial markets infrastructure, and acts upon transnational and national bureaucrats, thereby shaping how they conceptualize problems and the available solutions. The chapter 4 case study of the economization of the Kenyan interest rates market has also demonstrated the embedding of BWIs' neoclassical macro-econometric models into Kenyan financial regulators' bureaucracies, through the loan conditionalities and technical assistance programs. Once embedded, they become relatively autonomous, as a result of ideological reification and naturalization.

### **Co-constitutive Nature of Legal, Economic and Technological Ideas and Practices**

The third insight is the complex, co-constitutive, but not necessarily causal, relationships between legal formalism, neoclassical economic theories, technological ideas, and their related practices, which contribute to the resilience and durability of transnational regulatory neoliberalism. The chapter 5 case study on juridification of the Kenyan interest rates market has demonstrated the co-constitutive relationship between the Rule of Law and New Institutional Economics, in articulating the essentialism of the institution of private property in economic and financial market development. The chapter 6 case study on Credit Information Sharing technologies in Kenya has demonstrated the nature of these technologies as hybrid assemblages of co-constitutive legal, economic and technological ideas and practices. The inter-disciplinary nature of ideologies underpinning neoliberal regulatory discourse, their performance through practice, and further embedding in technologies and other materialities, reveals the need for the Third World to expand its focus in contesting legal norms, to include equally significant economic and technological ideas, practices, and artefacts.<sup>901</sup> This insight is therefore important for TWAIL practitioners' fashioning of relevant tools for praxis.

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<sup>900</sup> See Gouveia (n 74) 226 Gouveia argues that structural factors of global hegemony are usually built into 'a totalizing and overly-deterministic theory of change'.

<sup>901</sup> Kennedy, for example, notes that 'ultimately, politics is less a matter of structure and agents than of ideas and expertise'. Thus, contesting global governance should be about 'remaking the political economy of the world'. David Kennedy, 'Preface' in José María Beneyto and others (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2012) xii–xiii.

## **Emancipatory Potential of the Legitimizing and Performative Power of Ideas and Practices**

The fourth insight is the conceptual indeterminacy, inconsistency, and contradiction at the heart of the legal, economic and technological ideologies. This finding is relevant to the debate among TWAIL practitioners, on whether they should resist and contest the neoliberal transnational financial regulatory order from outside, reform it from within, or merely contest the hegemonic ordering with the tools availed within the system. It supports immanent critique's call to exploit the contradictions and indeterminacies of legal formalism, neoclassical economics, and technological ideas and related practices, in conceptually reorienting them to speak for the concerns of the Third World peoples, as was attempted, for example, through the New International Economic Order (NIEO). This includes (as advocated by Eslava and Pahuja) challenging International Law's Eurocentric universality to aspire for a new universality. This finding of conceptual indeterminacy is also relevant to the harnessing of the ideological and performative power of economic and technological ideas and practices towards designing alternative economic and technological organizations. As proposed in Chapter 6, this includes a radical democratization of public technological infrastructure, e.g. credit scoring and reporting technologies, through open sourcing.

The thesis concludes that the present Third World efforts aimed at contesting the regulatory neoliberalism at the heart of the transnational financial regulatory order should also focus on the ideological and performative power of the ideational infrastructure of the global financial markets. In doing so, TWAIL practitioners should of necessity adopt an interdisciplinary approach in their reflection, conceptualization, articulation, dissemination and legal operationalization of an alternative international financial law praxis.

### **4. Limitations of the Study Findings**

The thesis has attempted to articulate the power of neoliberal ideas underpinning the financial markets in reproducing transnational regulatory neoliberalism and defeating national financial reform projects in Third World countries. However, while the discussion has elicited useful insights, certain limitations should be taken note of.

First, the study, by concentrating on the role of the neoliberal ideational infrastructure and related practices, has not explored equally significant and material Third World related factors that have also impeded their contestation of transnational financial regulatory order. These include resource constraints, conflicting and oppositional interests among the Third World,

systemic State corruption, and unique historical, political and cultural contexts that undermine the undertaking of a Third World hegemonic project in transnational governance. This is evident, for example, in the geo-political challenges confronting the BRICS, as China strategizes to be the next economic super-power, while Russia, India, Brazil and South Africa seek a multi-polar dispersal of power. Third World contestation of transnational regulatory neoliberalism, with the benefit of insights on the ideological and performative power of ideas and practices, will still be undermined by these other factors.

Second, the methodology adopted for this study, due to resource and time constraints, has relied extensively on document analysis of primary and secondary sources. Due to the nature of the subject area – ideas and their cognition by market actors – face-to-face interviews would have elicited undoubtedly deeper insights into how Third World regulators and policy makers receive and conceive of various ideas, and rationalize their choice of certain neoliberal financial regulatory policies.

Third, as stated in the introductory chapter, the choice of Kenya as a case study was informed by its embodying of many characteristics of post-colonial, emerging Third World economies under the programmatic management of BWIs, and also as an active member of the Third World bloc under the WTO that has contested its globalizing policies. Nevertheless, Kenya has distinct economic, political, cultural and historical characteristics that determine how its policy makers, regulators and market actors interact with the ideational infrastructure of financial markets.

## **5. Recommendations for Further Research**

Based on the limitations of the thesis, outlined above, there is need for further research to deepen the inquiry on the role of ideas and related technologies and practices in reproducing regulatory neoliberalism and globalised financial markets in Third World countries.

First, there is need for further conceptual articulation by TWAIL scholars of an interdisciplinary approach to the study of transnational financial ordering. There remains a lively debate between extreme ends of structuralist economic sociologists and Actor-Network theorists, on questions of agency. As TWAIL insists on being an assemblage of common sensibilities regarding the Third World's relationship with international law, rather than a unified theoretical and methodological framework, it remains open for experimentation with non-conventional theoretical and methodological assemblages.

Second, even without a common theoretical approach on the role of ideas and related technologies and practices in global ordering, TWAIL should intensify its focus into traditionally marginalized areas. David Kennedy, for example, argues for TWAIL's renewed focus on political economy questions, especially after the financial crisis. The ideological and performative role of mainstream economic theory should therefore get more focus in the study of International Law. In addition, while acknowledging the significant scholarly work that has already been accomplished in the field, TWAIL scholars should stand on the shoulders of these legacies, and intensifying their focus on the material embedding of International Law norms, especially in technologies.

Third, as TWAIL II has previously demonstrated in distancing itself from Third World States' parochial interests in contesting global hegemony, it should augment its critique of international financial law's exploitative nature with an equally (immanent) critical praxis of the Third World. This is because successful TWAIL praxis in establishing equitable economies and regulatory orders based on justice and equality at the international level should start from the Third World countries. Indeed, one of the insights from the critical political economy-Actor Network Theory assemblage is that the local has the potential for extending itself into a global, while the global is really an extension of a particular local.

## BIBLIOGRAPHY

Abi-Saab G, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines?' (2016) 37 *Third World Quarterly* 1957

Ackerman F and Nadal A, 'Introduction: Underneath the Flawed Assumptions' in Frank Ackerman, Alejandro Nadal and Kevin P Gallagher (eds), *The Flawed Foundations of General Equilibrium Theory: Critical Essays on Economic Theory* (Routledge 2004)

Africa Centre for Open Governance, 'Mission Impossible? Implementing the Ndung'u Land Report' (Africa Centre for Open Governance 2009)

Ahmed R and Karunditu S, 'Kenya Credit Providers Association: Roadmap 2010-2015' (Financial Sector Deepening (FSD) Kenya 2010)

Ahn I, 'Deconstructing the Economy of Debt: Karl Marx, Jürgen Habermas, and an Ethics of Debt' 6 *Trans-Humanities Journal* 5

Akerlof GA, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics* 488

Alessandrini D, 'Financial Derivatives and the Challenge of Performativity: Where Contingency Meets Contestability' in Emilie Cloatre and Martyn Pickersgill (eds), *Knowledge, technology and law* (Routledge 2015)

Anand RP, *International Law and the Developing Countries: Confrontation Or Cooperation?* (Martinus Nijhoff Publishers 1987)

Andae G, 'CAK Accuses Banks and Millers of Colluding to Fix Product Prices' *Business Daily* (Nairobi, 17 April 2016) <<http://www.businessdailyafrica.com/CAK-accuses-banks-and-millers-of-colluding-to-fix-product-prices/539546-3163692-naybj0/index.html>> accessed 19 September 2016

Anghie A, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (1999) 32 *New York University Journal of International Law and Politics* 243

—, 'Universality and the Concept of Governance in International Law', *Legitimate governance in Africa: International and domestic legal perspectives* (Kluwer Law International 1999)

—, 'International Financial Institutions' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004)

—, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005)

Anghie A and Chimni B, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese J. int'l L.* 77

Antonio RJ, 'Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought' (1981) 32 *The British Journal of Sociology* 330

Argañarás LFC, 'The State of Necessity as International Defense Raised by a State Undergoing a Financial Crisis. A Case Study' (2007) 4 *Transnational Dispute Management (TDM)*

- Ashman S, Fine B and Newman S, 'The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development' (2011) 47 *Socialist Register* 174
- Austin JL, *How to Do Things with Words* (Oxford University Press 1975)
- Avgouleas E, *Governance of Global Financial Markets: The Law, the Economics, the Politics* (Cambridge University Press 2012)
- Baker A, 'Financial Crises and US Treasury Policy: The Institutional and Ideational Basis of American Capability' in J Robertson (ed), *Power and Politics After Financial Crises: Rethinking Foreign Opportunism in Emerging Markets* (Palgrave Macmillan 2008)
- , 'Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance' (2010) 86 *International Affairs* 647
- , 'The New Political Economy of the Macroprudential Ideational Shift' (2013) 18 *New Political Economy* 112
- Balbus ID, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' [1977] *Law and Society Review* 571
- Barnes B, 'Social Life as Bootstrapped Induction' (1983) 17 *Sociology* 524
- Barnett M and Duvall R, 'Power in International Politics' (2005) 59 *International organization* 39
- Barnett MN and Finnemore M, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 *International organization* 699
- Barry A and Slater D, 'Technology, Politics and the Market: An Interview with Michel Callon' (2002) 31 *Economy and Society* 285
- Basel Committee on Banking Supervision, 'International Convergence of Capital Measurement and Capital Standards: A Revised Framework' (Bank for International Settlements 2006)
- , *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (Bank for International Settlements 2010)
- , *Basel III: The Liquidity Coverage Ratio and Liquidity Risk Monitoring Tools* (Bank for International Settlements 2013)
- , *Basel III: The Net Stable Funding Ratio* (Bank for International Settlements 2014)
- Beck RJ, Arend AC and Lugt RDV, *International Rules Approaches From International Law and International Relations* (Oxford University Press 1996)
- Bedjaoui M, *Towards a New International Economic Order* (Holmes & Meier Publishers 1979)
- Been V and Beauvais JC, 'The Global Fifth Amendment - NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine' (2003) 78 *New York University Law Review* 30
- Bennett J, 'Edible Matter' (2007) 45 *New Left Review*



Berg I and Kalleberg AL, 'The Next Long Swing: Spatialisation, Technocratic Control, and the Restructuring of Work at the Turn of the Century', *Sourcebook of Labor Markets: Evolving Structures and Processes* (Springer Science & Business Media 2012)

Bhagwati J, 'The Capital Myth - The Difference between Trade in Widgets and Dollars' (1998) 77 *Foreign Affairs* 7

Bhagwati JN, *The New International Economic Order: The North-South Debate* (National Advisory Council for Development Cooperation 1977)

Biersteker TJ, 'Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions' [1990] *International Studies Quarterly* 477

Biesta GJJ and Stams GJJM, 'Critical Thinking and the Question of Critique: Some Lessons from Deconstruction' (2001) 20 *Studies in Philosophy and Education* 57

Bingham, Lord, 'The Rule of Law' [2007] *The Cambridge Law Journal* 67

Birla R, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Duke University Press 2008)

—, 'Law as Economy: Convention, Corporation, Currency' (2011) 1 *UC Irvine L. Rev.* 1015

—, 'Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power' (2011) 21 *Colum. J. Gender & L.* 90

Biziwick M, Cattaneo N and Fryer D, 'The Rationale for and Potential Role of the BRICS Contingent Reserve Arrangement' (2015) 22 *South African Journal of International Affairs* 307

Blowfield M and Murray A, *Corporate Responsibility* (Oxford University Press 2014)

Bossone B, 'Integrating Macroeconomic and Financial Sector Analyses within IMF Surveillance: A Case Study on IMF Governance' (International Monetary Fund 2008) IEO Background Paper

Bradford CI and Lim W (eds), *Global Leadership in Transition: Making the G20 More Effective and Responsive* (Korea Development Institute ; Brookings Institution Press 2011)

Bradlow D, 'Stuffing New Wine into Old Bottles: The Troubling Case of the IMF' (2001) 3 *Journal of International Banking Regulation* 9

—, 'The Governance of the IMF: The Need for Comprehensive Reform' [2006] Available at SSRN 928467 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=928467](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928467)> accessed 1 February 2015

Bradlow DD, 'International Law and the Operations of the International Financial Institutions' in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010)

Braun B, 'Why Models Matter: The Making and Unmaking of Governability in Macroeconomic Discourse' (2014) 7 *Journal of Critical Globalisation Studies* 48

Bresser-Pereira LC, 'The 2008 Financial Crisis and Neoclassical Economics' (2010) 30 *Brazilian Journal of Political Economy* 03

- Brown W, *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press 2015)
- Brownbridge M, *Government Policies and the Development of Banking in Kenya* (Institute of Development Studies 1996)
- , 'Financial Distress in Local Banks in Kenya, Nigeria, Uganda and Zambia: Causes and Implications for Regulatory Policy' (1998) 16 *Development Policy Review* 173
- Brubaker R, *The Limits of Rationality* (Routledge 2013)
- Burton D, 'Credit Scoring, Risk, and Consumer Landscapes in Emerging Markets' (2012) 44 *Environment and Planning A* 111
- , 'Making a Market: The UK Retail Financial Services Industry and the Rise of the Complex Sub-Prime Credit Market' (2004) 8 *Competition & Change* 3
- Butler J, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40 *Theatre Journal* 519
- Çalışkan K and Callon M, 'Economization, Part 1: Shifting Attention from the Economy towards Processes of Economization' (2009) 38 *Economy and Society* 369
- , 'Economization, Part 2: A Research Programme for the Study of Markets' (2010) 39 *Economy and Society* 1
- Callon M, 'Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay' (1984) 32 *The Sociological Review* 196
- , 'The Sociology of an Actor-Network: The Case of the Electric Vehicle', *Mapping the dynamics of science and technology* (Springer 1986)
- , 'Introduction: The Embeddedness of Economic Markets in Economics' (1998) 46 *The Sociological Review* 1
- , 'Actor-Network Theory—the Market Test' (1999) 47 *The Sociological Review* 181
- , 'An Essay on the Growing Contribution of Economic Markets to the Proliferation of the Social' (2007) 24 *Theory, Culture & Society* 139
- , 'Some Elements of a Sociology of Translation' [2007] *The Politics of Interventions* 57
- , 'How to Design Alternative Markets: The Case of Genetically Modified/Non-Genetically Modified Coexistence' in JK Gibson-Graham (ed), *Making Other Worlds Possible: Performing Diverse economies* (2015)
- Callon M and Muniesa F, 'Peripheral Vision Economic Markets as Calculative Collective Devices' (2005) 26 *Organization studies* 1229
- Carrasco ER, 'The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body' (2010) 19 *Transnat'l L. & Contemp. Probs.* 203

Cattaneo N, Biziwick M and Fryer D, 'The BRICS Contingent Reserve Arrangement and Its Position in the Emerging Global Financial Architecture' (South African Institute of International Affairs 2015) SAIIA Policy Insights 10

Central Bank of Kenya, 'Bank Supervision Annual Report 1999' (Central Bank of Kenya 2000) <[www.centralbank.go.ke](http://www.centralbank.go.ke)>

—, 'Bank Supervision Annual Report 2014' (Central Bank of Kenya 2015) <[www.centralbank.go.ke](http://www.centralbank.go.ke)>

—, 'Bank Supervision Annual Report 2015' (Central Bank of Kenya 2016) <[www.centralbank.go.ke](http://www.centralbank.go.ke)>

—, 'Monetary Policy Statement' (Central Bank of Kenya 2016)

—, 'Submission of Credit Information to Licensed Credit Reference Bureaus' <[https://www.centralbank.go.ke/uploads/banking\\_circulars/1456582762\\_Banking%20Circular%20No%204%20of%202016%20-%20The%20Banking%20Amendment%20Act%202016.pdf](https://www.centralbank.go.ke/uploads/banking_circulars/1456582762_Banking%20Circular%20No%204%20of%202016%20-%20The%20Banking%20Amendment%20Act%202016.pdf)> accessed 16 July 2017

Central Bank of Kenya and Kenya Bankers Association, 'Credit Reference Bureau Data Specification Document' <<https://www.centralbank.go.ke/wp-content/.../KBA-Data-Specification-Document.pdf>> accessed 9 July 2017

—, 'Credit Reference Bureau Data Standards Manual' <<https://www.centralbank.go.ke/wp-content/.../08/KBA-Data-Standards-Manual.pdf>> accessed 9 July 2017

Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya, 'The 2016 FinAccess Household Survey' (Financial Sector Deepening (FSD) Kenya 2016)

Centre for Economic Governance and Aids in Africa, 'The IMF in Kenya: Implications for Health and Development' (Centre for Economic Governance and Aids in Africa 2009)

Cetina KK and Grimpe B, 'Global Financial Technologies: Scoping Systems That Raise the World' in TJ Pinch and Richard Swedberg (eds), *Living in a material world: economic sociology meets science and technology studies* (MIT Press 2008)

Chalongphob Sussangkarn, 'The Chiang Mai Initiative Multilateralization: Origin, Development and Outlook' (Asian Development Bank Institute 2010) Working Paper 230

Chami R, Sharma S and Fullenkamp C, *A Framework for Financial Market Development* (International Monetary Fund 2009)

Charlesworth H, 'The James Crawford Biennial Lecture Series on International Law: Comment' (2003) 24 *Adelaide Law Review* 13

Chimni B, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *Int'l Comm. L. Rev.* 3

—, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melb. J. Int'l L.* 499

—, 'International Financial Institutions and International Law: A Third World Perspective' in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010)

—, 'Prolegomena to a Class Approach to International Law' (2010) 21 *European Journal of International Law* 57

—, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 *Trade, Law and Development* 14

—, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17

—, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective' in John Linarelli (ed), *Research Handbook on Global Justice and International Economic Law* (Edward Elgar Publishing 2013)

Chirathivat S, 'Ten Years after the Asian Crisis: Toward Economic Sustainability in Southeast Asia' (Friedrich-Ebert-Stiftung 2007)

Chorafas DN, *Risk Management Technology in Financial Services: Risk Control, Stress Testing, Models, and IT Systems and Structures* (Elsevier 2011)

Christophers B, *Banking across Boundaries: Placing Finance in Capitalism* (John Wiley & Sons 2013)

Chumo B, 'Kenya's Electricity Access Rate Now at a Historic 60 per Cent' *Daily Nation* (Nairobi, 23 July 2016) <<http://www.nation.co.ke/oped/Opinion/kenya-electricity-access-rate-now-at-a-historic-sixty-per-cent-/440808-3307998-p0whfa/index.html>> accessed 13 July 2017

Chwieroth JM, 'Testing and Measuring the Role of Ideas: The Case of Neoliberalism in the International Monetary Fund' (2007) 51 *International Studies Quarterly* 5

—, 'Normative Change from Within: The International Monetary Fund's Approach to Capital Account Liberalization' (2008) 52 *International Studies Quarterly* 129

—, *Capital Ideas: The IMF and the Rise of Financial Liberalization* (Princeton University Press 2009)

Citron DK and Pasquale FA, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 *Washington Law Review* 1

Clegg L, 'Global Governance behind Closed Doors: The IMF Boardroom, the Enhanced Structural Adjustment Facility, and the Intersection of Material Power and Norm Stabilisation in Global Politics' (2012) 7 *The Review of International Organizations* 285

Clegg L, *Controlling the World Bank and IMF: Shareholders, Stakeholders, and the Politics of Concessional Lending* (Springer 2013)

Clift B and Tomlinson J, 'When Rules Started to Rule: The IMF, Neo-Liberal Economic Ideas and Economic Policy Change in Britain' (2012) 19 *Review of International Political Economy* 477

Coats AW, 'Changing Perceptions of American Graduate Education in Economics, 1953–1991' (1992) 23 *The Journal of Economic Education* 341

Coeckelbergh M, *Money Machines: Electronic Financial Technologies, Distancing, and Responsibility in Global Finance* (Routledge 2016)

Coeckelbergh M, DuPont Q and Reijers W, 'Towards a Philosophy of Financial Technologies' [2017] *Philosophy & Technology* 1

Cohen ES, 'Assessing the Impact of the Global Financial Crisis on Transnational Regulatory Governance: The Case of Public-Private Hybrid Regulatory Networks', *Third Biennial Conference of the ECPR Standing Group on Regulatory Governance, University College, Dublin* (2010) <<http://www.regulation.upf.edu/dublin-10-papers/4H3.pdf>> accessed 17 September 2017

Cohen MR, 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8

Colander D and Klamer A, 'The Making of an Economist' (1987) 1 *The Journal of Economic Perspectives* 95

Competition Authority of Kenya, 'Annual Report and Financial Statements 2014/2015' (Competition Authority of Kenya 2015) Statutory Annual Report

Connelly S, 'Critical Finance Law' <<http://criticallegalthinking.com/2013/11/11/critical-finance-law/>> accessed 4 May 2017

Constant EW, 'Reliable Knowledge and Unreliable Stuff: On the Practical Role of Rational Beliefs' (1999) 40 *Technology and Culture* 324

Cook T and McKay C, 'How M-Shwari Works: The Story So Far' (Consultative Group to Assist the Poor (CGAP) and Financial Sector Deepening (FSD) Kenya 2015) 10

Corea G, *Taming Commodity Markets: Integrated Programme and the Common Fund in United Nations Conference on Trade and Development* (Manchester University Press 1992)

Cotterrell R, 'Feasible Regulation for Democracy and Social Justice' (1988) 15 *Journal of Law and Society* 5

—, *The Sociology of Law: An Introduction* (Oxford University Press 1992)

—, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1997)

Cottier T, 'Cosmopolitan Values in International Economic Law: Myths and Realities' in Beat Sitter-Liver (ed), *Universality, from Theory to Practice: An Intercultural and Interdisciplinary Debate about Facts, Possibilities, Lies and Myths* (Academic Press Fribourg 2009)

Cox RW, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature' (1979) 33 *International Organization* 257

Credit Information Sharing Association of Kenya, 'Credit Scoring' [2016] *CIS Kenya Digest*

—, 'CIS for Innovation and Financial Inclusion: "Mikopo Kisasa"' (Credit Information Sharing Association of Kenya 2016) Conference Report

Cutler AC, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003)

- , 'Gramsci, Law, and the Culture of Global Capitalism' (2005) 8 *Critical Review of International Social and Political Philosophy* 527
- , 'Toward a Radical Political Economy Critique of Transnational Economic Law' in Susan Marks (ed), *International law on the left: re-examining Marxist legacies* (Cambridge University Press 2008)
- Daniel Kalderimis, 'IMF Conditionality as Investment Regulation: A Theoretical Analysis' (2004) 13 *Social & Legal Studies* 103
- Davel G, Serakwane T and Kimondo M, 'Kenya Credit Information Sharing Initiative: A Progress Report 2008-2011' (Financial Sector Deepening (FSD) Kenya 2012) Commissioned Report
- De Goede M, 'The SWIFT Affair and the Global Politics of European Security\*' (2012) 50 *JCMS: Journal of Common Market Studies* 214
- Deakin S and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' [2016] *Journal of Comparative Economics*
- Deloitte Consulting Limited, 'An Analysis of Economic and Competitive Factors Influencing Kenyan Interest Rates' (Kenya Bankers Association 2014)
- Detragiache ME and Demirgüç-Kunt A, *Financial Liberalization and Financial Fragility* (International Monetary Fund 1998)
- Dezalay Y and Garth BG, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1998)
- Di Iorio F, 'Is Methodological Individualism a Reductionist Approach?' [2013] Department of Economics New York University 1
- Dicey AV and Wade ECS, *Introduction to the Study of the Law of the Constitution*, vol 10 (Macmillan & Co 1939)
- Dixon C, 'The New BRICS Bank: Challenging the International Financial Order?' (London Metropolitan University 2015) Global Policy Institute Policy Paper 28
- Dore R, 'Financialization of the Global Economy' (2008) 17 *Industrial and Corporate Change* 1097
- Dreher A, 'The Development and Implementation of IMF and World Bank Conditionality' <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=333960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=333960)> accessed 2 February 2015
- , 'A Public Choice Perspective of IMF and World Bank Lending and Conditionality' (2004) 119 *Public Choice* 445
- DuBois M, 'The Governance of the Third World: A Foucauldian Perspective on Power Relations in Development' (1991) 16 *Alternatives: Global, Local, Political* 1
- Dudziak ML, 'Working toward Democracy: Thurgood Marshall and the Constitution of Kenya' (2006) 56 *Duke Law Journal* 721
- Dunn B, 'Money and Finance', *Global Political Economy* (Pluto Books 2009)
- Dworkin R, *A Matter of Principle* (OUP 1985)

Edelman LB and Stryker R, 'A Sociological Approach to Law and the Economy' in Neil J Smelser and Richard Swedberg (eds), *The handbook of economic sociology* (Princeton University Press; Russell Sage Foundation 2005)

Editorial, 'Correct Credit Bureau Flaws' *Business Daily* (Nairobi, 11 May 2016) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Correct-credit-bureau-flaws/539548-3199370-tgm3vgz/index.html>> accessed 20 September 2016

—, 'Banks Have Themselves to Blame on Interest Rates Bill' *Business Daily* (Nairobi, 28 July 2016) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Banks-have-themselves-to-blame-on-interest-rates-Bill/539548-3320344-10comy4/index.html>> accessed 21 September 2016

Elliott J, Kwack SY and Tavlas GS, 'An Econometric Model of the Kenyan Economy' (1986) 3 *Economic Modelling* 2

Engelen E and others, 'The Limits of Expertise: The United Kingdom as an Unhappy Family', *After the Great Complacency: Financial Crisis and the Politics of Reform* (Oxford University Press 2011)

Epstein GA (ed), 'Introduction: Financialization and the World Economy', *Financialization and the World Economy* (Edward Elgar Publishing 2005)

Epstein RA, 'The Neoclassical Economics of Consumer Contracts Exchange' (2007) 92 *Minnesota Law Review* 803

Eslava L, *Local Space, Global Life* (Cambridge University Press 2015)

Eslava L and Pahuja S, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 *Trade, Law and Development* 103

Falk R, Rajagopal B and Stevens J, 'Introduction' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008)

Feenberg A, 'Subversive Rationalization: Technology, Power, and Democracy' (1992) 35 *Inquiry* 301

—, *Transforming Technology: A Critical Theory Revisited* (Oxford University Press 2002)

—, *Between Reason and Experience: Essays in Technology and Modernity* (MIT Press 2010)

Feinberg RE, 'The Changing Relationship between the World Bank and the International Monetary Fund' (1988) 42 *International Organization* 545

Fengler W, 'How Price Controls Can Lead to Higher Prices' <<http://blogs.worldbank.org/african/how-price-controls-can-lead-to-higher-prices>> accessed 22 September 2016

Ferran E and others (eds), *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012)

'Financial Freedom with L-Pesa Digital Credit Score Certificate – L-Pesa Fintech Blog' <<http://blog.l-pesa.com/index.php/2016/10/05/financial-freedom-with-l-pesa-digital-credit-score-certificate/>> accessed 16 July 2017

Financial Services Authority, 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (UK Financial Services Authority 2009) PUB REF: 003289

Financial Stability Forum, 'Issue Paper of the Task Force on Implementation of Standards' (Financial Stability Forum 2000)

—, 'Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience' (Financial Stability Forum 2008)

Finlayson AC and others, 'The "Invisible Hand": Neoclassical Economics and the Ordering of Society' (2005) 31 *Critical Sociology* 515

Fioramonti L, *Gross Domestic Problem: The Politics Behind the World's Most Powerful Number* (Zed Books Ltd 2013)

Fitzpatrick P, *The Mythology of Modern Law* (Routledge 2002)

Fohlin C, 'Economic, Political, and Legal Factors in Financial System Development: International Patterns in Historical Perspective' (Social Science Research Network 2000) SSRN Scholarly Paper ID 267674 <<https://papers.ssrn.com/abstract=267674>> accessed 8 August 2017

Fourcade M and Healy K, 'Classification Situations: Life-Chances in the Neoliberal Era' (2017) 42 *Historical Social Research / Historische Sozialforschung* 23

Frankfurter GM and McGoun EG, 'Ideology and the Theory of Financial Economics' (1999) 39 *Journal of Economic Behavior & Organization* 159

Frederick John Dealtry Lugard B, *The Dual Mandate in British Tropical Africa* (Edinburgh; London: W Blackwood 1922)

Friedman M, *Capitalism and Freedom* (University of Chicago Press 2009)

Fukuyama F, 'The End of History?' [1989] *The National Interest* 3

Furusawa M, 'Monetary Policy and the Future of Central Banking: Implications for Africa' (50th Anniversary of the Central Bank of Kenya, Nairobi, 13 September 2016) <<http://www.imf.org/en/News/Articles/2016/09/13/sp091316-Monetary-Policy-and-the-Future-of-Central-Banking-Implications-for-Africa>> accessed 22 September 2016

Gabel P, 'Reification in Legal Reasoning' (1980) 3 *Research in Law and Sociology* 25

Garcia-Amador FV, *The Emerging International Law of Development: A New Dimension of International Economic Law* (Oceana Publications 1990)

Garlick S, *The Nature of Masculinity: Critical Theory, New Materialisms, and Technologies of Embodiment* (UBC Press 2016)

Gathii JT, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade L. & Dev.* 26

Gelpi R and Julien-Labruyère F, *The History of Consumer Credit: Doctrines and Practices* (Springer 2000)



- Gerding EF, 'Code, Crash, and Open Source: The Outsourcing of Financial Regulation to Risk Models and the Global Financial Crisis' (2009) 84 *Washington Law Review* 127
- Ghai Y, 'The Theory of the States in the Third World and the Problem of Constitutionalism' (1990) 6 *Connecticut Journal of International Law* 411
- Glick R, Moreno R and Spiegel MM, 'Financial Crises in Emerging Markets: An Introductory Overview' in Reuven Glick, Ramon Moreno and Mark M Spiegel (eds), *Financial Crises in Emerging Markets* (Cambridge University Press 2001)
- Gomez KF, 'Latin America and ICSID: David versus Goliath' (2011) 17 *Law and Business Review of the Americas* 195
- Gordon RW, 'Critical Legal Histories' [1984] *Stanford Law Review* 57
- Gouveia L, 'Reopening Totalities: Venezuela's Restructuring and The Globalisation Debate' in David Goodman and Michael Watts (eds), *Globalising food: agrarian questions and global restructuring* (Routledge 1997)
- Gran G, 'Beyond African Famines: Whose Knowledge Matters?' (1986) 11 *Alternatives* 275
- Granovetter M, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 *American Journal of Sociology* 481
- Gross K, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 *Wash. ULQ* 1031
- Guerrien B, 'Irrelevance and Ideology' [2004] *Post-Autistic Economic Review*
- Guguyu O, 'Central Bank Opposes MPs' Bid to Put Ceiling on Interest Rates' *Daily Nation* (Nairobi, 17 February 2016) <<http://www.nation.co.ke/business/Central-Bank-opposes-MPs-bid-to-put-ceiling-on-interest-rates/996-3080314-11p46wq/index.html>> accessed 26 October 2016
- Gylfason T, *Credit Policy and Economic Activity in Developing Countries with IMF Stabilization Programs* (International Finance Section, Department of Economics, Princeton University 1987)
- Habermas J, 'Technology and Science as Ideology', *Toward a Rational Society: Student Protest, Science, and Politics* (Beacon Press 1971)
- Hajnal PI, *The G8 System and the G20: Evolution, Role and Documentation* (Ashgate Publishing, Ltd 2013)
- Hale RL, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470
- , 'Force and the State: A Comparison of "Political" and "Economic" Compulsion' (1935) 35 *Columbia Law Review* 149
- , 'Bargaining, Duress, and Economic Liberty' (1943) 43 *Columbia Law Review* 603
- Hall P, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25 *Comparative Politics* 275

Hansard Editor, 'Proceedings of the Parliamentary Debate on the Second Reading of the Central Bank of Kenya (Amendment) Bill, during the Session of the 8th Parliament' (Kenya National Assembly 2000) Official Hansard Report

—, 'Proceedings of the Committee of the Whole House, Debate on the Central Bank of Kenya (Amendment) Bill, during the Session of the 8th Parliament' (Kenya National Assembly 2000) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the Finance Minister's 2001 Budget Speech, during the 8th Parliament' (Kenya National Assembly 2001) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the 2002 Budget Speech of the Minister of Finance, during the 8th Parliament' (Kenya National Assembly 2002) Official Hansard Report

—, 'Proceedings of the Reading of the Finance Minister's 2004 Budget Speech, during the 9th Parliament' (Kenya National Assembly 2004) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the Second Reading of the Banking (Amendment) Bill, during the Session of the 9th Parliament' (Kenya National Assembly 2004) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the Banking (Amendment) Bill, during the Session of the 9th Parliament' (Kenya National Assembly 2004) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the Banking (Amendment) Bill, during the Session of the 9th Parliament' (Kenya National Assembly 2005) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the Motion for Adoption of the Report on the Decline of the Kenya Shilling, during the 10th Parliament' (Kenya National Assembly 2012) Official Hansard Report

—, 'Proceedings of the Parliamentary Debate on the Motion for Adjournment of the House, Sine Die, during the 10th Parliament' (Kenya National Assembly 2012) Official Hansard Report

Hansen PH, 'From Finance Capitalism to Financialization: A Cultural and Narrative Perspective on 150 Years of Financial History' (2014) 15 *Enterprise & Society* 605

Hansjörg H, 'After the Financial Crisis: Reforms and Reform Options for Finance, Regulation and Institutional Structure' (2016) 3 *Journal of Economics Bibliography* 172

Harrigan J and Mosley P, 'Evaluating the Impact of World Bank Structural Adjustment Lending: 1980–87' (1991) 27 *The Journal of Development Studies* 63

Harrington CB and Merry SE, 'Ideological Production: The Making of Community Mediation' (1988) 22 *Law & Society Review* 709

Harrison G, *The World Bank and Africa: The Construction of Governance States* (Routledge 2004)

Harvey D, *A Brief History of Neoliberalism* (OUP Oxford 2007)

Heilbroner R, 'Economics as Universal Science' (2004) 71 *Social Research* 615

- Helleiner E, 'A Bretton Woods Moment? The 2007–2008 Crisis and the Future of Global Finance' (2010) 86 *International Affairs* 619
- , 'Multilateralism Reborn? International Cooperation and the Global Financial Crisis' in Nancy Bermeo and Jonas Pontusson (eds), *Coping with Crisis* (Russell Sage Foundation 2012)
- , 'Introduction and Overview', *The Status Quo Crisis: Global Financial Governance After the 2008 Meltdown* (Oxford University Press 2014)
- , 'Was the Market-Friendly Nature of International Financial Standards Overturned?', *The Status Quo Crisis: Global Financial Governance After the 2008 Meltdown* (Oxford University Press 2014)
- Henriksen LF, 'Economic Models as Devices of Policy Change: Policy Paradigms, Paradigm Shift, and Performativity' (2013) 7 *Regulation & Governance* 481
- Hildebrandt M, 'Intricate Entanglements of Law and Technology', *Smart technologies and the end (s) of law: Novel entanglements of law and technology* (Edward Elgar Publishing 2015)
- Hirsch P, Michaels S and Friedman R, 'Dirty Hands" versus "clean Models": Is Sociology in Danger of Being Seduced by Economics?' (1987) 16 *Theory and society* 317
- Ho DE, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?' (2002) 5 *Journal of International Economic Law* 647
- Hornsby C, *Kenya: A History Since Independence* (IB Tauris 2013)
- Hunt A, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law' (1985) 19 *Law & Society Review* 11
- , 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1
- Ikenberry GJ, 'The Future of the Liberal World Order: Internationalism After America' (2011) 90 *Foreign Affairs* 56
- Ingham G, "'Babylonian Madness": On the Historical and Sociological Origins of Money' in John Smithin (ed), *What is Money?* (Routledge 2002)
- International Monetary Fund, *Kenya: 2001 Article IV Consultation-Staff Report; Staff Supplement; and Public Information Notice on the Executive Board Discussion* (International Monetary Fund 2002)
- , 'The Recent Financial Turmoil—Initial Assessment, Policy Lessons, and Implications for Fund Surveillance' (International Monetary Fund 2008)
- , *Articles of Agreement of the International Monetary Fund* (International Monetary Fund 2011)
- , 'The IMF's Response to the Global Economic Crisis' (International Monetary Fund 2016) Factsheet
- International Monetary Fund and The World Bank, 'Assessing the Implementation of Standards: A Review of Experience and Next Steps' (International Monetary Fund 2001) <<http://www.imf.org/external/np/pdr/sac/2001/eng/review.htm>>

IPSOS Public Affairs, 'Stakeholder Awareness of the CIS Mechanism in Kenya' (Financial Sector Deepening (FSD) Kenya 2015) Report Commissioned by FSD Kenya

Irungu G, 'NSE Investors Lose Sh243bn after Rates Cap Hits Bank Shares' *Business Daily* (Nairobi, 15 September 2016) <<http://www.businessdailyafrica.com/NSE-investors-lose-Sh243bn-after-rates-cap-hits-bank-shares/539552-3382894-yk4t1wz/>> accessed 26 October 2016

Jackson TH, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *The Yale Law Journal* 857

Jappelli T and Pagano M, 'Information Sharing, Lending and Defaults: Cross-Country Evidence' (2002) 26 *Journal of Banking & Finance* 2017

Johnson H, in Jagdish N Bhagwati (ed), *The New International Economic Order: The North-South Debate* (MIT Press 1976)

Jürgenmeyer J and Krenn K, 'Classification Situations: A New Field of Research for Valuation Studies?' (2016) 4 *Valuation Studies* 177

Kaffenberger M and Chege P, 'Digital Credit in Kenya: Time for Celebration or Concern?' <<http://www.cgap.org/blog/digital-credit-kenya-time-celebration-or-concern>> accessed 3 July 2017

Kairu SG and Amadi A, 'Kenya Credit Information Sharing Initiative: A Proposed Mechanism for Alternative Dispute Resolution' (Financial Sector Deepening (FSD) Kenya 2014) Commissioned Report

Kanaiya S and Omollo A, '2nd Regional Credit Information Sharing Conference: Unlocking Access to Affordable Credit' (Association of Kenya Credit Providers 2013) Conference Report

Kang'ara SW, 'When the Pendulum Swings Too Far: Structural Adjustment Programs in Kenya' [1998] *Third World Legal Stud.* 109

Kanth R, 'Against Eurocentred Epistemologies: A Critique of Science, Realism and Economics' in Steve Fleetwood (ed), *Critical realism in economics: Development and debate*, vol 12 (Routledge 1999)

Karingi SN and Ndung'u N, *Macro Models of the Kenyan Economy: A Review* (Kenya Institute for Public Policy Research and Analysis 2000)

Kartha S, 'Discourses of the Global South' in John S Dryzek, Richard B Norgaard and David Schlosberg (eds), *The Oxford Handbook of Climate Change and Society* (Oxford University Press 2011)

Kennedy D, 'Preface' in José María Beneyto and others (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2012)

—, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016)

Kennedy DW, 'Some Caution About Property Rights as a Recipe for Economic Development' (Harvard Law School 2009) Working Paper

Kenya Bankers Association, Memorandum of Understanding, 'Memorandum From The Bank Chief Executive Officers Through The Kenya Bankers Association To The Central Bank Of Kenya In Response To The Banking (Amendment) Bill 2015' (10 August 2016) <www.kba.co.ke>

Kenya National Assembly, *Report of the Parliamentary Select Committee on the Decline of the Kenya Shilling Against Foreign Currencies* (10th Parliament-Fourth Session, Kenya National Assembly 2012)

Keynes JM, *General Theory of Employment, Interest and Money* (Atlantic Publishers & Dist 2016)

Kitchin R, 'Thinking Critically about and Researching Algorithms' (2017) 20 *Information, Communication & Society* 14

Kline M, *Mathematics in Western Culture* (Oxford University Press 1964)

Knights D and Vurdubakis T, 'Calculations of Risk: Towards an Understanding of Insurance as a Moral and Political Technology' (1993) 18 *Accounting, Organizations and Society* 729

Koskenniemi M and Lehto M, 'The Privilege of Universality: International Law, Economic Ideology and Seabed Resources' (1996) 65 *Nordic Journal of International Law* 533

Kotz DM, 'The Financial and Economic Crisis of 2008: A Systemic Crisis of Neoliberal Capitalism' (2009) 41 *Review of Radical Political Economics* 305

—, *The Rise and Fall of Neoliberal Capitalism* (Harvard University Press 2015)

Krasner SD, *Structural Conflict: The Third World Against Global Liberalism* (University of California Press 1985)

Krever T, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model' (2011) 52 *Harvard International Law Journal* 287

Krippner GR, 'The Financialization of the American Economy' (2005) 3 *Socio-Economic Review* 173

Kyrtsis A-A, 'Introduction: Financial Deregulation and Technological Change' in Alexandros-Andreas Kyrtsis (ed), *Financial Markets and Organizational Technologies: System Architectures, Practices and Risks in the Era of Deregulation* (Springer 2010)

La Porta R and others, 'Legal Determinants of External Finance' (1997) 52 *The Journal of Finance* 1131

—, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113

Lang AT, 'The Legal Construction of Economic Rationalities?' (2013) 40 *Journal of Law and Society* 155

Langley P, 'Financialization and the Consumer Credit Boom' (2008) 12 *Competition & Change* 133

—, 'Equipping Entrepreneurs: Consuming Credit and Credit Scores' (2014) 17 *Consumption Markets & Culture* 448

Laszlo E and others, 'Obstacles to International Finance', *The Obstacles to the New International Economic Order* (Pergamon Press 1980)

- Latour B, *Science in Action: How to Follow Scientists and Engineers Through Society* (Harvard University Press 1988)
- , *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press 2005)
- Law J, 'Actor Network Theory and Material Semiotics' [2009] *The new Blackwell companion to social theory* 141
- Law J and Singleton V, 'Performing Technology's Stories: On Social Constructivism, Performance, and Performativity' (2000) 41 *Technology and Culture* 765
- Lawson T, 'Mathematical Modelling and Ideology in the Economics Academy: Competing Explanations of the Failings of the Modern Discipline?' (2012) 1 *Economic Thought*
- Leathers CG and Raines JP, 'The Schumpeterian Role of Financial Innovations in the New Economy's Business Cycle' (2004) 28 *Cambridge Journal of Economics* 667
- Lee YW, 'Japan and the Asian Monetary Fund: An Identity–Intention Approach' (2006) 50 *International Studies Quarterly* 339
- Leech D, 'Voting Power in the Governance of the International Monetary Fund' (2002) 109 *Annals of Operations Research* 375
- Lempert R and Sanders J, *An Introduction to Law and Social Science* (University of Pennsylvania Press 1986)
- Lenglet M, 'Conflicting Codes and Codings How Algorithmic Trading Is Reshaping Financial Regulation' (2011) 28 *Theory, Culture & Society* 44
- Leyshon A and Thrift N, 'Lists Come Alive: Electronic Systems of Knowledge and the Rise of Credit-Scoring in Retail Banking' (1999) 28 *Economy and Society* 434
- Li TM, 'Formations of Capital and Identity', *The Will to Improve: Governmentality, Development, and the Practice of Politics* (Duke University Press 2007)
- Liberi J, 'The Financial Stability Forum: A Step in the Right Direction...Not Far Enough' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 549
- Litowitz D, 'Reification in Law and Legal Theory' (1999) 9 *Southern California Interdisciplinary Law Journal* 401
- Lotti L, 'Fundamentals of Algorithmic Markets: Liquidity, Contingency, and the Incomputability of Exchange' [2017] *Philosophy & Technology* 1
- Lozoya J and Bhattacharya AK, 'Introduction' in Jorge Lozoya and AK Bhattacharya (eds), *The Financial Issues of the New International Economic Order: Pergamon Policy Studies on The New International Economic Order* (Elsevier 2014)
- Lukács G, 'Reification and the Consciousness of the Proletariat' in Rodney Livingstone (tr), *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press 1971)

- Mackenzie A and Vurdubakis T, 'Codes and Codings in Crisis Signification, Performativity and Excess' (2011) 28 *Theory, Culture & Society* 3
- Mackenzie D, *An Engine, Not a Camera: How Financial Models Shape Markets* (MIT Press 2008)
- Maeße J, 'Spectral Performativity. How Economic Expert Discourse Constructs Economic Worlds' (2013) 14 *economic sociology\_the european electronic newsletter* 25
- Mager A, 'Algorithmic Ideology' (2012) 15 *Information, Communication and Society* 769
- Maimbo SM, Gallegos H and Alejandra C, 'Interest Rate Caps Around the World: Still Popular, But a Blunt Instrument' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2513126 <<http://papers.ssrn.com/abstract=2513126>> accessed 30 August 2016
- Maniruzzaman AFM, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12 *European Journal of International Law* 309
- Manji A, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya' (2012) 50 *The Journal of Modern African Studies* 467
- Mann H, 'ISDS: Who Wins More, Investors or States?' (International Institute for Sustainable Development 2015)
- Marcuse H, *One-Dimensional Man: The Ideology of Advanced Industrial Society* (Sphere Books 1968)
- , 'Freedom and Freud's Theory of Instincts' (1970) 199 *Five Essays: Psychoanalysis, Politics, Critical Theory*
- , 'Industrialisation and Capitalism in the Work of Max Weber' in Jeremy J Shapiro (tr), *Negations: essays in critical theory* (MayFlyBooks 2009)
- Margulis ME and Porter T, 'Governing the Global Land Grab: Multipolarity, Ideas, and Complexity in Transnational Governance' (2013) 10 *Globalizations* 65
- Marks S, 'Big Brother Is Bleeping Us-with the Message That Ideology Doesn't Matter' (2001) 12 *European Journal of International Law* 109
- , *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2003)
- Marron D, "'Lending by Numbers": Credit Scoring and the Constitution of Risk within American Consumer Credit' (2007) 36 *Economy and society* 103
- Martin WG, *South Africa and the World Economy: Remaking Race, State, and Region* (University Rochester Press 2013)
- Mazrui A and Mutunga W, 'The State Versus Academic Unions in Postcolonial Kenya' in Silvia Federici, Constantine George Caffentzis and Ousseina Alidou (eds), *A Thousand Flowers: Social Struggles Against Structural Adjustment in African Universities* (Africa World Press 2000)
- McCloskey DN, *If You're So Smart: The Narrative of Economic Expertise* (University of Chicago Press 1990)

Mckinnon R and Grassman S, 'Financial Repression and the Liberalisation Problem within Less-Developed Countries' in Dr Sven Grassman and Professor Erik Lundberg (eds), *The World Economic Order* (Palgrave Macmillan UK 1981)

McKinnon RI, *Money and Capital in Economic Development* (Brookings Institution Press 2010)

Metropol Corporation, 'Scores' <<https://www.metropol.co.ke/personal/scores/>> accessed 11 July 2017

Meyer JW and Rowan B, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 *American Journal of Sociology* 340

Michira M, 'Banks Making Too Much Money, Says CS Rotich' *Standard Digital News* (Nairobi, 20 August 2016) <<http://www.standardmedia.co.ke/article/2000212657/banks-making-too-much-money-says-cs-rotich>> accessed 21 September 2016

Micro-Finance Risk Management LLC, 'The Potential for Credit Scoring for SME Lending in Kenya' (Financial Sector Deepening (FSD) Kenya 2008) Report Commissioned by FSD Kenya's GrowthFin Programme

Miévillie C, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17 *Leiden Journal of International Law* 271

Miller P, 'Accounting as Social and Institutional Practice: An Introduction' in Anthony G Hopwood and Peter Miller (eds), *Accounting as social and institutional practice*, vol 24 (Cambridge University Press 1994)

—, 'Calculating Economic Life' (2008) 1 *Journal of Cultural Economy* 51

Minsky HP, 'The Financial Instability Hypothesis: An Interpretation of Keynes and an Alternative to "Standard" Theory' (1977) 20 *Challenge* 20

Miriri D, 'Kenya's Move to Cap Commercial Rates May Lock out Borrowers -IMF' *Reuters* (Nairobi, 25 August 2016) <<http://www.reuters.com/article/kenya-banks-imf-idUSL8N1B639Q>> accessed 22 September 2016

Mirowski P and Nik-Khah E, 'Markets Made Flesh: Performativity, and a Problem in Science Studies, Augmented with Consideration of the FCC Auctions' in Donald A MacKenzie, Fabian Muniesa and Lucia Siu (eds), *Do Economists Make Markets?: On the Performativity of Economics* (Princeton University Press 2007)

Mkandawire PT, *African Voices on Structural Adjustment* (Africa World Press 2003)

Morgan J, 'Introduction' in Jamie Morgan (ed), *What is Neoclassical Economics?: Debating the origins, meaning and significance* (Routledge 2015)

Morgan MS and Knuuttila T, 'Models and Modelling in Economics' in Uskali Mäki (ed), *Philosophy of Economics*, vol 13 (Elsevier 2012)

Moschella M, 'Designing the Financial Stability Board: A Theoretical Investigation of Mandate, Discretion, and Membership' (2013) 16 *Journal of International Relations and Development* 380



- , 'The Institutional Roots of Incremental Ideational Change: The IMF and Capital Controls after the Global Financial Crisis' (2015) 17 *The British Journal of Politics and International Relations* 442
- Muniesa F, Millo Y and Callon M, 'An Introduction to Market Devices' (2007) 55 *The sociological review* 1
- Murphy CN, 'What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology' (1983) 27 *International Studies Quarterly* 55
- Murunga GR, 'Governance and the Politics of Structural Adjustment in Kenya' in Godwin R Murunga and Shadrack W Nasong'o (eds), *Kenya: The struggle for democracy* (Zed Books 2007)
- Musila JW and Rao UG, 'A Forecasting Model of the Kenyan Economy' (2002) 19 *Economic Modelling* 801
- Mutai E, 'MPs Lose 12-Year Battle over Interest Rate Caps' *Business Daily* (Nairobi, 22 April 2012) <<http://www.businessdailyafrica.com/MPs-lose-12-year-battle-over-interest-rate-caps-/539546-1391644-format-xhtml-b67v5bz/index.html>> accessed 27 October 2016
- , 'Parliament Urged to Disband Credit Reference Bureaus' *Business Daily* (Nairobi, 10 May 2016) <<http://www.businessdailyafrica.com/Parliament-urged-to-disband-credit-reference-bureaus/539546-3198168-ggn16x/index.html>> accessed 20 September 2016
- Mutua MW, 'The Ideology of Human Rights' (1995) 36 *Virginia Journal of International Law* 589
- Mutua MW, '(Book Review) Exporting American Dreams: Thurgood Marshall's African Journey by Mary L. Dudziak' (2009) 31 *Human Rights Quarterly* 1146
- Mwega F, 'The Competitiveness and Efficiency of the Financial Services Sector in Africa: A Case Study of Kenya' (2011) 23 *African Development Review* 44
- Nduko J, 'Students' Rights and Academic Freedom in Kenya's Public Universities' in Silvia Federici, Constantine George Caffentzis and Ousseina Alidou (eds), *A Thousand Flowers: Social Struggles Against Structural Adjustment in African Universities* (Africa World Press 2000)
- Ndung'u N, *The Exchange Rate and the Interest Rate Differential in Kenya: A Monetary and Fiscal Policy Dilemma* (Kenya Institute for Public Policy Research and Analysis 2000)
- , 'Credit Information Sharing to Enhance Financial Sector Development' (Launch of the Banking Credit Information Sharing Implementation Project, Nairobi, 27 August 2009) <[www.bis.org/review/r090922a.pdf](http://www.bis.org/review/r090922a.pdf)> accessed 4 July 2017
- Ndung'u NS, 'Governor's Remarks at the Launch of the Study Report on the Cost of Collateral in Kenya' (Launch of the Study Report on Cost of Collateral in Kenya, Nairobi, 24 March 2010)
- Nelken D, 'Is There a Crisis in Law and Legal Ideology?' (1982) 9 *Journal of Law and Society* 177
- Nelson JM, 'Promoting Policy Reforms: The Twilight of Conditionality?' (1996) 24 *World Development* 1551
- New Development Bank, 'Agreement on the New Development Bank' (New Development Bank 2014)

Ngugi G, 'Githae Ducks Bare-Knuckle Interest Rates War with MPs' *Business Daily* (Nairobi, 15 March 2012) <<http://www.businessdailyafrica.com/Githae-ducks-bare-knuckle-interest-rates-war-with-MPs-/539546-1367240-fw3071z/index.html>> accessed 27 October 2016

—, 'Banks Face Major Shake-up If MPs Pass Midiwo Bill' *Business Daily* (Nairobi, 3 October 2012) <<http://www.businessdailyafrica.com/Banks-face-major-shake-up-if-MPs-pass-Midiwo-Bill/539552-1524316-1n05rz/index.html>> accessed 21 September 2016

—, 'CBA Blacklists 140,000 Safaricom Loans Defaulters' *Business Daily* (Nairobi, 26 January 2014) <<http://www.businessdailyafrica.com/markets/CBA-blacklists-140-000-Safaricom-loans-defaulters/539552-2161116-rj8i3kz/index.html>> accessed 5 July 2017

—, 'Banks Defy New Loan Pricing Tool to Rake in Sh141bn' *Business Daily* (Nairobi, 3 February 2015) <<http://www.businessdailyafrica.com/Banks-defy-new-loan-pricing-tool-to-rake-in-Sh141bn/539552-2610950-u5meilz/index.html>> accessed 26 October 2016

—, 'Banks Urge Uhuru to Dismiss Bill Capping Interest Rates' *Daily Nation* (Nairobi, 28 July 2016) <<http://www.nation.co.ke/business/Banks-call-on-Uhuru-to-dismiss-proposed-law-on-interest-rates/996-3319776-mit13pz/index.html>> accessed 26 September 2016

—, 'Banks Dangle Sh30bn SME Loans to Avert Interest Rates Cap' *Business Daily* (Nairobi, 11 August 2016) <<http://www.businessdailyafrica.com/Banks-dangle-Sh30bn-SME-loans-to-avert-interest-rates-cap/539552-3340258-s1uqrl/index.html>> accessed 21 September 2016

—, 'CBK Puts Banks on Notice for Abuse of Credit Bureaus' *Business Daily* (Nairobi, 17 August 2016) <<http://www.businessdailyafrica.com/Bank-executives-face-CBK-action-for-misuse-of-credit-scoring/539552-3347638-129jg92/index.html>> accessed 20 September 2016

—, 'Pain of Kenyans Blacklisted for Amounts as Small as Sh100 in Mobile Loans, Bank Fees' *Business Daily* (Nairobi, 9 September 2016) <<http://www.businessdailyafrica.com/Pain-of-Kenyans-blacklisted-for-amounts-as-small-as-Sh100/539552-3374802-103kvlwz/>> accessed 22 September 2016

Ngugi B, 'Cartel-like Behaviour Blamed for High Banking Charges' *Daily Nation* (Nairobi, 9 February 2016) <<http://www.nation.co.ke/lifestyle/smartcompany/Cartel-like-behaviour-blamed-for-high-banking-charges/1226-3068342-hrd92wz/index.html>> accessed 20 September 2016

—, 'IMF Calls on Kenya to Scrap Interest Rate Capping Law' *Business Daily* (Nairobi, 15 April 2017) <<http://www.businessdailyafrica.com/news/IMF-pressure-Kenya-interest-rate-cap/539546-3890742-sc66p0z/index.html>> accessed 22 June 2017

Ngugi RW, 'Financial Reform Process in Kenya: 1989–96' (2000) 12 *African Development Review* 52

Ngugi RW and Kabubo JW, 'Financial Sector Reforms and Interest Rate Liberalization: The Kenya Experience' (African Economic Research Consortium 1998) AERC Research Paper 72

Njihia M, 'Human Biases May Hurt Progress of Financial Tech' *Business Daily* (Nairobi, 15 June 2016) <<http://www.businessdailyafrica.com/corporate/Human-biases-may-hurt-progress-of-financial-tech/539550-3250980-qa750mz/index.html>> accessed 9 July 2017

Njoroge P, 'Banking Sector Reforms Will Reduce Cost of Credit' *Business Daily* (Nairobi, 2 August 2016) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Banking-sector-reforms-will-reduce-cost-of-credit/539548-3329136-lxgpv9/index.html>> accessed 21 September 2016

North DC, *Institutions, Institutional Change and Economic Performance* (Cambridge university press 1990)

—, 'Institutions' (1991) 5 *The Journal of Economic Perspectives* 97

Nourse V, 'Law's Constitution: A Relational Critique' (2002) 17 *Wisconsin Women's Law Journal* 23

O'Boyle B and McDonough T, 'Critical Realism, Marxism and the Critique of Neoclassical Economics' (2011) 35 *Capital & Class* 3

—, 'The State of Nature and Natural States: Ideology and Formalism in the Critique of Neoclassical Economics' in Jamie Morgan (ed), *What is Neoclassical Economics?: Debating the origins, meaning and significance* (Routledge 2015)

Odhiambo NM, 'Interest Rate Reforms, Financial Deepening and Economic Growth in Kenya: An Empirical Investigation' (2009) 43 *The Journal of Developing Areas* 295

Okafor OC, 'Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective' (2005) 43 *Osgoode Hall Law Journal* 171

O'Keeffe G, Valdez M and Nyaggah K, 'Credit Information Sharing in Kenya: A Guide for Credit Providers' (Kenya Credit Information Sharing Initiative 2012)

Osoro J, 'Why Kenyan Banks Remain Competitive Rivals' *Business Daily* (Nairobi, 7 June 2015) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Why-Kenyan-banks-remain-competitive-rivals-/539548-2743248-rlw26d/index.html>> accessed 19 September 2016

Padilla AJ and Pagano M, 'Sharing Default Information as a Borrower Discipline Device' (2000) 44 *European Economic Review* 1951

Pahuja S, 'Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide' (2000) 13 *Leiden Journal of International Law* 749

—, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge University Press 2011)

—, 'Global Poverty and the Politics of Good Intentions' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Bloomsbury Publishing 2014)

Palley TI, 'Financialization: What It Is and Why It Matters', *Financialization* (Palgrave Macmillan UK 2013)

Perrone NM, 'The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity' (2016) 23 *Indiana Journal of Global Legal Studies* 603

Perry-Kessaris A, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development' (2011) 7 *International Journal of Law in Context* 401

—, 'The Re-Co-Construction of Legitimacy of/through the Doing Business Indicators' (2017) 13 *International Journal of Law in Context* 498

- Pippin RB, 'On the Notion of Technology as Ideology: Prospects' in Yaron Ezrahi, Everett Mendelsohn and Howard P Segal (eds), *Technology, Pessimism, and Postmodernism* (Univ of Massachusetts Press 1994)
- Polanyi K, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944)
- Popke EJ, 'Recasting Geopolitics: The Discursive Scripting of the International Monetary Fund' (1994) 13 *Political Geography* 255
- Porter T, 'The G-7, the Financial Stability Forum, the G-20, and the Politics of International Financial Regulation' (The International Studies Association Annual Meeting, Los Angeles, CA, 15 March 2000)
- , 'Introduction: Post-Crisis Transnational Financial Regulation and Complexity in Global Governance' in Tony Porter (ed), *Transnational Financial Regulation after the Crisis* (Routledge 2014)
- Preda A, 'Socio-Technical Agency in Financial Markets: The Case of the Stock Ticker' (2006) 36 *Social Studies of Science* 753
- , 'The Sociological Approach to Financial Markets' (2007) 21 *Journal of economic surveys* 506
- Rahal JE and Mungai G, 'Credit Scoring for SME Banking' (Financial Sector Deepening (FSD) Kenya 2015) Project Technical Note
- Rajagopal B, 'International Law and the Development Encounter: Violence and Resistance at the Margins Violence' (1999) 93 *American Society of International Law Proceedings* 16
- , 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (2000) 41 *Harvard International Law Journal* 529
- , 'From Resistance to Renewal: Bretton Woods Institutions and the Emergence of the "New" Development Agenda', *International law from below: development, social movements, and Third World resistance* (Cambridge University Press 2003)
- , 'International Law and the Development Encounter', *International law from below: development, social movements, and Third World resistance* (Cambridge University Press 2003)
- , *International Law from below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003)
- Rapkin DP and Strand JR, 'Reforming the IMF's Weighted Voting System' (2006) 29 *The World Economy* 305
- Ratuva S, 'Subalternization of the Global South: Critique of Mainstream "Western" Security Discourses' (2016) 28 *Cultural Dynamics* 211
- Raz J, 'Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195
- , 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (OUP 2009)

Reddix-Small B, 'Credit Scoring and Trade Secrecy: An Algorithmic Quagmire or How the Lack of Transparency in Complex Financial Models Scuttled the Finance Market' (2011) 12 UC Davis Business Law Journal 87

Reijers W and Coeckelbergh M, 'The Blockchain as a Narrative Technology: Investigating the Social Ontology and Normative Configurations of Cryptocurrencies' [2016] *Philosophy & Technology* 1

Reinisch A, 'Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases - Comments on CMS v. Argentina and LG&E v. Argentina' (2007) 8 *Journal of World Investment & Trade* 191

Reiter SA, 'Economic Imperialism and the Crisis in Financial Accounting Research' (1998) 9 *Critical Perspectives on Accounting* 143

Republic of Kenya, 'Report of the Commission of Inquiry into Illegal/Irregular Allocation of Land' (Government Printers 2004)

—, 'Final Report of the Truth Justice and Reconciliation Commission' (Government Printers 2013)

Riddell JB, 'Things Fall Apart Again: Structural Adjustment Programmes in Sub-Saharan Africa' (1992) 30 *The Journal of Modern African Studies* 53

Ritzer G, *Expressing America* (SAGE 1995)

Rodrik D, 'After Neoliberalism, What?', *Remarks at the BNDES seminar on New Paths of Development, Rio de Janeiro, September* (2002)

Rona-Tas A, 'The Off-Label Use of Consumer Credit Ratings' (2017) 42 *Historical Social Research / Historische Sozialforschung* 52

Rono JK, 'The Impact of the Structural Adjustment Programmes on Kenyan Society' (2002) 17 *Journal of Social Development in Africa* 81

Ropohl G, 'A Critique of Technological Determinism' in PT Durbin and F Rapp (eds), *Philosophy and Technology* (Springer Science & Business Media 2012)

Salyer LE, 'The Constitutive Nature of Law in American History' (1991) 15 *Legal Studies Forum* 61

Santos A, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006)

Santos AC and Rodrigues J, 'Economics as Social Engineering? Questioning the Performativity Thesis' (2009) 33 *Cambridge Journal of Economics* 985

Sanya S and Gaertner M, *Assessing Bank Competition within the East African Community* (International Monetary Fund 2012)

Sarat A and others, 'From the Special Issue Editors' (1988) 22 *Law & Society Review* 629

Sargent N, 'Law, Ideology and Corporate Crime: A Critique of Instrumentalism' (1989) 4 *Canadian Journal of Law and Society* 39

Schirm SA, 'Ideas and Interests in Global Financial Governance: Comparing German and US Preference Formation' (2009) 22 Cambridge Review of International Affairs 501

Schwartz V, 'Credit Scoring in Kenya: Observations and Comparisons from the Field | Kiva' <<https://fellowsblog.kiva.org/fellowsblog/2012/08/30/credit-scoring-in-kenya-observations-and-comparisons-from-the-field>> accessed 17 July 2017

Scott SV, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 Eur. J. Int'l L. 313

Scott SV and Zachariadis M, *The Society for Worldwide Interbank Financial Telecommunication* (Routledge 2013)

Searle JR, *The Construction of Social Reality* (Simon and Schuster 1995)

Sen A, *Development as Freedom* (OUP 2001)

Shaw ES, *Financial Deepening in Economic Development* (Oxford University Press 1973)

Shklar JN, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964)

Sinha SP, *Legal Polycentricity and International Law* (Carolina Academic Press 1996)

Sklair L, *Globalization: Capitalism and Its Alternatives* (3rd edn, Oxford University Press 2002)

Slattery D and others, 'Neoclassical Economics: Science or Neoliberal Ideology?' (2013) 10 European Journal of Economics and Economic Policies 313

Slough M and Arora S, 'Credit Reference Project Phase II Mid Term Review' (Financial Sector Deepening (FSD) Kenya 2013) Commissioned Report

Soederberg S, 'On the Contradictions of the New International Financial Architecture: Another Procrustean Bed for Emerging Markets?' (2002) 23 Third World Quarterly 607

Sornarajah M, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Year Book of International Law 19

—, 'Resistance and Change in International Investment Law', *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015)

—, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' (2016) 37 Third World Quarterly 1972

Steil B, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order* (Princeton University Press 2013)

Stephen MD, 'Rising Powers, Global Capitalism and Liberal Global Governance: A Historical Materialist Account of the BRICs Challenge' (2014) 20 European Journal of International Relations 912

Stewart C, 'The Rule of Law and the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 Macquarie Law Journal 135

Stiglitz JE, 'Capital Market Liberalization, Economic Growth, and Instability' (2000) 28 *World development* 1075

—, *Globalization and Its Discontents* (Penguin 2003)

—, 'Capital-Market Liberalization, Globalization, and the IMF' (2004) 20 *Oxford Review of Economic Policy* 57

—, 'The Economics Behind Law in a Market Economy: Alternatives to the Neoliberal Orthodoxy' in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press 2013)

Stryker R, 'The Sociology of Law' in Clifton D Bryant and Dennis L Peck (eds), *21st Century Sociology: A Reference Handbook* (SAGE 2006)

Summers LH, 'Time US Leadership Woke Up to New Economic Era' <<http://larrysummers.com/2015/04/05/time-us-leadership-woke-up-to-new-economic-era/>> accessed 11 January 2018

Sumner C, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (Academic Press London 1979)

Sypnowich C, *The Concept of Socialist Law* (Oxford University Press UK 1990)

Szydlowska A, 'Credit Reference Bureau Phase II Final Evaluation Report' (Financial Sector Deepening (FSD) Kenya 2015) Commissioned Report

Tala, 'About' (TALA) <<http://tala.co/about/>> accessed 14 July 2017

Tala Kenya, 'Financial Freedom: 4 Lessons from Tala Customers' <<https://medium.com/tala/financial-freedom-4-lessons-from-tala-customers-24924b97fcd3>> accessed 16 July 2017

—, 'How Positive Credit Reporting Can Help You Grow' <[https://medium.com/@tala\\_KE/how-positive-credit-reporting-can-help-you-grow-931e09f271f4](https://medium.com/@tala_KE/how-positive-credit-reporting-can-help-you-grow-931e09f271f4)> accessed 11 July 2017

Tamanaha BZ, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2008) 3 *NYUJL & Liberty* 516

Taylor I, *Global Governance and Transnationalizing Capitalist Hegemony: The Myth of the 'Emerging Powers'* (Routledge 2016)

The de Larosière Group, 'Report of the High-Level Group on Financial Supervision in the EU' (European Commission 2009)

The President's Working Group on Financial Markets, 'Policy Statement on Financial Market Developments' (United States Department of the Treasury 2008)

Thompson JB, *Ideology and Modern Culture: Critical Theory in the Era of Mass Communication* (Polity Press 1990)

- Thompson P, 'Worlds Apart? The Political Economy of Communication, Information and Institutional Investor Media Usage in Global Financial Markets' (RMIT University 2010) <<https://researchbank.rmit.edu.au/view/rmit:10303>> accessed 1 July 2015
- Tieleman K, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' [2000] UN Vision Project on Global Public Policy Networks
- Tironi M, 'Modes of Technification: Expertise, Urban Controversies and the Radicalness of Radical Planning' (2015) 14 *Planning Theory* 70
- Titi C, 'Investment Arbitration in Latin America: The Uncertain Veracity of Pre-Conceived Ideas' (2014) 30 *Arbitration International* 357
- TNS RMS East Africa, 'A Baseline Survey Technical Report on Local Public Opinion on the Credit Information Sharing Mechanism' (Financial Sector Deepening (FSD) Kenya 2014) Report Commissioned by FSD Kenya
- Trubek DM, 'Max Weber on Law and the Rise of Capitalism' [1972] *Wis. L. Rev.* 720
- , 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *The Yale Law Journal* 1
- , 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575
- Trubek DM and Galanter M, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 1974 *Wisconsin Law Review* 1062
- Tshuma L, 'The Political Economy of the World Bank's Legal Framework for Economic Development' (1999) 8 *Social & Legal Studies* 75
- Tsingou E, 'Transnational Private Governance and the Basel Process: Banking Regulation and Supervision, Private Interests and Basel II' in Jean-Christophe Graz and Andreas Nölke (eds), *Transnational Private Governance and its Limits* (Routledge 2008)
- , 'Regulatory Reactions to the Global Credit Crisis: Analyzing a Policy Community under Stress' [2010] *Global Finance in Crisis. The Politics of International Regulatory Change*. London and New York: Routledge 21
- Udehn L, *Methodological Individualism: Background, History and Meaning* (Routledge 2001)
- Umar K, 'Rationalism and the Problematique in Policy Making and Analysis : The Case of Public Policy Targeting in Africa' <<http://repository.up.ac.za/handle/2263/3955>> accessed 13 January 2017
- United Nations, 'Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System' (United Nations 2009)
- United Nations Conference on Trade and Development, 'Debt Management and Financial Analysis System' (United Nations Conference on Trade and Development 1992) DMFAS Newsletter 1



—, *World Investment Report 2015: Reforming International Investment Governance* (25 edition, United Nations Publications 2015)

—, 'Financial Regulatory Reform after the Crisis', *Trade and Development Report 2015: Making the International Financial Architecture Work for Trade and Development* (United Nations Publications 2015)

—, *Trade and Development Report 2015: Making the International Financial Architecture Work for Trade and Development* (United Nations Publications 2015)

United Nations General Assembly, 'Res 63/277 on Organization of a United Nations Conference at the Highest Level on the World Financial and Economic Crisis and Its Impact on Development (9 April 2009) UN Doc A/RES/63/277'

—, 'Res 63/303 on Outcome of the Conference of the World Financial and Economic Crisis and Its Impact on Development (9 July 2009) UN Doc A/RES/63/303'

Van Egmond S and Zeiss R, 'Modeling for Policy: Science-Based Models as Performative Boundary Objects for Dutch Policy Making' (2010) 28 *Science & Technology Studies*

Vincentelli IA, 'The Uncertain Future of ICSID in Latin America' (2010) 16 *Law and Business Review of the Americas* 409

Wade RH, 'US Hegemony and the World Bank: The Fight over People and Ideas' (2002) 9 *Review of International Political Economy* 215

Wagh S and others, 'Kenya Economic Update : Reinvigorating Growth with a Dynamic Banking Sector' (The World Bank 2013) 83267

Wainwright T, 'Elite Knowledges: Framing Risk and the Geographies of Credit' (2011) 43 *Environment and Planning A* 650

Walker G, 'A New International Architecture and the Financial Stability Forum' in Rosa M Lastra (ed), *The Reform of the International Financial Architecture* (Kluwer Law International 2000)

Walras L, *Elements of Pure Economics* (Routledge 2013)

Walter A, *Governing Finance: East Asia's Adoption of International Standards* (Cornell University Press 2008)

Wansleben L, *Cultures of Expertise in Global Currency Markets* (Routledge 2013)

Weber M and Rheinstein M, *On Law in Economy and Society* (Clarion 1967)

Weber R and Staiger D, 'Financial Stability Board: Mandate and Implementation of Its Systemic Risks Standards' (2014) 2 *International Journal of Financial Studies* 82

Weber RH and others, 'Addressing Systemic Risk: Financial Regulatory Design' (2014) 49 *Texas International Law Journal*

Weber RH and Arner DW, 'Toward a New Design for International Financial Regulation' (2007) 29 *University of Pennsylvania Journal of International Economic Law* 391

- Weitzer R, 'Law and Legal Ideology: Contributions to the Genesis and Reproduction of Capitalism' (1980) 24 Berkeley journal of Sociology 137
- Weller CE and Singleton L, 'Peddling Reform: The Role of Think Tanks in Shaping the Neoliberal Policy Agenda for the World Bank and International Monetary Fund' in Dieter Plehwe, Bernhard JA Walpen and Gisela Neunhöffer (eds), *Neoliberal hegemony: A global critique* (Routledge 2007)
- Were M and others, 'A Theoretical Framework for Kenya's Central Bank Macroeconometric Model' (Africa Growth Initiative at Brookings 2013) Working Paper 10
- , 'Assessing the Effectiveness of Monetary Policy in Kenya: Evidence from a Macroeconomic Model' (2014) 37 Economic Modelling 193
- Were M and Karingi SN, *Better Understanding of the Kenyan Economy: Simulations from the KIPPRA-Treasury Macro Model* (Kenya Institute for Public Policy Research and Analysis 2002)
- Were M, Ngugi R and Makau P, 'Experiences with Financial Sector Reforms and Trade Liberalization in Kenya' (Kenya Institute for Public Policy Research and Analysis 2013) Research Proposal
- Weston LP, *Your Credit Score: How to Improve the 3-Digit Number That Shapes Your Financial Future* (FT Press 2011)
- Wigan D, 'Credit Risk Transfer and Crunches: Global Finance Victorious or Vanquished?' (2010) 15 New Political Economy 109
- Williamson J, 'The Washington Consensus as Policy Prescription for Development' (Institute for International Economics 2004)
- Wisman JD, 'Legitimation, Ideology-Critique, and Economics' (1979) 46 Social Research 291
- Woods N, 'The Challenge of Good Governance for the IMF and the World Bank Themselves' (2000) 28 World development 823
- , *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Cornell University Press 2006)
- World Bank, 'Governance and Development' (The World Bank 1992) 10650
- , *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank Publications 2005)
- , 'Financial Sector Assessment Program: IEG Review of the Joint World Bank and IMF Initiative' (The World Bank 2006)
- , 'General Principles for Credit Reporting' (The World Bank 2011) 70193
- World Health Organization and United Nations Children's Fund, 'Progress on Drinking Water, Sanitation and Hygiene: 2017 Update and SDG Baselines' (World Health Organization 2017) WA 670
- Wroughton L, 'G20 Fails to Endorse Financial Transaction Tax' *Reuters* (4 November 2011) <<https://www.reuters.com/article/g20-tax/g20-fails-to-endorse-financial-transaction-tax-idUSN1E7A302520111104>> accessed 14 January 2018
- X. Y. Q, 'Traditional Chinese Law v. Weberian Legal Rationality' (2010) 10 Max Weber Studies 29

York University, 'Professor Obiora Okafor Appointed Chairperson of UN Human Rights Council Advisory Committee' (*Osgoode Hall Law School*) <<https://www.osgoode.yorku.ca/news/professor-obiora-okafor-appointed-chairperson-un-human-rights-council-advisory-committee/>> accessed 8 January 2018

Zarate J, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (PublicAffairs 2013)

*Albert Ruturi, JK Wanywela & Kenya Bankers Association V The Minister of Finance & Attorney General and Central Bank of Kenya* (2002) 1 Kenya Law Rep 61 (High Court at Nairobi)

*Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & the Attorney General* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts))

*Beatrice Wanjiku & Another v Attorney General & Another* [2012] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts))

*Captain JN Wafubwa v Housing Finance Company of Kenya* [2012] eKLR (The High Court of Kenya at Nairobi (Milimani Commercial Courts))

*Carol Ann Gatt v Barclays Bank plc & Mark Williams* (2013) 97 (Jan) ER D (EWHC 0002 (QB))

*GBM Kariuki v Director of Criminal Investigations & 3 others* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts))

*Jamlick Gichuhi Mwangi v Kenya Commercial Bank Ltd & another* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Law Courts))

*Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR (The Court of Appeal at Nairobi)

*National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR (The Court of Appeal at Nairobi)

*Thuku Kirori & 4 others v County Government of Murang'a* [2014] eKLR (High Court of Kenya at Murang'a)

*Trusted Society of Human Rights Alliance & Others v Judicial Service Commission & the Attorney General* [2016] eKLR (High Court of Kenya at Nairobi (Milimani Commercial Courts))

Banking Act 2016 (Cap 488, Laws of Kenya)