STOCK MARKETS IN SUB-SAHARAN AFRICA: WESTERN LEGAL INSTITUTIONS AS A COMPONENT OF THE NEO-COLONIAL PROJECT

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1. INTRODUCTION

The importation or imposition of Western legal rules and institutions has frequently had a dramatically adverse impact on the societies that have been required to embrace them. Western legal regimes have totally rewritten traditional understandings of family relationships, gender and sexuality,1 and real property interests,2 to name but a few areas of cultural contamination. The recent trend toward the establishment of Western-style stock markets in sub-Saharan Africa (“SSA”) generally has introduced

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1 See, e.g., Marc Epprecht, “Good God Almighty, What’s This!”: Homosexual “Crime” in Early Colonial Zimbabwe, in BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES 197 (Stephen O. Murray & Will Roscoe eds., 1998) (documenting historical and cultural aspects of sexuality and gender in African societies). A Ndebele man was charged with “indecent assault” and was tried before the Zimbabwe colonial courts in 1917 for having sex with another man. When asked to respond to the charge, the man replied, “I admit the offence. I did not know it was a crime.” Id. at 200.

2 See, e.g., Gerald Torres & Kathryn Milun, Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 1990 DUKE L.J. 625 (discussing the land claims of the Mashpee Indian Tribe). In Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff’d sub nom. Mashpee Tribe v. New Seabury Corp, 592 F.2d 575 (1st Cir. 1979), the court ruled that a federal statute, enacted by Congress to protect the land rights of Native Americans, did not apply to the Mashpee tribe, who the court viewed as having relinquished their status as a tribe, by, among other things, organizing themselves as a town to enjoy the right of suffrage and the economic benefits flowing from participating in the political process.
more subtle but no less troubling concerns. This Article attempts a preliminary examination of the advent of stock markets in SSA as a continuation of the neo-colonial project, the replication of Western institutions in the neo-colony for the benefit of the Western economic hegemony, at the expense of domestic interests. It concludes that the use of Western law in the creation and maintenance of SSA stock markets, as a consequence of structural adjustment and other development protocols promoted by the multilateral financial organizations, including the World Bank and the International Monetary Fund, creates an institutional structure in SSA that facilitates the neo-colonial recapture of SSA resources and forces significant redeployment of regional resources from general domestic to specialized foreign uses. But most importantly, the introduction of stock markets in SSA as a legal intervention cannot be an effective component in structuring institutions to promote economic development in the region because they do not impact those economies at the level of production. Instead, the stock markets focus their attention at the processes of finance and trade, making those areas susceptible to global assimilation while having little, if any, impact on the abilities of these economies to increase the export production, which has become the *sine qua non* of economic growth and development. In fact, the deployment of these markets as a component of the elusive path to economic development is almost fraudulent, as these markets will do little, if anything, to encourage convergence, developing economies “catching-up” with more developed economies. Instead, these markets, and the laws upon which they are predicated, are structural interventions in the finance and trade sectors of SSA whose primary consequence is the reallocation of domestic resources from local to international interests.

This Article shall rely on heterodox economics, specifically, institutional, post-Keynesian and anti-essentialist Marxian.

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3 Institutional economics is an American school of economic thought which sees as its focus the study of the behavior of real economies in real time and the efforts of these economies to provision their respective societies. WILLIAM M. DUGGER, UNDERGROUND ECONOMICS: A DECODE OF INSTITUTIONALIST DISSENT xix (1992); James R. Stanfield, The Scope, Method, and Significance of Original Institutional Economics, 33 J. ECON. ISSUES 231, 234 (1999). Institutional theory focuses on human needs and the resources, including technological resources available to meet them. Power and habit rather than markets and competition are the fundamental forces that shape economic processes, and institutions, through
thought, as its analytical platform. Orthodox economics, the neoclassical paradigm, requires the adoption of a number of their development and change impact the structure of the economy and society. Institutional economics is therefore an evolutionary paradigm neither seeking or valuing equilibrium, but focused instead on the forces and processes of change. Id. at 234-35; see Charles R.P. Foucault, The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional, 26 VT. L. REV. 263 (forthcoming 2002) [hereinafter The Rational Rogue].

Johan Deprez notes that there are four characteristics that distinguish post-Keynesian economics:

First, economic actions by firms and individuals are understood to be taking place within a context of true uncertainty, instead of the orthodoxy's full certainty or risk context. Second, a model based in historical time, rather than one based in logical or mechanical time, is the most appropriate abstraction for analyzing the economy. Third, oligopolistic market structures are seen to dominate modern economies, in contrast to the usual orthodox assumption of perfect competition. Fourth, the social nature of income distribution is important in explaining the dynamics of advanced capitalist economies, as opposed to technology and thrift that explain income distribution in orthodox economics.


An anti-essentialist Marxian theory looks to the intervention made by the theory. In essence,

[An antiessentialist theory understands every theory (including itself) to be inherently partial, a particularly focused intervention in the social discourse. From the antiessentialist standpoint, no theory has found or could have found the essence of anything; that is not the point of theorizing. The point is the particular social intervention the theory makes.


7 Generally,

[Neoclassical economics describes the economy as a state of equilibrium, in which the forces of supply and demand interact to achieve optimal allocation of society's resources. The focus of neoclassical economics is on the decision-making activity of entrepreneurs, households and firms. It assumes that economic decision-making is voluntary, informed and rational (i.e., utility maximizing). The models used in neoclassical economics are based on transactions occurring in exchange (i.e., barter) markets, in which perfect competition prevails. In these markets, goods
highly unrealistic assumptions about the way both people and markets behave. Neoclassical theory assumes that humans are primarily and consistently motivated by the goal of maximizing their personal self-interest as they understand it. However, cognitive theory has convincingly demonstrated that humans employ a range of decisional heuristics that result in decision making that exhibits consistent biases away from the theoretical


Economic rationality is the decisional heuristic traditionally used to explain human decision making by classical and neoclassical economists. It conceptualizes human decision making as being motivated primarily by the individual actor’s efforts to maximize her personal utility as she understands it. The Rational Rogue, supra note 3. The rationality heuristic requires that decision making occurs in an ergodic environment in which economic actors have homogeneous expectations. They also must have complete and accurate information concerning the consequences of all potential decisions and the ability to costlessly reverse any decision. Financial Innovation, supra note 7, at 560.


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predictions of neoclassical theory. In contrast, heterodox theories tend to perceive human behavior as being embedded in social processes, which for example, structure the way humans perceive and react to information. Institutional theory also perceives the nature of its inquiry differently than does the neoclassical paradigm. The neoclassical paradigm seeks to construct models which emulate the laws of nature, particularly physics. Institutional economists base their analyses on their examination of the behavior of real economies in historic time; therefore, the institutional approach is more likely to produce results consistent with the reality of human processes. Finally, institutional economics uses the concept of increasing opportunity, a dynamic expanding view of what is possible, as its value premise. The neoclassical paradigm seeks the result that is efficient with no real concern about the consequences of efficiency on the telos of humanity.

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11 Many common occurrences elucidate that factors other than those indicated by neoclassical theory influence human decision making. For example, at times economic actors behave as if they are "anchored" to prior decisions, i.e., they fail to make appropriate modifications in their decisions when faced with information which undermines the reasonableness of their prior decision. People often make decisions using the representativeness heuristic by which they judge the likelihood of a future event by its degree of similarity to the stereotype of the event. And despite the promotion of self-interest practiced by neoclassical theory, people prefer to be treated fairly and tend to treat others fairly as well.

The Rational Rogue, supra note 3.

12 Stein, supra note 10, at 732-33.

13 The models that represent the laws of physics are fundamental models that reliably reflect cause and effect relationships. Emanuel Derman, Valuing Models and Modeling Value, J. PORTFOLIO MGMT. 106 (1996). Neoclassical economic models, however, are either phenomenological models ("as if" models whose arguments are based on extrapolations from known phenomena) or statistical models (models generated by correlating the observable variables to determine their mechanics). Id. at 107-08. Although these models are capable of making predictions, unlike the fundamental models of science, they can claim to express no relationship between cause and effect. Human processes do not form immutably, no matter how inconvenient that may be to economic theorists. Id.

14 See DUGGER, supra note 3, at xxvi-xxvii (explaining that institutionalists construct an evolutionary paradigm to correspond to the evolving economy).

15 Id. at 7-8 (stating that equality of opportunity is a value premise of major significance).

16 Id. (criticizing the efficiency-seeking approach as being based upon the status quo and not reflective of reality).
2. STOCK MARKETS

Organized impersonal equity markets are largely a product of the modern age. Although markets for risk intermediation and banking or deposit-based investment intermediation have existed for millennia, the development of fungible, readily alienable interests in business organizations is a fairly recent development. The creation of the modern business corporation and modern equity instruments was prompted by fairly specific changes in the European financial sector of the sixteenth and seventeenth centuries as well as by geopolitical developments. Stock companies were a response to the risk and reward structure of European efforts to exploit trading opportunities with the non-European world. In the sixteenth century, the uncertainty which accompanied virtually every sea-going mercantile expedition, and the lack of effective means of insuring against the risks which were inseparable from these ventures, encouraged the development of ownership/investment modalities capable of packing the risk-reward function in instruments which could be readily acquired and/or liquidated. Moreover, such instruments could be purchased in quantities that reflected an individual investor's propensity to tolerate loss, should the expedition fail or otherwise fail to produce the returns anticipated.

17 *Financial Innovation*, supra note 7, at 519-20. However, there were forms of partnership that arose in twelfth century Italy in which non-managing investors could participate financially in such *commedas* in which their risk of loss was limited to the amount of their investment. *Id.* at 521 n.88. Innovations in the structure of business organizations were important if large-scale risk-taking ventures were to become practical. The consequences of being a co-owner of a failed partnership, which could include being imprisoned or sold into slavery to satisfy one's debts, provided a strong incentive for the creation of alternative organizations in which personal liability could be limited. *Id.; see also* JONATHAN BASKIN & PAUL J. MIRANTI, JR., *A History of Corporate Finance* 47-50 (1997) (discussing finance and organization of international commerce in the Venetian Republic).

18 Financing the debt resulting from Britain and France's competition for political supremacy in the 17th and 18th centuries was instrumental in the development of secondary markets for debt trading. BASKIN & MIRANTI, *supra* note 17, at 89. For a discussion of the development of the traditional instruments of corporate and commercial finance, see *Financial Innovation*, supra note 7, at 521-24.

19 *See* *Financial Innovation*, *supra* note 7, at 521-24.

20 BASKIN & MIRANTI, *supra* note 17, at 96-98.

21 *Financial Innovation*, *supra* note 7, at 521-23.
Stock exchanges arose to facilitate the secondary trading of such interests in joint stock companies and early corporations. This financing model permitted the accumulation of the large amounts of capital necessary to fund, in the first instance, European commercial adventures, and later, the industrial revolution. These markets, and their proliferation, represented a significant financial sector innovation. Financial innovation occurs "when social, technological, political or ideological change [encourages] the development of new types of commercial transactions and business relationships." For example, technological innovation, in an environment of population growth, urbanization, increased opportunities for education, and the rise of the middle class created both significant capital surplus and a need for more efficient methods of capital allocation. Stock exchanges, as a component of the financial sector, both created and fueled the dissemination of the technological advances of the industrial revolution. Thus, at least at their origin, stock exchanges were responses to real, as opposed to financial, changes in the economy.

It is important to recognize that the development of stock exchanges, or the development of any sophisticated market, is not a natural consequence of economic processes. Instead, markets are interventions in society which operate as structural principles or institutions to channel economic development and the political,

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22 Financial innovation may be defined as a: "'new' or 'better' way of providing the fundamental services of the financial sector." Id. at 518. In the present example, the development of impersonal secondary equity markets provided an efficient new method of investment and investment intermediation.

23 Id. at 535-36.

24 Institutions should not be confused with organizations. Instead organizations, as is true of any human artifact, are composed of numerous institutions, and are impacted by a wide variety of exogenous institutional processes. For institutional economists, an institution is not a material or physical phenomenon. Instead an institution is a socially constructed belief system about the way things are and the way things should be. Institutions are prevalent patterns of thought that impact the structure, operation and consequences of all processes in societies, including its economic and financial processes. Therefore, institutions are structuration principles, and although they cannot exist independently of individuals, their ability to be transmitted enables them to survive the groups, communities and organizations that create them.

The Rational Rogue, supra note 3.
social, and financial consequences thereof in particular directions, both to achieve and to maintain particular distributions of assets, resources, and opportunities. Neoclassical theory generally takes the approach that the economy should be regulated by market processes, i.e., markets establish the prices that determine the ways assets and resources are distributed. Therefore, "[n]othing must be allowed to inhibit the formation of markets, nor must incomes be permitted to be formed otherwise than through sales. Neither must there be any interference with the adjustment of prices to changed market conditions—whether the prices are those of goods, labor, land, or money."

By recognizing that labor, land, and money are not natural commodities, Polanyi necessarily came to the conclusion that the markets for these factors of production are exclusively the result of the exercise of power, whether governmental, organizational or personal. But more importantly, markets are not impartial arbiters of patterns of distribution. Markets differentially impose benefits and burdens on different members of society, whether considered as individuals or as members of groups. It is in this way that a market economy tends to preserve the existing distribution of assets, resources, and opportunities, and it is for this reason that the decision to permit societal processes to be governed by markets does nothing to redress the inequality that is endemic

26 Id. at 68.
27 Id. at 69.
28 See Gregory Baum, Karl Polanyi on Ethics and Economics 15-19 (1996). Karl Polyani, 1886-1964, an economic historian, argued that economic behavior is embedded in social relations. Therefore, capitalism is properly understood as anomalous because capitalism and the markets that define it seek to define social relations in terms of economic behavior. Thus, Polyani rejected the underlying premise of the neoclassical paradigm, the universality of economic functions and relations, and concluded that there are a variety of ways in which economies can be organized without resorting to the dehumanizing characteristics of impersonal markets. His major work, The Great Transformation, was published in 1944. See generally id.; John Lodewijks, Polanyi’s Views on Integration, in Encyclopedia of Political Economy (Philip Anthony O’Hara ed., 1999).
29 Dugger, supra note 3, at xxii. One need only think of the creation of real estate markets in the Western Hemisphere to appreciate both their artificiality and their use as an ideologically inspired means of distributing assets, resources, and opportunities.
to capitalism. Therefore, it becomes essential to determine the likely consequences of the deployment of stock markets in the societal processes of SSA because these markets are purposeful interventions and not the necessary products of economic evolution.

3. THE DEVELOPMENT PARADIGM FOR SUB-SAHARAN AFRICA

Sub-Saharan African societies, like all developing economies, are envisioned as being on a path towards economic convergence in which the developing economies will eventually “catch up” with the developed economies. It generally has been assumed that the road to such development will require that developing economies replicate the financial, commercial, and legal institutions of the West. This conclusion flows from the neoclassical paradigm’s views on the growth of economies.

The neoclassical model of growth most influential in the structuring of economic and social interventions in developing economies is an exogenous growth model based on the work of Nobel Laureate Robert Solow. The Solow model predicts that any given rate of savings and investment will generate a constant level of per capita income, which should rise with the level of

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30 In 1993, the developing economies, including SSA, East Asia, the Pacific, South Asia, the Middle East, North Africa, Latin America, and the Caribbean, contained approximately 85% of the planet’s population but received about 21% of the world’s income. In contrast, the developed economies contained 14.8% of the world’s population, but received nearly 79% of the world’s income. JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 12 (Routeledge ed., 1997). Although it could be argued that some of the less developed economies are not truly capitalistic, the processes of globalism, from their roots in the colonial experience to the present, have actively promoted a hegemonic view of economic processes that one could argue culminated in the collapse of the apparent Soviet Union and the adoption of market processes in the People’s Republic of China. For a discussion of the concept of hegemony as developed by Gramsci, see CARL BOGGS, GRAMSCI’S MARXISM 36-39 (1976). For a discussion of a mechanism by which some of the inequality resulting from capitalism might be moderated, see Robert H.A. Ashford, The Binary Economics of Louis Kelso: The Promise of Universal Capitalism, 22 RUTGERS L.J. 3 (1990) (proposing to address the issue of inequality by extending the ability to invest in corporate equity to everyone).


32 CYPHER & DIETZ, supra note 30, at 125.
exogenous technological change. Simply put, this model suggests that poor nations are poor because of inadequate savings and investment and efforts to raise the amount of national savings and investment will result in increased growth. Because the rate of technological change will generally be greater for developing economies, which are only now investing in advanced technology, as opposed to developed economies that have already absorbed the impact of much technological change, the rate of economic growth of developing countries should be sufficiently higher than the rate of growth for developed economies to permit "catch-up"—the convergence of the level of per capita output for both developed and developing economies.

Therefore, according to the Solow model, the road to economic development requires those societal changes that would stimulate savings and investment to promote economic growth, i.e., the neoliberal economic agenda—free markets, unrestrained currency mobility, low government spending, and a general policy of fiscal austerity. The development paradigm that has resulted from this view of economic growth has sometimes been referred to as the "Washington consensus." The Washington consensus, arising out of Reagan-era geopolitics, consists of the belief that reliance on the private sector and market processes is the best, if not only, way to fuel economic growth and that economic growth is the only way to

33 Robert Solow, A Contribution to the Theory of Economic Growth, 70 Q. J. ECON. 65 (1956); T. W. Swan, Economic Growth and Capital Accumulation, 32 ECON. REC. 334 (1956). A Solow-Swan type production function can be expressed as \( Y(t) = (A(t))(K(t))^{1-\alpha}(L(t))^\alpha \), where \( 0 < \alpha < 1 \), where \( Y \) is total output, \( A \) is exogenous technological progress, \( K \) is accumulated physical capital and \( L \) is labor force growth. CYPHER & DIETZ, supra note 30, at 125-27.

34 CYPHER & DIETZ, supra note 30, at 125-27.

35 Haynes & Husan, supra note 31, at 695.

36 Unfortunately, the Solow model of economic growth failed to reflect historic empirical findings. The magnitude of the differences in capital accumulation between developed and developing economies does not appear to be sufficient to explain the differences in perceived growth rates. In response to this problem, endogenous growth theories have developed which attribute a significant amount of perceived growth to the externalities flowing from differing rates of accumulated human capital as opposed to accumulated physical capital. CYPHER & DIETZ, supra note 30, at 239-42, 245-47. Thus, an endogenous growth model can be expressed as \( Y = F(R, K, H) \), where \( Y \) equals total output, \( R \) is the amount invested in research and development, \( K \) is accumulated physical capital and \( H \) is accumulated human capital. Id. at 246. Endogenous growth models abandon the prospect of convergence as the goal of development in developing economies. Id. at 249-51.
reduce poverty. Political democracy therefore was styled as the path to development because only Western-style democracy safeguarded economic freedom. Therefore, developing economies, by focusing on rapid technological development, would, in time, converge with developed economies, providing comparable levels of output per capita, income, and growth, thereby increasing general societal welfare.

The effectuation of the Washington consensus faced two impediments important to an analysis of the development of stock markets in SSA. First, it was necessary to ensure that economic rights were recognized and protected. Principal among these rights were property rights and contractual rights. Although many, if not most, SSA countries inherited legal regimes for the protection of property rights and the enforcement of contracts from their colonial experiences, it would be recognized that these legal institutions, while necessary, would not be sufficient to enable desirable levels of economic growth. In addition to the adoption
of law-related reforms, developing economies would need large infusions of finance in order to acquire technology that could be used to establish the industries which would improve the economic performance of these countries.

Initially, finance would be provided by Western banks. Although much of the sovereign nation lending in the 1970s and 1980s was in response to Organization of Petroleum Exporting Countries ("OPEC") price increases, some debt was incurred in an effort to expand the level of, first, import substitution, and

outside of the jurisdiction of Egyptian courts or authority. L.S. STAVRIANOS, GLOBAL RIFT: THE THIRD WORLD COMES OF AGE 221 (1981). The collaboration between the colonial powers and the colonized elites further lead to the erosion of the legitimacy of the rule of law. CYPER & DIETZ, supra note 30, at 79. Therefore, it is understandable that Posner, for example, would question the commitment of the developing economies to the protection of contractual and property rights based on the various nations' willingness, if not ability, to create and finance the institutions necessary to protect economic rights. Richard A. Posner, Creating a Legal Framework for Economic Development, 13 WORLD BANK RES. OBSERVER 1 (1998). According to Posner, the mechanics involved in the creation and maintenance of property and contractual rights: "consists of competent, ethical, and well-paid professional judges who administer rules that are well designed for the promotion of commercial activity. The judges are insulated from interference by the legislative and executive branches of government. They are advised by competent, ethical, and well-paid lawyers." Id. at 1-2.

42 CYPER & DIETZ, supra note 30, at 541-47.

43 In 1973, OPEC substantially raised the price of crude oil, resulting in large deficits for developing economies. Id. at 533-36.

44 Import substitution, popular in Latin America and the Caribbean, had as its goal the domestic production of goods that traditionally had been imported. Trade barriers were developed to protect local industries and governments invested in the infrastructure necessary to facilitate production. Thomas D. Boswell, Book Review, 77 ECON. GEOGRAPHY 198 (2001) (reviewing GLOBALIZATION AND NEOLIBERALISM: THE CARIBBEAN CONTEXT (Thomas Klak ed., 1998)). Import substitution was a product of structuralism, which rejected free markets as a road to economic development and relied instead on national planning and regional coordination to promote development. Richard V. Adkisson, Conditionality, Restructuring, and the Reperipherization of Latin America, 32 J. ECON. ISSUES 341, 342 (1998). Although import substitution was abandoned in the early 1980s, reappraisal of its results indicate that it was probably as successful as contemporary neoliberal reform in promoting economic growth. Id. at 347-49. It was replaced in the development tool kit by an export production model, modeled on the experiences of Japan and Korea. Id. at 342. However, the achievement of high levels of export production assumes the existence of markets to absorb these products, and assuming that the developed economies maintain their respective levels of export production, export production among the developing economies can only be successful in a generally expanding world economy, a condition, that at best, must be temporary. Haynes & Husan, supra note 31, at 695.
later, export production. However, the global recession of the early 1980s both limited the amount of new financing available to developing economies and forced them to reallocate increasing amounts of income from export production to debt service, with a predictable impact on domestic economic development. The developing economies in SSA next turned to multilateral financial institutions such as the International Monetary Fund ("IMF") and the World Bank in their efforts to finance export production and, therefore, economic growth. However, the multilateral financial institutions used this opportunity to provide financing as a method of promoting free-market economics, trade, and financial liberalization. Loans from the IMF were conditioned on the borrowing state's agreement to effect specific macroeconomic changes. Although the IMF and World Bank acknowledged that the required free-market based interventions would be painful, the borrowers were assured that within a few years they would reap the benefits of increased economic growth. That did not occur, but instead, decreased government spending translated into cutbacks for education, health, and welfare programs. Devaluation made


46 Id.

47 Id.

48 Generally, borrower nations agreed to cut government spending, remove import controls and domestic commodity price stabilization, devalue the currency, limit domestic credit availability by raising interest rates, liberalize capital flows for both investment and repatriation of profits, and privatize government enterprises.

49 For example, a 1994 World Bank report observed "[u]niversities swallow one-fifth of the education budget in Africa—too large a share." The WORLD BANK, ADJUSTMENT IN AFRICA: REFORMS, RESULTS, AND THE ROAD AHEAD 173 (1994). Instead, African nations were encouraged to focus on providing public primary and secondary education and allow the private sector to provide higher education. Id. at 173. However, decreased investment in public sector higher education and the absence of significant private sector involvement in higher
badly needed foreign equipment and spare parts more expensive. High interest rates promoted speculation rather than savings, and trade liberalization encouraged dumping of foreign products in SSA markets. In response, the multilateral financial institutions insisted that the reforms had not gone far enough and made increasingly stringent economic, fiscal, and legal reforms the prerequisites for further financial assistance. The development of stock markets was promoted as a further reform that would promote economic prosperity.50

4. SUB-SAHARAN STOCK EXCHANGES

The first African stock exchanges arose at the seats of entrenched colonial power. The Johannesburg Stock Exchange was established in 1887,51 the Alexandria Stock Exchange was established in 1888,52 the Cairo Stock Exchange was established in 1903,53 and the Bourse des Valeurs Mobilieres de Casablanca was

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50 See id. at 110 ("Establishing a bound, efficient financial system is important to sustained economic growth . . . . [F]inancial development is correlated with growth, because of higher investment and greater efficiency."). It is noteworthy, however, that redevelopment mechanisms used to rehabilitate western Europe after World War II are rarely considered with respect to currently developing economies. As Professor Canova has convincingly demonstrated, the current economic success of western Europe and the United States flows in large measure from the Marshall Plan by which the United States "recycled" its surplus into long-term public-sector investment in European infrastructure and technology. Timothy A. Canova, Financial Liberalization, International Monetary Dis/Order, and the Neoliberal State, 15 AM. U. INT’L L. REV. 1279, 1315-20 (2000). Although the United States was willing to invest more than $150 billion dollars in current values in Europe, it and the rest of the West have not been willing to make such investments in currently developing economies. Timothy A. Canova, Banking and Financial Reform at the Crossroads of the Neoliberal Contagion, 14 AM. U. INT’L L. REV. 1571, 1638-43 (1999). Professor Canova has properly questioned whether the choice of development mechanisms results from a subordination project that undermines the economic vitality of developing economies as well as "the cultural integrity of racial, ethnic, and religious identity." Timothy A. Canova, Global Finance and the International Monetary Fund’s Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities, 33 U.C. DAVIS L. REV. 1547, 1549-50 (2000).


53 Id.
established in 1929. However, the establishment of stock exchanges by post-colonial governments began more than three hundred years after the commencement of secondary markets for securities in Europe. In fact, most of the SSA stock exchanges have been established within the last twenty years, with a marked acceleration in their creation in the last ten years. Therefore, it is obvious that the financial, political, social, and technological environments in which post colonial SSA stock exchanges were created differ dramatically from the conditions under which they originally arose in the West. The development of post-colonial SSA stock exchanges also differs significantly from their establishment in South America and Asia.

The recent trend toward the establishment of stock markets in SSA does not appear to be a response to the real sector's need for capital. Instead, these markets are being established in response to an economic theory that disfavors the use of economic planning and parastatal business organizations as policy instruments for the promotion of economic development. Neoclassical theory, as applied to developing economies, suggests that improved economic growth and consequential improvements in standards of living require the free operation of market processes for the allocation of assets and resources. It is hoped, if not believed, that what has not been accomplished by foreign aid, extensive borrowing from Western banks, structural adjustment, and financial liberalization will result from the addition of Western-style equity markets to a mix of policy instruments deployed in SSA. It is argued that the various monetary infusions, privatizations, and increased capital mobility have failed to make predicted positive impacts on the standard of living in most of SSA because of the absence of the types of financial and policy discipline believed to be imposed by freely operating capital markets. It is argued that the establishment of such markets will build upon earlier policy adjustments and lead to the path of

55 Secondary trading of securities began on the Amsterdam Bourse in 1611. Financial Innovation, supra note 7, at 522 (citing FRANKLIN ALLEN & DOUGLAS GALE, FINANCIAL INNOVATION AND RISK SHARING 13-14 (1994)). The first official London Stock Exchange came into existence in 1802 and the New York Stock Exchange was created in 1817. Id.
56 See Appendix, infra.
greater efficiency and productivity necessary for sustained improvements in economic growth and the enhancement of human welfare.

5. THE FAILURE OF NEOLIBERALISM AND NEOCLASSICAL DEVELOPMENT THEORY

The challenge to post colonial SSA has been to create economies which permit the improvement of the human condition. Despite its potential, SSA's economic development generally has been perceived as uninspiring. Real per capita income was virtually unchanged during the period 1970-1998.\textsuperscript{57} During that period, world economic growth in per capita income averaged 2.4\% per year with the Asian economies averaging 4.7\% per year.\textsuperscript{58} However, economic growth in SSA varied dramatically by country. The nine fastest growing economies\textsuperscript{59} achieved average growth rates of 3.1\% in real per capital income, while the nine slowest growing economies\textsuperscript{60} experienced 2\% contraction per year in real per capita income. By the middle of the 1990s real per capita income growth averaged 1.5\% in SSA.\textsuperscript{61} These results were achieved despite the deployment of a series of policy interventions, ranging from state-planned economies, extensive borrowing from Western lenders, and the flip-side of state control, privatization.

More important than the failure of structural adjustment to improve economic growth is the fallacious premise upon which these efforts are based. Haynes and Husan, using the assumptions

\textsuperscript{57} \textsc{international monetary fund}, \textit{growth in sub-saharan africa: performance, impediments, and policy requirements}, \textsc{world economic outlook} 136, 136 (1999).

\textsuperscript{58} \textit{Id.} The development of the Asian Tiger economies is advanced as an example of the consequences of financial liberalization and vibrant capital markets. However, irrespective of their recent reverses, it appears very unlikely that the success achieved by the Asian Tiger economies can be replicated by the institution of stock markets in SSA. The Asian economies, unlike their SSA counterparts, are known for their strong industrial and high tech manufacturing sectors that have become integral components of the international marketplace. \textit{See} James K. Galbraith & Lu Jiaqing, \textit{Economic Regionalization, Inequality, and Financial Crisis, in Inequality & Industrial Change: A Global View} 186, 186-89 (James K. Galbraith & Maureen Berner eds., 2000).

\textsuperscript{59} Botswana, Congo, Equatorial Guinea, Guinea, Mauritania, Mauritius, Mozambique, Seychelles, and Swaziland. \textsc{international monetary fund}, \textit{supra} note 57, at 136 n.3.

\textsuperscript{60} Angola, Democratic Republic of Congo, Djibouti, Liberia, Madagascar, Sierra Leone, Somalia, Togo, and Zambia. \textit{Id.}

\textsuperscript{61} \textit{Id.} at 136.
of neoclassical theory, sought to determine when the developing economies would converge with the developed economies.\textsuperscript{62} Assuming optimal long-term average growth rates for convergence, two percent for developed economies and five percent for developing economies, Haynes and Husan concluded that African developing economies would catch-up with the currently developed economies in eighty-nine years.\textsuperscript{63} Assuming the least optimal long-term growth rates for convergence, two percent for developed economies and three percent for developing economies, the developing African economies would catch-up to the currently developed economies in 264 years.\textsuperscript{64} However, Haynes and Husan recognized that their general assumptions were highly unrealistic. First, they assumed long-term positive economic growth despite the fact that on average the rate of growth for the world economy has been declining.\textsuperscript{65} Second, they ignored the tendency of the rate of growth of developing economies to slow down as the adoption of technology and the transfer of resources from low productivity activities to higher productivity industries is fully absorbed by the economy.\textsuperscript{66} Finally, they observed that their assumptions of constant economic growth were inconsistent with the general pattern of economic progress in which growth, stagnation, recession, and depression occur in cycles, and they discovered that periods of sustained growth are exceptional.\textsuperscript{67}

\textsuperscript{62} Haynes & Husan, supra note 31, at 696. The Solow-type growth model used by Haynes and Husan is conditioned on countries having similar rates of savings and population or labor force growth. Therefore, it could be argued that Haynes and Husan were unable to find evidence of movement towards convergence because their examples did not have similar rates of savings and labor force growth. Cypher & Dietz, supra note 30, at 241. However, neoclassical theory would suggest that the differences in savings rates would be equalized by liberalized capital flow regimes and differences in labor force growth should provide an advantage to developing economies with high birth rates. Thus, despite dissimilar rates of savings, market processes should provide the adjustments necessary to achieve the Solow conditions. \textit{Id.}

\textsuperscript{63} Haynes & Husan, supra note 31, at 699.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 698.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.} Haynes and Husan also conclude that a significant impediment to economic growth is financial inequality and that active financial distribution may be an essential component of a development by growth project. \textit{Id.} at 701.
Therefore, the promise of economic convergence is illusory at best. The adoption and implementation of structural adjustment programs in SSA have not resulted in significant economic growth. Moreover, assuming that significant sustained economic growth could be maintained, it would require between 89 and 264 years for the developing economies of SSA to approach the per capita incomes of the currently developed economies. Thus, it is unlikely that the deployment of neoliberal economic policy will promote significant economic development in SSA; however, these policies will result in substantial structural changes to the economies of SSA by promoting the widespread redistribution of assets from public ownership and control to private, non-domestic ownership and control.

6. **Stock Market Establishment and Privatization**

As a component of the multilateral neoliberal economic agenda, privatization provides the ostensibly legal methodology for the transfer of SSA assets from local public control to foreign private control. Privatization has been promoted as a way for SSA states to recapture the resources they have invested in infrastructure and public services and to permit the redirecting of such resources toward improving economic growth and the standard of living. It is based on neoclassical economic theory's conclusion that private ownership is inherently superior to public ownership as a way to improve both production and allocation efficiency. Its adoption however, results from the implementation of structural adjustment programs as a condition of financial assistance from multilateral funding and donor agencies, including the World Bank and the International Development Bank.

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70 Id.

71 Id.
The empirical work exploring the consequences of privatization has been mixed. Although the claim that privatization improves efficiency is supported by some researchers, others have concluded that state ownership or control is no less efficient than private ownership. However, heterodox economic scholars generally have concluded that structural adjustment programs implemented in SSA have been failures. In particular, privatization and a reduced state role in economic planning have not generated the improvements in efficiency and productivity anticipated. Schneider attributes the failure of privatization programs as a component of structural adjustment to corrupt government officials who were in the best position to use their resources and relationships to benefit personally from privatization. This experience has been one of the reasons for the promotion of Western-style capital markets, which are thought to eliminate some of the opportunities for crony capitalism and result in broad distribution of corporate equities among investors. Nevertheless, it must be remembered that much of the privatization occurring prior to the late 1980s was influenced by the Western goal of confronting and isolating non market-based economic policies as part of its Cold War efforts.

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75 Geoffrey E. Schneider, *An Institutionalist Assessment of Structural Adjustment Programs in Africa*, 33 J. Econ. Issues 325 (1999). Schneider argues that the failure of structural adjustment programs and their modification by the introduction of “new,” as opposed to “original,” institutionalist economic principles were not likely to produce better results. Rather, economic priorities and financial policy must be created by the people and governments in which they will be implemented and that “development by fiat from above—or from abroad” is unlikely to succeed. Id. at 331.

76 Id. at 327.

77 Id. at 328 (citing Thomas Callaghy, *The Political Economy of African Debt: The Case of Zaire*, AFRICA IN ECONOMIC CRISIS (John Ravenhill ed., 1986); ROBERT KULTGAARD, TROPICAL GANGSTERS (1990)).

78 See, e.g., MARGARET THATCHER, THE DOWNING STREET YEARS (1993). Thatcher acknowledges that the economic rationales for privatization were secondary to her ideologically based desire to injure British trade unionism. Id. at 668-69.
the Cold War, the development of SSA stock exchanges was viewed as a way to correct the failings of earlier privatization efforts while further encouraging the adoption of market based rules and regulatory regimes.\textsuperscript{79}

Therefore, it comes as no surprise that SSA stock markets have largely been used to float issues of privatized firms. Although the initial public offerings of the stock exchanges in South Africa, Zimbabwe, and Namibia have been largely devoted to raising additional capital for listed mid-range firms, most of the offerings on the SSA stock exchanges have resulted from privatizations.\textsuperscript{80} The Malawi stock exchange, for example, has only conducted IPOs of securities in privatized firms since its establishment in 1996; Zambia's Lusaka stock exchange has only offered the securities of privatized firms since it began operations in 1994; and all of the IPOs on Ghana's stock exchange have also been the result of privatization.\textsuperscript{81}

Although the exchanges in Kenya and Tanzania have offered the securities of private issuers, the privatizations of the Kenya Reinsurance Company, the Housing Financing Company of Kenya, and Chemili Sugar Company will again place the Kenyan exchange in the position of refinancing formerly public entities. It is fair to say that with the exception of the stock markets in South Africa, Zimbabwe, and Namibia, the majority of all of the issues on the SSA stock exchanges have resulted from privatization. Therefore, it appears that the stock markets in SSA are not playing the type of role that they have played in the West and in Asia. They are not providing financing for the development of innovative independent domestic industries. Instead, they appear to be serving two primary functions. First, they provide a means for multinational corporations to acquire controlling stakes in firms whose assets are SSA's exploitable natural resources and exportable agricultural commodities. For example, the following

\textsuperscript{79} Privatization is frequently promoted as a means to achieve greater political as well as financial liberalization. See, e.g., Maxwell O. Chibundu, \textit{Law and the Political Economy of Privatization in Sub-Saharan Africa}, 21 MD. J. INT'L L. & TRADE 1 (1997) (discussing the phenomenon of privatization across the globe).


\textsuperscript{81} Id.
chart indicates that much of the equity of recently privatized Ghanian firms has been acquired by non-Ghanians.\textsuperscript{82}

<table>
<thead>
<tr>
<th>Ghanian Stock Exchange Company</th>
<th>Non-Resident Ownership</th>
<th>Resident Ghanians Ownership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accra Brewery Ltd.</td>
<td>69.35%</td>
<td>NA</td>
</tr>
<tr>
<td>Aluworks Ltd.</td>
<td>3.99</td>
<td>NA</td>
</tr>
<tr>
<td>British American Tobacco</td>
<td>72.46</td>
<td>NA</td>
</tr>
<tr>
<td>Ghana Ltd.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CFAO (Ghana) Ltd.</td>
<td>60.08</td>
<td>NA</td>
</tr>
<tr>
<td>Enterprise Insurance Co. Ltd.</td>
<td>56.72</td>
<td>43.25%</td>
</tr>
<tr>
<td>Fan Milk Ltd.</td>
<td>61.25</td>
<td>38.31</td>
</tr>
<tr>
<td>Ghana Commercial Bank Ltd.</td>
<td>0.06</td>
<td>98.86</td>
</tr>
<tr>
<td>Guinness Ghana Ltd.</td>
<td>69.54</td>
<td>30.35</td>
</tr>
<tr>
<td>Home Finance Co. Ltd.</td>
<td>3.44</td>
<td>96.31</td>
</tr>
<tr>
<td>Metalloplastica (Ghana) Ltd.</td>
<td>0.01</td>
<td>51.39</td>
</tr>
<tr>
<td>Meccanical Lloyd Co. Ltd.</td>
<td>0.01</td>
<td>89.59</td>
</tr>
<tr>
<td>Mobil Oil (Ghana) Ltd.</td>
<td>62.24</td>
<td>37.62</td>
</tr>
<tr>
<td>Pioneer Aluminum Factory Ltd.</td>
<td>6.52</td>
<td>92.72</td>
</tr>
<tr>
<td>Paterson Zochonis Ghana Ltd.</td>
<td>94.44</td>
<td>5.48</td>
</tr>
<tr>
<td>Standard Chartered Bank Ghana Ltd.</td>
<td>77.39</td>
<td>22.43</td>
</tr>
<tr>
<td>Super Paper Products Co. Ltd.</td>
<td>19.34</td>
<td>71.21</td>
</tr>
<tr>
<td>Social Security Bank Ltd.</td>
<td>40.42</td>
<td>59.29</td>
</tr>
<tr>
<td>Unilever Ghana Ltd.</td>
<td>79.09</td>
<td>20.79</td>
</tr>
</tbody>
</table>

The willingness of such international concerns to invest in SSA’s stock markets is at odds with the investor’s general interest in “effective and credible regulation of financial markets.”\textsuperscript{83} SSA stock markets lack the mature and predictable regulatory structure that tend to support demand for securities. Instead, despite their relative youth, SSA stock market issues are enjoying high levels of demand. One possible explanation is that investors do not view these markets as a means for participation in the long-term

\textsuperscript{82} This chart was created from information available at the web site of the Ghana Stock Exchange, \textit{Listed Companies: What is a Listed Company or Security}, available at http://www.gse.com.gh/listed.htm.

appreciation of a firm, or as a method to speculate on co-investor psychology. Instead, these markets and their supporting legal institutions (both domestic and transnational) are being used to establish (or in some instances re-establish) claims to SSA's resources, without serious regard to their role as investment modalities.

Although it is conceivable that the deployment of Western legal institutions would also promote economic growth, this result is unlikely. In order for an economy to develop, particularly when development is viewed primarily from the perspective of increased exports, there must be coordination between trade, finance, and production, the three primary circuits of capital that exist in market economies.\(^4\) A circuit of capital permits money to be converted into capital and then back into money:

In the productive circuit producers, such as industrialists or commercial farmers, raise money or take out loans to purchase capital, such as machinery or buildings, to produce commodities and services for sale . . . . In the financial circuit, financiers lend to consumers or producers who repay with interest. In the trade circuit, merchants buy commodities to sell on at a profit. However, it is only in the productive circuit that commodities, such as the exportables vital to the success of structural adjustment, are produced and value is created.\(^5\)

The focus of the legal interventions promoted by structural adjustment, such as stock markets, is on the financial and trade circuits of capital. Although the multilateral financial institutions and neoclassical theorists argue that these interventions can lead to increased growth, their ability to impact the productive circuits of capital is limited by the focus of SSA stock markets on privatizations, rather than on the provision of capital for the development of new firms or the expansion of existing ones.\(^6\)

\(^4\) See Carmody, supra note 68, at 28.

\(^5\) Id.; see B. ONIMODE, AN INTRODUCTION TO MARXIST POLITICAL ECONOMY (1992).

\(^6\) Although the markets in South Africa and Zimbabwe have produced a number of initial public offerings, other markets, such as those in Ghana, Malawi, and Tanzania have served almost exclusively as means of establishing a sales
Although SSA governments could use the funds resulting from the creation of privatization to strengthen domestic industries, such behavior would be inconsistent with the free market approach favored by the multilateral financial institutions that argue for limited government involvement with the private sector.\textsuperscript{87} For example, to encourage domestic industries, South Korea banned the import of automobiles and other consumer goods for decades, which promoted savings and encouraged the development of domestic industries.\textsuperscript{88} Such policy choices are denied to the economies of SSA. Therefore, liberalized trade and investment regimes, which are created using Western legal institutions, result in the bleeding off of local capital that is used to acquire imported goods or its investment through the auspices of the newly created stock markets in the securities of foreign firms. So the resources acquired by the SSA states as a result of privatizations are used to pay off sovereign debt rather than being devoted to productive activities. Nevertheless, the creation of stock markets provides a strong demonstration of the state’s commitment to privatization and facilitates implementation as mandated by national policies and structural adjustment programs.

The creation of stock exchanges in the West and in Asia were closely related to the real economic functions of stock markets. Keynes argued that stock market intermediated investments should be based on “forecasting the prospective yield of assets over their whole life.”\textsuperscript{89} Instead, stock markets, and particularly

\begin{itemize}
\item[bank]{Emmannelle Moors De Giorgio,} \textit{African Stock Markets Remain Robust,} \textit{AFR. Bus.} May 1, 1999, \textit{available at} 1999 WL 11783830.
\item[bank]{This current approach ignores the history of development in Asia, which involved active government involvement and coordination between the financial, trade and productive circuits of capital.}
\item[bank]{The [International Financial Institution’s] claim the East Asian NICs [Newly Industrializing Countries] exemplify neo-liberal policies. However, Japan, South Korea and Taiwan developed, in part, by regulating the trade and financial circuits of capital in order to promote their own locally owned productive capital. In Korea, the banking system was nationalized, thereby allowing the government to direct resources away from housing, for example, towards activities with higher social rates of return, particularly export-oriented manufacturing.}
\end{itemize}

Carmody, \textit{supra} note 68, at 31.

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{Financial Innovation,} \textit{supra} note 7, at 572 (citing \textit{JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY} 158 (1939)).
contemporary stock markets, have become dedicated to speculation, the effort of attempting to "forecast the psychology of the market."90 Unfortunately, it is frequently easier and more profitable to speculate than to successfully predict the long term profitability of a firm.91 Like Keynes, Thorstein Veblen, one of the progenitors of the Institutionalist economic tradition, also viewed stock exchanges as properly devoted to the valuation of corporate capital, but recognized that the prices generated by stock exchanges are largely influenced by psychological processes used by investors to establish their expectations about a firm's earning capacity.92 The development of SSA stock markets appears largely unrelated to either the traditional neoclassical explanation of stock exchanges, which views them as perfectly competitive markets in which equilibrium prices are established,93 or the heterodox view of stock markets, which sees them as components of the process of social provisioning. Instead they are facilitating the re-establishment international and elite claims to SSA's resources.

7. GLOBALIZATION AND THE NEO-COLONIAL PROJECT

Globalization is both a process and a structure. Multinational corporations engage in this process with the aid of their client states and transnational economic agencies to enhance the profitability of these firms, with the recognition that the benefits of any increased profitability will inure to the firms' largely Western investors. At its most benign, globalization, or multinational diversification, is pursued as a means of minimizing the risks produced by foreign exchange exposure that markets have been
unable to eliminate.\textsuperscript{94} At its worst, globalization is the effort to use economic coercion based, in part, on debt burdens, to establish an economic hegemony capable of expropriating the wealth of developing economies to the coffers of multinational corporations without regard for human conditions, the environment or the future.\textsuperscript{95} Unlike the developing economies with strong manufacturing and industrial sectors that are able to provide some competition to Western based multinationals, the process of globalization in SSA limits those economies to two primary roles. First, it provides raw materials and commodities to international markets. Second, it consumes the technologies and services produced by more developed economies.\textsuperscript{96} In order for this process to work efficiently, it must be free from significant control by local people or national governments, which is facilitated by instituting the neoliberal agenda in the financial and trade sectors of the economy.

In addition to its process consequences, globalization's economic models, constructed on a platform of neoclassical economic theory, view the SSA stock markets as a means to hedge their portfolio exposures on Western and Asian capital markets. SSA stock exchanges are viewed as having very low correlation coefficients with Western and Asian markets.\textsuperscript{97} The factors that have been promoted as limiting long-term economic growth in SSA are seen as de-linking SSA stock markets from financial contagion arising elsewhere in the financial world. Although SSA countries were adversely affected by trade and declines in prices for raw materials and commodities resulting from the "Asian" financial crises, the relatively low degree of international integration, and the underdevelopment of their financial markets, limited the impact of these crises on the SSA financial sector.\textsuperscript{98} As a result, SSA equities prices tend to be less affected by volatility in Western and Asian markets. Moreover, as individual SSA countries tend to be significantly dissimilar to each other, they tend


\textsuperscript{96} Id.


\textsuperscript{98} See INTERNATIONAL MONETARY FUND, supra note 57, at 136.
not to respond to shocks that impact Asian and South American markets as relatively cohesive units. However, the diversification opportunities which, at least in part, resulted in U.S. $2.1 billion of foreign portfolio investment in Africa, ultimately will lead to stronger linkages between market movements in the West and in SSA. It appears reasonable to conclude that the increased use of Western-style legal regulations and governance regimes may result in increased market correlation, both between SSA markets and the West and among SSA markets, as similar legal structures exposed to similar stimuli are likely to produce similar consequences. This effect will also be enhanced by the significant movement among SSA states to harmonize their investment regimes to promote foreign investment and to facilitate cross-listing of securities on various SSA stock exchanges. This provides one of the points of entry for the use of law.

8. LAW AS A SOCIETAL INTERVENTION

Western legal institutions, when introduced into non-Western societies, frequently serve as instruments for deployment of European cultural values, including European economic values that judge a process based on its efficiency and view institutions based on their ability to protect property rights. Law shapes the economic process and renders it subject to the ideologically based goals of its creators. Because law masquerades as “fair, even-handed and impartial,” it is rarely contested. Nevertheless, law organizes behavior, including economic behavior, in ways that make its creators better able to extend their world view and their power. The use of Western-style stock exchanges privileges both

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99 See Foreign Investors’ Interest Has Grown in More, supra note 97.
100 This figure is particularly significant when considered with the fact that the top fifty African blue-chip firms have a total market capitalization of U.S. $7.7 billion. Id.
101 See id.
103 See Chibundu, supra note 79, at 10.
104 See DUGGER, supra note 3, at 213 (discussing development of economic markets out of legislation).
105 See Nunn, supra note 102, at 365-66.
106 Id. at 350-51. Davis and Neacsu refer to this process as “legitimation” and argue that a legalized regime mediates “between real social conditions and our perceptions of them.” Michael H. Davis & Dana Neacsu, Legitimacy, Globally: The
Western views of transactional legality and the economic values upon which such constructs are based, because law legitimates its tacit assumptions and beliefs, which include the inevitability of the existing economic system and its distribution of assets, resources, and opportunities. Of course this is nothing new. Western law has been used to shape the cultures and world views of traditional societies for centuries. However, the promotion of Western legal structures as the “last hope” for the economic revitalization of SSA economies can properly be viewed as a component of a neo-colonial agenda, the use of SSA’s resources to benefit neo-colonial interests at the expense of the neo-colony.

The development of stock markets in England and the United States took place in an environment permeated by the common law, which had been in development for hundreds of years. The common law “filled in the blanks” necessarily created by the establishment of a new financial institution. The profession of lawyering was also well developed and formalized through education, practical experience, and judicial supervision. The professions of accountancy and bookkeeping were well established and were able to provide the ancillary services needed to maintain an exchange. Additionally, the fiduciary principles underlying the agency relationship were present to govern broker-client interactions. It would be false to suggest that SSA lacks the tradition of law and lawyering necessary to achieve compliance with the regulatory structures associated with Western-style stock exchanges. However, it would be unreasonable to assume that the lawyers, judges, and ancillary financial professionals necessary to represent the exchanges, issuers, underwriters, and purchasers were in place, simply sitting around waiting for exchanges to be established so they could then swing into operation. Professor Stuart Cohn’s experience in teaching securities regulation to Ugandan market professionals is instructive:


107 See generally Davis & Neascu, supra note 106 (suggesting the same).
108 Financial Innovation, supra note 7, at 523.
109 Id. at 520-21.
Nothing existed except the laws, a Capital Markets Authority that had no capital markets to regulate, and a stock exchange devoid of stock. Broker-dealers existed in name only, with nothing to trade and no experience in creating public issues. There were no private companies that had engaged in a public offering, and privatization offerings to the public were still in the planning stages. There were few, if any, trained and knowledgeable lawyers and accountants prepared for the demands of a securities market . . . . I had assumed that the statutes, regulations, and organizational structure reflected market realities and developments—an assumption based on U.S. experience, where securities laws came well after the development of primary and secondary securities markets. I had never seen a different model and did not appreciate that sophisticated rules and institutions could be—and indeed had been—promulgated in an experiential vacuum. 111

Professor Cohn found it necessary to spend time on topics like the difference between debt and equity and primary and secondary markets and continued to address such basic concerns throughout the course. This should not be seen as an indication of any failing on the part of the senior business executives and government officials who attended the course. 112 Rather, it is an indication of the lack of familiarity with legal institutions that heretofore were largely irrelevant.

If these markets are to succeed and become genuine African institutions, operated, regulated, and served by local professionals, then significant resources will have to be invested in their training and continuing education. The option of importing market professionals to fill these roles is, of course, unacceptable. Nonetheless, the creation of market professionals in SSA will further the neo-colonial project by redirecting resources to functions that primarily serve the interests of foreign investors and

112 Id. at 105.
domestic elites, rather than the less specialized needs of the general population.  

Another consequence of the differences between the institutional structure of the law at the creation of pervasive securities regulation in the United States in the 1930s and the creation of such regulatory regimes in twenty-first century SSA involves the deployment of governmental resources. The U.S. Securities Acts of 1933 and 1934 were drafted with the expectation that their definitional ambiguities and operational gaps would be resolved by a judiciary and administrative apparatus able to expand to accommodate such new challenges. The commitment of governmental resources to such tasks was not problematic to an administration that had the financial resources to embrace Keynesian solutions to intransigent unemployment. Whether SSA states should devote significant resources to the expansion of its judiciary and administrative structures for the purpose of maintaining stock exchanges is questionable in light of the dubious real value of these exchanges to their economies. However, it is fairly clear that the commitment of resources for such purposes will further the neo-colonial project of diverting resources from general local use to use for specific foreign and/or elite purposes.

Thus, the use of Western-style stock markets in SSA provides a methodology for the recapture of SSA resources by foreign and elite interests and will redirect governmental and societal resources from local to foreign concerns, and from the benefit of the general public to the benefit of the elites.

The intersection of Western law and neoclassical economic theory further serves the neo-colonial project by the way in which it views cause and effect. The basic premise of the African development project is flawed to the extent that it suggests that the causes of African underdevelopment are scalable and susceptible

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113 In considering whether multilateral development agencies should develop conditionalities that might facilitate the development of stable democratic institutions in Africa, Professor Ndulo recognizes the relationship between domestic elites and development paradigms. Ndulo states, "Moreover, the ruling elites are aware of the need for international approval. There is a clear recognition that failure to cultivate an internationally acceptable image would inevitably result in the international marginalization of the ruling elites." Muna Ndulo, The Democratic State in Africa: The Challenges for Institution Building, 16 NAT'L BLACK L.J. 70, 97-98 (1998). Although Professor Ndulo's observation was made in the context of the development of democratic institutions it appears equally applicable to the debate concerning the adoption of "economic reforms." Id.
to explanation in much the same way that an arithmetic expression can be explicated. The flip-side of this understanding of causation is the belief that \(x\) units of financial liberalization, interacting with \(y\) units of privatization and \(z\) units of specialized legal institutions, will result in enhanced economic development. The essentialism of neoclassical economic theory presents SSA underdevelopment as the result of a failure to rely on market mechanisms for the distribution of assets and resources. However, societal phenomena do not follow the cause and effect paradigm of Cartesian essentialism. Rather, societal processes result from circular causation or overdetermination. For the Marxian, overdetermination expresses the constant interplay between theory and all other processes in society. ¹¹⁴ "Institutionalists hold that no part of society, its religion, economy, politics, and so on, is independent of the others, and therefore no single segment can be truly understood in isolation." ¹¹⁵ Societal processes can only be understood in relation to each other with the proviso that "lines" of causality do not run in only one direction.¹¹⁶ Therefore, the only effective deployment theory will recognize that theory and the policy instrument it generates can only be one factor in the mix of societal processes relevant to enhanced economic development. The deployment of free markets and the laws upon which they are structured, like much of neoclassical based policy, achieves a redistribution of resources in assets from the poor and weak to the wealthy and strong. The use of stock exchanges in SSA should be seen as another effort to improve the prospects of the neo-colonial project.

The use of Western-style markets places SSA firmly on an economic path governed by neoclassical concepts of efficiency and in a system in which there is a market mediated allocation of assets and resources. Although other geographic regions have also taken this path, they have not, for the most part, been beset with the structural concerns that continue to plague SSA economies. As Schneider has demonstrated, the potential effectiveness of market based solutions to the economic difficulties of SSA are largely undermined by the region’s institutional characteristics:

¹¹⁴ RESNICK & WOLFF, supra note 5, at 7.
¹¹⁶ Id. at 77-78.
1. An oligopolistic banking sector.
2. A weak insecure state.
3. A large agricultural sector dominated by peasant farming and ceremonial behavior.
4. Inadequate, deteriorating infrastructure designed during the colonial period to extract resources, rather than to facilitate internal trade.
5. An export sector dominated by primary products, many of which are facing declining terms of trade.
6. A small industrial sector that usually is not internationally competitive, partly due to the small size of the domestic market.

9. **POORLY FUNDED EDUCATION AND HEALTH CARE SYSTEMS**

These structural impediments to economic development are embedded in societies that are very different from the ones in which stock markets have been deployed successfully to gradually disseminate the fruits of technology and gradually raise living standards for some population segments. Despite free market's rhetoric, with respect to most things, including economic policy, one size does not fit all. The use of stock markets in SSA will have results governed not by the models of neoclassical theory, but by uncertainty. The only saving grace of economic underdevelopment, the insulation of SSA markets from off-border economic shocks, will be eroded as investment in SSA assets become part of multinational holdings and subject to investment decisions made without regard to their social impact, and regional and international investment harmonization inserts SSA markets in a global financial domino set, subject to financial contagions from which they may lack the ability to recover.

10. **CONCLUSION**

What is needed both in these markets and in globalized markets generally is more, not less, autonomy and less, not greater, integration. The unique set of environmental factors present in the SSA financial sector calls for the deployment of appropriate economic policy instruments. Such policies will not be created if

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117 Schneider, *supra* note 75, at 327.
the criteria for economic success is based on notions of efficiency, and they will not be effective if deployed without adequate regard for their interaction with other societal processes. More importantly, potentially the most effective interventions will not be developed if the potential for genuine innovation is stifled by the wholesale imposition of extant financial and legal institutions on these societies. There is no quick or easy path that will lead to the level of economic development necessary to achieve significant increases in regional standards of living. But there are fairly expeditious ways to replicate colonial relationships in SSA economies. Unfortunately, that appears to be the road before SSA.
APPENDIX

Post Colonial Sub-Saharan African Stock Exchanges

<table>
<thead>
<tr>
<th>Year</th>
<th>Exchange Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>Lagos Stock Exchange [Nigeria]</td>
</tr>
<tr>
<td>1988</td>
<td>Stock Exchange of Mauritius</td>
</tr>
<tr>
<td>1989</td>
<td>Ghana Stock Exchange</td>
</tr>
<tr>
<td>19892</td>
<td>Botswana Stock Exchange</td>
</tr>
<tr>
<td>1990</td>
<td>Swaziland Stock Market</td>
</tr>
<tr>
<td>1991</td>
<td>Nairobi Stock Exchange [Kenya]</td>
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<tr>
<td>1992</td>
<td>Namibian Stock Exchange</td>
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<td>1993</td>
<td>Zimbabwe Stock Exchange</td>
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<td>1994</td>
<td>Lusaka Stock Exchange [Zambia]</td>
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<tr>
<td>1995</td>
<td>Malawi Stock Exchange</td>
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<td>1996</td>
<td>Dar es Salaam Stock Exchange [Tanzania]</td>
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<tr>
<td>1997</td>
<td>Uganda Securities Exchange</td>
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<tr>
<td>1998</td>
<td>Bourse Regionale des Valeurs Mobiliieres119</td>
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<tr>
<td>1999</td>
<td>Maputo Stock Exchange [Mozambique]</td>
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</table>


119 The Bourse Regionale des Valeurs Mobiliieres (BRVM - Regional Stock Exchange) is a regional exchange serving the French-speaking member countries of the West African Economic and Monetary Union (UMOE), including Benin, Burkina Faso, Côte d’Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo. Mbendi Information for Africa, Bourse Regionale des Valeurs Mobiliieres (BRVM), at http://www.mbendi.co.za/exch/25/p0005.htm (last visited Feb. 21, 2002).