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The Utilization of the Rule of Law for Economic Development in Developing States: The Case of Egypt from Nasser to Mubarak

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A Thesis Submitted to the

Department of Law

In partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law

By

Mohamed M. Ahmed

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ABSTRACT

Neoliberal development proponents argue that the rule of law is essential for achieving economic development. It demands adjusting legislative and legal institutional practices to enforce and protect market operations, and the minimizing of state intervention. The IFIs and the developed states adopted this development approach in dealing with developing states through conditional-based lending. Through attaching structural regulative adjustments and the reformation of juristic institutions as preconditions to their fiscal assistance, the IFIs, influenced by the developed states, were able to impose a system of legal economic governance over the developing economies. Across the different development stages, developing states who did not follow the neoliberal development approach managed to achieve greater economic growth in comparison to those who followed it. This paper analyses the rule of law through the different development phases starting in the 1950s till the 2000s. It assesses their interaction with the different economic development paradigms. It defines the techniques and outcomes of adopting the rule of law by the main development actors, mainly the developed and developing states, the IFIs, and the international economic order. It evaluates the essentiality of the rule of law for achieving economic prosperity as a central neoliberal claim. As a case study, this thesis charts the economic transformation of the Egyptian economy from state-led to market-oriented as an economic adjustment transformation that was supervised by the IFIs. The paper argues that, despite the implementation of the rule of law in Egypt as required by the IFIs, the expected economic development was not achieved. Based on such study, this paper undermines the essentiality of the rule of law for economic development and deems it as a neoliberal instrument for economic governance rather than a prerequisite for development.

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I. Introduction

From the ashes of two World Wars, a new global order based, theoretically, on the separation of political conflicts from economic interests was created. This new order was, since the beginning, based on the discrimination between countries which described themselves as developed while considering others as inferior, needy developing countries. The developed states adopted a holistic vision of advancing those who are underdeveloped, by prescribing medicines for economic illnesses and catalysts for economic growth and prosperity. Those were the features on which the new international order was founded. A system that was built on fictitious sympathy and charity between the wealthy nations and the poor ones. The IFIs are among the main actors in that new economic order. As they are the experts in development and the channel through which economic and developmental knowledge are transferred from the most expert nations to the least. Nevertheless, the developing countries never approached their economic objectives of becoming the same as the developed world despite adhering to the economic policies of the IFIs since their establishment.

The economic polarity between the East and the West ignited competition between the two dominant poles in seducing the developing nations' economies. The IFIs played the role of the economic messengers of the West, while the Eastern Bloc did not have such institutional capabilities. However, after the dominance and prevalence of the Western model and the collapse of the Soviet Union, the relations between the developed nations, especially the United States, and the developing states were no longer based on compassion as before; if it ever truly existed. Nonetheless, it shifted toward achieving greater economic success and capital accumulation at the expense of the developing nations.[1] This was not through use of force as before, but through other types of coercion, namely legal ones. The rule of law has become the technique through which economic dominance is assured for the West. Hence, international rules were designed for the governance of the international economic order.

[1] Joseph E. Stiglitz, *Interview*, 11 GLOBALIZATIONS, 473-480 (2014) 11, *available at* https://www.tandfonline.com/doi/abs/10.1080/14747731.2014.951207.

Meanwhile, domestic complementary legal norms are being implanted in the developing states' legal systems by several methods; mainly, IFI conditionality.

Covered by noble developmental schema, such as the one that Amartya Sen advocates for from the outside,[2] and due to forceful economic needs, the IFIs' economic models have found their way into most of the developing countries' systems. From the inside, it is motivated by a wild, unmerciful, neoliberal, capitalistic desire that craves the control and monopolization of resources. The reliance on the rule of law is a strategic choice for development scholars since the legal norm possesses some distinct features that do not exist in any other type of norms. As Kennedy indicated, a legal norm is a very effective tool of governance that possesses the ability to shape economic policy design on the one hand, and ensures the outcomes of different economic operations on the other.[3] A legal norm can impose noble virtues such as justice, fair distribution, and the protection of rights. Nevertheless, and contrary to what may be perceived, morality is not an integral part of its design. This permits its utilization for the complete opposite of the previously stated virtues.

The rule of law that this paper discusses was subject to different structural changes that gave it the characteristics of being economically efficient to the extent of its supersession of other contradicting values and norms. The economic aspect, in this version of the rule of law, incorporated other social interests such as equality, rights, justice, and fair distribution to be either factors for its implementation, or secondary objectives. Yet, economic interests are the main and ultimate end of its implementation. Social values and rights proponents did not have the power to influence its creation, as Anghie expresses.[4] Yet, a pertinent question to be asked is whether the rule of law is essential for economic dominance or economic development? The answer to that question differs depending on which side is asking; the Western states and the IFIs, or the developing countries. The former will regard it as an emancipatory means for the improvement of the economic conditions of the latter. Whereas the latter will identify it as a system of dominance that resembles

[2] *See* Amartya Sen, Development as Freedom, (Alfred Knopf) (1999).
[3] David Kennedy & Joseph E. Stiglitz, Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century30-38, (Oxford University Press) (2013).
[4] Antony Anghie, *Whose Utopia? Human Rights, Development, and the Third World*, 22 *Qui Parle*, 63 (2013).

colonization for the purpose of taking over their resources. Consequently, this research aims at exploring to what extent the rule of law, as a neoliberal requirement that is advocated by IFI policies, is necessary for the achievement of economic development. For the purpose of this paper, Egypt is selected as a case study as one of the developing countries which relied on the neoliberal economic policies adopted by the IFIs to implement its transition and seek better economic conditions.

This paper also questions the development model that was set by the IFIs, which was enforced by conditionality, and implemented by Egypt during its financial crisis in the 1990s. Through the implementation of neoliberal development strategies, Egypt became one of the post-war/colonial economic system's victims. Not by force, but through the rule of law, the current unjust economic order is being coercively applied to developing countries. The World Bank and the IMF perform a significant role in such global injustice through interference in the internal polices of the developing member states, by obliging these states to commit economic suicide through engagement in the biased international trade and investment systems. This raises doubts about the objectives of the current international economic system in general, and the project of development in particular, which is constantly presented with different interfaces to developing states.

In order to do so, the following chapter shall consider the international economic order after the establishment of the Bretton Wood financial organizations, and their neoliberal economic development strategies. It indicates their economic objectives, political restrictions, decision making processes, and the evolution of their scope of operations from financial assistance to policy-making through the rule of law. Chapter three of this paper tracks how the rule of law is being integrated in the different development stages starting from post-World War II and the establishment of the Bretton Woods system, till the 2000s, and the changes in the role of the state in response to this different integration. Chapter four presents the economic transition of Egypt as a case study for transformation from a socialist planned economy to a neoliberal market system, through following the World Bank and the IMF's economic policies. In this regard, the paper shall explore such neoliberal influences on the rule of law in Egypt with regard to both the regulatory and the institutional levels. The Egyptian investment law will be the model on which the neoliberal influences will be

traced, while the Egyptian Supreme Constitutional Court will be the institutional application for the rule of law. This paper additionally reviews the results of the application of the IFI's structural economic adjustments in Egypt.

II. The Establishment and Mandates of the World Bank and the IMF vs. their Practical Application

One of the main features of the new international order after World War II was the separation between the political and economic interests of states. This separation has existed since the creation of the United Nations and the Bretton Woods financial institutions. This chapter will present a background on the establishment of these institutions, with a special focus on the Bretton Woods institutions, since the UN is beyond the scope of this paper. Then it defines the objectives, political limitations, decision making, and the scope of operation of these financial institutions. Lastly, it demonstrates how this new international order magnified the role of these institutions through the powers of globalization.

A. Background on the Establishment of the IFIs and their Role within the International Order

Post-World War II, and in support for Truman's historic speech in 1949,[5] two major international institutional structures were created to practice international political and economic governance. For international economic interests, the World Bank and the International Monetary Fund (IMF) – known as the Bretton Woods institutions – were created in 1944. In 1945, the United Nations was created after the San Francisco conference for international political interests.[6] Secular international political and economic hubs were essential for the accommodation of all states in one place despite their political and economic conflicts. It was an opportunity, especially for states other than the great powers, to have a platform that would enable them to address other nations in the world. In addition, the separation between the political and economic concerns increased the engagement of states as their political and sovereign integrity were not to be touched, while conflict in economic interests was to be negotiated. The two international entities were tasked with imposing a system of governance that involved channels for dispute resolution on the one hand, and to realize the interests of the states on the other, without resorting to the use of force.

[5] JASON HICKEL, THE DIVIDE, A BRIEF GUIDE TO GLOBAL INEQUALITY AND ITS SOLUTIONS 13, (2017).
[6] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality*, (William Heinemann) (2011).

Such institutionalization contributed to creating a set of internationally recognized norms that became recognized as international law later on.[7] These internationally recognized norms acquired their enforceability through the imposition of the characteristics of the legal rule. Accordingly, these rules enjoyed the same features of an ordinary legal norm, being abstract, impartial, and coercive. The establishment of such norms at the international level unified the applicable rules to all member states whether for political or economic interests. The theoretical separation between the United Nations as a political organization, and the World Bank and the IMF, as economic ones, resulted in the separation between the rules that govern both political and economic interests as well. This new order distinguished norms that states are required to respect and implement. It also established authoritative international references that were granted the competence to decide what is just and what is not on the international stage, on the one hand, and what is political and what is not on the other.

After the Second World War, states were categorized according to their economic strength and advancement. The developed world was the one that possessed the economic and productive capabilities; while the developing world was the one that needed economic assistance to become developed.[8] This assistance was supposed to be offered through the newly established secular economic arms of the developed nations. Whether through consultancy or financial aid, the Bretton Woods institutions were entitled to contribute to the development of the least developed nations. The newly established system was based on the differentiation between the advanced nations and the "backward" ones that lacked the requirements to be considered developed.[9] Additionally, it was oriented by the conception of development as an economic objective to be administrated by the World Bank and the IMF.[10]The World Bank and the IMF's mandates indicate the objectives of the two institutions, and their mutual relations with the member states. Nevertheless, the manner by which these financial institutions performed their role signified how they overstepped their limits

[7] *Supra* note 6.
[8] *Id.*
[9] *Id.*
[10] *Id.*

by intervening in the policy-making of the member states, which was restricted, as will be demonstrated, within their articles of agreement.

B. The Mandates of the World Bank and the IMF, the Political Limitations, and Decision Making

Each of the two financial institutions has its own mandate that decides the frame of their operations. While both institutions are concerned with international economic interests in association with the states, each one approaches such economic needs from a different angle. Both institutions have 189 member states,[11] and both institutions are entitled to assist member states with economic difficulties by means of financial assistance and consultations.[12] It is also important to note that both institutions became specialized agencies of the United Nations.

1. Organizational Structure

Unlike the IMF, the World Bank has many suborganizations. The main two are the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). In addition, the World Bank Group includes the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID), each as a separate legal entity.[13] For the purpose of this paper, the focus will be on IBRD, IDA, and ICSID.

2. Objectives

The objective of the IBRD is to: (i) assist in the reconstruction and development of the member states' territories by encouraging capital investment, restoring economies that were affected by wars, and motivating development in less developed countries; (ii) promote private foreign investment, and to substitute its absence through financing productive objectives on suitable conditions; (iii) promote long-term balanced growth of international trade, and the encouragement of international investment in order to

[11] *See* the World Bank's member states, available at https://www.worldbank.org/en/about/leadership/members. For the IMF, available at https://www.imf.org/external/np/sec/memdir/memdate.htm.
[12] *See*, scope of operations of the IMF within its articles of agreement, available at https://www.imf.org/external/pubs/ft/aa/index.htm.
[13] *See* the organizational structural of the World Bank, available at https://www.worldbank.org/en/about/unit.

raise the standard of living and the labor conditions of member states; (iv) arrange loans for urgent and useful projects; (v) operate with regard to the effect of international investment on the member states territories after periods of war, in order to ensure the peaceful transition from a wartime to peacetime economy.[14] The objective of the IDA, as indicated in Article I of its mandate, is to endorse economic development and to increase productivity and the standard of living of the less developed areas of the world. This is to be achieved through financing important and more flexible development requirements in order to decrease the pressure of the balance of payments of member states, complementing the role played by the IBRD.[15]

On the other hand, the IMF has mainly a macroeconomic objective. The IMF is tasked with stabilizing the international monetary system through assisting member states. This is done by either offering loans or consultations, in order to adjust their balance of payments and to fix their exchange rates. The IMF is also meant to monitor and ensure the consistency of member states' currency par values, and to provide financial support in case of the instability of the balance of payments.[16]

3. Decision-Making

With regard to decision making within the World Bank and the IMF, it reflects the contributions of donating nations since it is a weighted voting system.[17] Both institutions have a board of governors in which each member has the right to be represented. This representation takes place by appointment, either the minister of finance or the governor of the central bank of each member state.[18] As for the IMF, most of the board's powers are delegated to the twenty-four members of the Board of Executives, with exception to some significant decisions. Decisions concerning admitting a new member, making quota adjustments, and amending the articles of agreement are reserved to the Board of Governance.[19] With regard to voting, decisions

[14] *See*, Article I of the IBRD's article of agreement, *available at* https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement/article-I.
[15] *See*, the IDA articles of agreement, *available at* http://pubdocs.worldbank.org/en/341581541440486864/IDAArticlesofAgreementEnglish.pdf.
[16] *See*, the IMF articles of agreement, *available at* https://www.imf.org/external/pubs/ft/aa/index.htm.
[17] Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L., 199, 211 (2004).
[18] Daniel Bradlow, *The World Bank, the IMF, and Human Rights*, 6 JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS, (1996).
[19] *Id.*

can be made by simple majority, or in certain cases a majority of 85%, as in the case of quota adjustment.[20] The United States has around 17% of the total vote, and has the right to veto decisions. As for the World Bank, the United States possesses around 15% of the total vote; while both China and India, which are the most populated states in the world, have around 3% of the voting power combined.[21] The World Bank also has a board of executive directors that run day-to-day tasks,[22] which is relatively smaller than the IMF's Executive Board.[23]

4. Political Restrictions

Both the mandates of the IBRD and IDA stipulate that,

> The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.[24]

As for the member states, the World Bank's mandate indicates that,

> The member states shall respect the international character of these organizations and refrain from seeking to influence the officials of these organizations who owe their primary duty of loyalty to the organization.[25]

Accordingly, the articles of agreement of the World Bank require mutual restriction of influence between the organization and its member states and to consider only the objectives of the organization that was established without bias. This separation between the developmental objectives of the World Bank and the political interests of its members, especially the United States, is hard to imagine; given the influence of

[20] *Supra* note 18.
[21] Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL., 1 (1999); *See also* for the United States' veto in the World Bank https://www.worldbank.org/en/country/unitedstates/overview; For the IMF, *see* https://fas.org/sgp/crs/misc/IF10676.pdf.
[22] *Id.* at 264.
[23] *Supra* note 18.
[24] *Supra* note 18, at 53.
[25] *Id*. *See also*, the World Bank articles of agreement, *available at* https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement.

the latter within the organization, and its implications on economic policy-making with regard to developing member states.

Unlike the Bank, the IMF's mandate does not include a provision that clearly restricts interference in the political affairs of member states.[26] Nevertheless, Article IV of the mandate indicates that the IMF should, "respect the domestic social and political policies and in applying these principles… pay due regard to the circumstances of members".[27] The IMF recognized this article as a restriction against interfering in member states' internal political affairs.[28] Similarly, as with the World Bank, the concern that this article invoked is also debatable because of the recent policy reform role that the IMF performed within developing states, which will be discussed later on.[29]

In this regard, neither the World Bank's mandate nor the IMF's define what is to be considered "political". In addition, and especially with regard to the World Bank, the mandates do not define the exact framework for using terms such as "economic" or "development". These terms are the core of what the World Bank and the IMF do, yet they are not well defined in either theory or practice. In that regard, both institutions reserve the right to interpret their articles of agreements to their boards only.[30] Accordingly, other parties' interpretations, even authorized legal ones, do not count or bind. The reason for the lack of decisiveness could be to avoid restricting these institutions, while leaving the decision as to the appropriate way of interference to their judgments, or to direct the institutions to adopt the definitions and the scope of interpretations of those terms in the manner that they are internationally accepted.[31]

This unclarity makes it difficult to determine what to include or exclude from the political sphere and the scope of operations of these institutions. As a consequence, the provisional restrictions indicated in the mandates of both institutions are thought to be useless, since how can one restrict the undefined? However, from the

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[26] *Supra* note 21.
[27] *Supra* note 18; *See also*, the IMF articles of agreement, *available at* https://www.imf.org/external/pubs/ft/aa/index.htm.\.
[28] *Supra* note 18.
[29] The scope of IMF operations will be discussed in the next part while tackling the Scope of the IFIs operations.
[30] Anghie, *supra* note 21, at 270.
[31] *Supra* note 18.

institutional point of view, both the Bank and the IMF are acting in accordance with their economic objectives on the one hand, and member state needs on the other.

Such practice was undisputed since their establishment till the 1970s, during which many economic twists took place. The oil crisis in the 1970s, the debt crisis in the 1980s, and the Asian financial crisis in the 1990s changed the way economics is perceived.[32] Accordingly, the foundational concepts of achieving economic development also have changed with the rise of neoliberal economics. The border between economics, development, law, and policy began to vanish starting from this period. The IFIs adopted a new economic approach within their operations, by including in their scope a state's internal governance systems as an essential element for economic development and stability.

Both institutions expanded the scope of their operations through adopting policy-based lending or conditionality, as will be demonstrated in the coming sections. The new approach required the implementation of structural adjustment with regard to the economic policies of the developing member states in order to adjust their mode of governance. The rule of law became an integral part of IFI policies, on which their development strategies were based starting in the 1970s. Many scholars criticized this expansion in the scope of operations of these financial institutions and considered it against their articles of agreement, which will be considered in the next section.

C. The Operational Evolution of the IFI, the SAP, and Political Accusations

The scope of operations of the IFIs will be reviewed over three periods. The first is before the adoption of the structural adjustments. The second is during its adoption, while the last period is operations post-SAP policy.

1. Prior to the SAP (1950s-60s)

The World Bank and the IMF were performing a complementary economic function that mainly focused on the internal economic development of the member states as a micro objective, and the steadiness of the world trade and financial order as a macro

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[32] JOHN RAPLEY, UNDERSTANDING DEVELOPMENT: THEORY AND PRACTICE IN THE THIRD WORLD, (2nd ed, Lynne Rienner Publishers Inc.) (2002).

one.[33] In its initial operations, the World Bank's main focus was to fund developmental projects upon the request of member states. The World Bank studied such projects and determined their feasibility. If a given project was recognized as feasible, then the World Bank would lend the member state the required financial assistance for implementation. The World Bank would also monitor how these funds were spent in order to ensure the proper employment of the funds as previously agreed with the member state. The feasibility of the project has two main aspects. The first is related to the developmental value that it added to the national economy of the member state. The other is related to the capacity of the member state to repay the debt to the World Bank.[34] The IMF grants member states financial support for the adjustment of their fiscal policies after conducting the required studies, in order to ensure the required budget's monetary balance. Development was mainly about useful productive projects and the correct monetary policy. The rule of law was not within the scope of development or for IFI operations during this phase.

Nevertheless, the scope of operations of the BWIs expanded dramatically after the reassessment of their old operations.[35] The evaluation of the project's lending policies was not satisfactory for the management of the IFIs. In addition, the high level of economic fluctuation required the adoption of more effective and decisive policies.[36] Accordingly, the BWIs abandoned their old development strategies that were based on the Keynesian economic model. These strategies mainly focused on increasing production, such as Import Substitution Industrialization (ISI). The new strategies adopted a liberal approach which tended toward trade liberalization and the free flow of investment. The BWIs also shifted from project-based to policy-based lending, which was presented in the Structural Adjustment Program (SAP). This shift was based, in theory, on amending structural deformations within the recipient states as a

[33] *Supra* note 21.
[34] David M. Trubek & Alvaro Santos, *The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, (2006).
[35] CELINE TAN, GOVERNANCE THROUGH DEVELOPMENT: POVERTY REDUCTION STRATEGIES, INTERNATIONAL LAW AND THE DISCIPLINING OF THIRD WORLD STATES, (1st ed, Routledge-Cavendish) (2011).

[36] Starting in the 1970s, many economic crises took place starting from the booming of oil prices in 1970s, then the debt crisis in the 1980s, and the Asian financial crises in the 1990s, which all influenced the global economy.

more efficient way of allocating the funds, and to ensure developmental progress through the rule of law.[37]

2. Structural Adjustment Program (SAP) approach (1970s – 80s)

The idea behind the SAP program was to eliminate the structural obstacles that disable the proper function of a market-oriented economy.[38] This implies the creation of an appropriate environment that involve SAP elements, which are fiscal austerity and disinflation policies, the privatization of state-owned enterprises, trade liberalization, currency devaluation, liberalization of foreign investments, and economic deregulation. These elements soon became the conditions upon which BWIs constructed their financial assistance. The developing countries that needed IFI financial assistance had to agree to the SAP.[39] Unlike previously, countries that did not rely on or need financial assistance from the IFIs, mainly in South Asia, had the freedom to decide their economic strategies. Those countries, despite being developing ones, managed to achieve high economic progress in comparison to the countries following a SAP as an economic strategy.

The program fundamentally altered the developing states' economic policies towards a market-oriented system.[40] It was the beginning of reliance on the rule of law with regard to the IFIs' operations. It entailed legislative amendments in order to transform state policy from state-led to market oriented. Law was regarded as an element of economic development, as will be further discussed in Chapter Three. Opening up to market forces was not in the best interest of these developing countries. On the contrary, it was in the best interests of the developed countries who ruled both the market and the IFIs.[41] The SAP development strategy did not perform well within the developing countries. It increased poverty levels within those countries and promoted inequalities. It is worth noting here that Turkey and Mexico were the first countries to implement SAPs in order to receive financial assistance from the IFIs in the early 1980s.[42] The implementation of the program caused collateral damages to the states

[37] *Supra* note 34.
[38] *Supra* note 32, at 79.
[39] *Supra* note 35.
[40] *Supra* note 34.
[41] The United States has great influence within the IFIs board since it has around 17% of the voting power, and enjoys the veto right, as indicated earlier in the previous section.
[42] *See*, Fikret Senses, *Turkey's Stabilization and Structural Adjustment Program in Retrospect and Prospect*, THE DEVELOPING ECONOMIES (1991), *available at*

which undertook it, as in Latin America and Africa, as it depended on cutting down public spending on important sectors within the state.[4344] The SAP program was criticized for decreasing public spending, unequal distribution of wealth because of privatization, and harsh monetary requirements that all contributed to increased poverty rates due to the lack of social protection.[45]As a consequence, and under pressure from criticism and weak results, the IFIs changed their older policy, in an attempt to take into account the destructive social implications of the SAP, in what was later known as the Poverty Reduction Strategy Paper (PRSP).

3. Post SAP: The Poverty Reduction Strategy Paper (PRSP) and Good Governance (1990s – 2000s)

The PRSP was not much different as a development program from the SAP. It merely had a more holistic form.[46] The program aimed at structural reform of the recipient state's economic policies, by liberalizing key economic sectors to attract private and foreign capital, and encourage free trade. The theory behind the program was that such flows of investment would have a "trickle down" effect on the population, which would alleviate poverty automatically.[47] The program involved more interference with the economic policies of the recipient states and more conditionalities.[48] Nonetheless, it was postulated as an attempt to strike a balance between maintaining a free liberalized market and increasing spending on important sectors, such as health and education, through shifting public expenditure from subsidies to these sectors. The program had a strong reliance on the rule of law and legal institutional practice. The rule of law was regarded as a fundamental element in order to achieve development. Law and the reform of legal institutions were an end in themselves for the IFIs' development agenda, and for neoliberal development in general.[49]

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https://www.ide.go.jp/library/English/Publish/Periodicals/De/pdf/91_03_02.pdf. *See* also, http://www.hartford-hwp.com/archives/40/003.html for Mexico.

[43] *Supra* note 35, at 134-166; For Latin America, *see*, Structural Adjustment Programs at the Root of the Global Crisis: case studies from Latin America, *available at* http://www.hartford-hwp.com/archives/40/003.html. For Africa, *see*, Fraser Logan, did Structural Adjustment Programmes Assist African Development, (jan.2015), *available at* https://www.e-ir.info/pdf/53895.

[44] *Supra* note 35, at 134-166.

[45] *Supra* note 35.

[46] *Supra* note 35.

[47] *Supra* note 35, at 65.

[48] *Supra* note 35.

[49] For more details, *See* Chapter 3 of this paper.

In that regard, two major events took place that also had a great influence on the developing economic policies and behavior of the BWIs. The first was the collapse of the Soviet Union in 1989, while the second was the Washington Consensus in 1990. The collapse of the Soviet Union strengthened the market-oriented approach. This strengthened the position of the Bretton Woods institutions in addition to the terms and conditions of their loans to developing states. Such a collapse was a clear indicator of the failure of the planned economy and marked the success of the liberal market alternative. As for the Washington Consensus, it was a recipe that was adopted by the World Bank, the IMF, and the United States Treasury for developing countries, and which was named and introduced by Joan Williamson as the "Washington Consensus".[50] The consensus was constructed of ten economic policy recommendations that developing countries should follow in order to strengthen their economies. These ten polices were as follows: (i) reducing government deficits through fiscal discipline; (ii) shifting public expenditure from subsidies to health, education, and infrastructure for the sake of the disadvantaged; (iii) tax reforms through establishing a broad tax base and moderate marginal rates; (iv) liberalizing interest rates through reducing government interference; (v) increase the flexibility of the exchange rate, (vi) trade liberalization; (vii) inward foreign direct investment liberalization; (viii) privatization of state-owned enterprises; (ix) deregulating market operation and competition and; (x) enhancing property rights.[51] This consensus soon became the new conditions required for receiving financial assistance from the IFIs.

The new policies of the Bretton Woods institutions required a change in the way the recipient state is governed.[52] It involved introducing regulatory adjustments to the governance system of the developing state in order to be able to achieve the prospected economic objectives through the methods of good governance. In this regard, in comparing between the SAP and the new adopted economic policies, "the former, governance connoted the effective implementation of policies of economic liberalization while in the latter, there is greater emphasis on governance as an instrument to promote the regulative capacities of the state."[53] As a consequence of

[50] *Supra* note 34.
[51] Ayse Kaya & Mike Reay, *How did the Washington Consensus Move Within the IMF? Fragmented Change from the 1980s to the Aftermath of the 2008 Crisis*, 26 REVIEW OF INTERNATIONAL POLITICAL ECONOMY, 384 (2019), *available at* https://doi.org/10.1080/09692290.2018.1511447.
[52] *Supra* note 35, at 139.
[53] *Supra* note 35, at 138

such change, these financial institutions, by using their lending powers, imposed pressure on developing states to radically change their economic model, especially given the lack of economic alternatives.[54] Moreover, along with trade liberalization and the facilitation of transnational flows of foreign capital policies initiated by the SAP program, the economic vulnerability of the recipient state increased and made it subject to economic exploitation by developed states. Under the flag of the rule of law, economic liberalization was taking place and dismantling state control over the market and protecting its operations from state interventions. Above all, the failure of any of the objectives of the SAP was always attributed to the state's inadequate governance.[55] The role of the state in post-SAP policy was to safeguard market operations in order to enhance investments and the free flow of capital. Another important role was to establish and utilize local politicians and decision makers for the continuity of the liberalization process.[56]

4. Criticism of Policy-Based Lending

The operation of the IFIs came under strict scrutiny after the Asian financial crisis in 1997-1998, the collapse of the Argentinian economy in 2001,[57]and the remarkable progress achieved by East Asia in comparison to other post-war developing countries who followed the unconstrained liberalization model and depended on the free flow of foreign investments.[58] Conditionality was regarded as a severe interference within the domestic policies of the recipient member states. Despite the political restrictions within the mandates of both the World Bank and the IMF, the broadening of the scope of operations of the BWIs rendered such limitations ineffective. This is not to mention the vague and elastic interpretation of what is considered political and what is economic. The coercive implementation of the neoliberal model in return for financial assistance was considered by many a breach of the IFIs' articles of agreement. The dramatic expansion in the scope of operations of both the World Bank and the IMF clearly interfered with the domestic political affairs of the recipient states. IFIs were

[54] HANS SINGER, THE STRATEGY OF INTERNATIONAL DEVELOPMENT: ESSAYS IN THE ECONOMICS OF BACKWARDNESS, (Macmillan) (1975).
[55] *Supra* note 34.
[56] *Supra* note 44.
[57] Since the Argentinian economic crisis was considered a neoliberal economic failure by many legal scholars.
[58] *Supra* note 32, at 139 and 173.

accused by many scholars of political bias towards the developed states by facilitating their control over the developing states' resources.[59]

It was clear from the economic performance of the BWIs their tendency towards the Western economic model. This could be demonstrated since its establishment and its attempts to seduce developing nations to become part of the Western economic lobby in the 1950s in opposition to Soviet influence.[60] Accordingly, the establishment of IFIs had an implied political role since the start of its operations.[61] It was also obvious how these financial institutions, after the expansion of their operations in many states, possessed great influence and significant bargaining power in dealing with developing states in desperate need of their financial assistance. Utilizing such power was clearly noted through the imposition of structural adjustment reforms within the recipient states, as developing states had limited options with regard to economic and fiscal assistance. The implementation of these programs clearly benefited the developed states and disadvantaged the developing ones, ensuring the continuity of the financial dominance of the former over the latter's resources. This is not to mention the demolition of the developing states' attempts to establish a new economic order (NIEO) through more trade liberalization, more reliance on foreign investments, and lastly coercively orienting their domestic economic policies into adopting such principles.[62]

The weighted voting system within the BWIs clearly serves the economic interests of the West. The United States alone has around 17% of the voting power within the boards of these institutions, not to mention the right to veto decisions,[63] hiding behind the functionality approach of the mandates of these institutions which deny such influence. Yet, the practical application of their economic programs indicates

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[59] Many legal scholars, as Antony Anghie, Sundhya Pahuja, and Jason Hickel argued that the IFIs were utilized in order to enable developed states to exercise control over the different resources within the developing states as a different model of colonial administration.

[60] The case of Egypt demonstrates such competition between the East and the West in attracting developing economies to their economic model through economic assistance. The West, through the BWIs, had offered financial support for the Egyptian High Dam project in return for Egypt severing ties with the Soviet Union.

[61] *See*, the letter that indicates the United States' political views, represented by the World Bank, with regard to Egypt in 1954; *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/32368/Address-by-Eugene-R-Black-President-of-the-World-Bank-to-the-National-Farm-Institute-Des-Moines-Iowa.pdf?sequence=1&isAllowed=y.

[62] *Supra* note 5

[63] Anghie, *supra* note 21, at 264.

otherwise.[64] Through the enforcement of liberalizing structural changes in the developing states' economic policies, the international economic order became predominantly one that normalized Western domination over the resources of developing nations. The developed states never gave up their control over economic resources within the colonized developing states. A neocolonial order was being established through the instrumentalization of the BWIs as a long economic arm that had access to domestic economic policy making within other states. A neocolonial administration that is armed by the formalism of legal norms through the rule of law and the powers of globalization to maintain its prevalence.

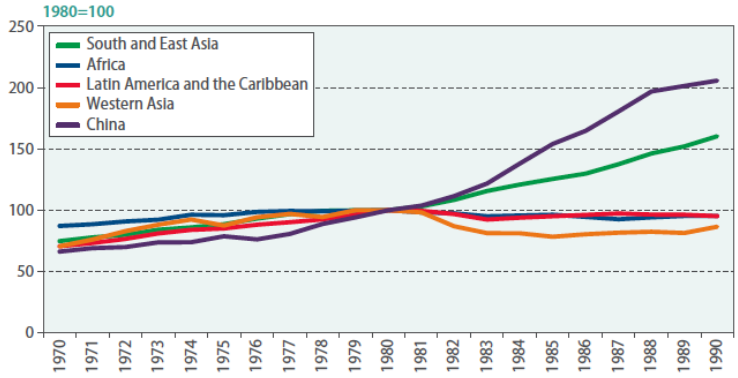

Figure 1: Trends in GDP per capita in selected developing regions, 1970-1990[65]

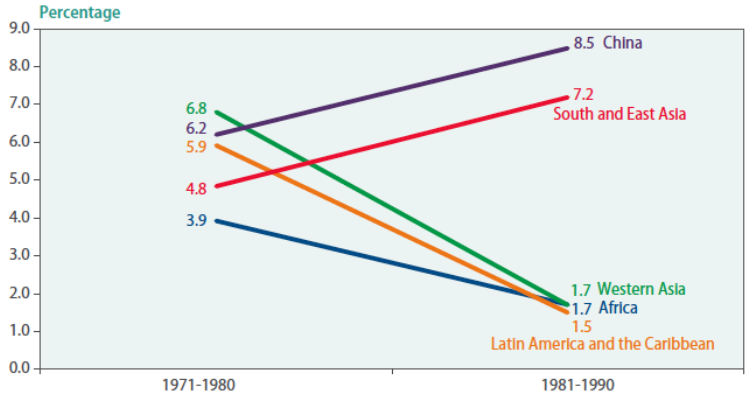

Figure 2: Annual average growth of GDP in developing regions, 1971-1990[66]

[64] *Supra* note 21.
[65] This diagram is retrieved from the World Economic and Social Survey. It demonstrates how China and South and East Asia managed to increase their GDP unlike the SAP countries. It is important to note that they were following state-led industrial export-oriented development policies. *Available at* https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESS_2017_ch3.pdf.
[66] *Id.*

D. The Powers of Globalization in Internalizing and Internationalizing the Legal Norm

International law plays a great role in the current global economic order. The main actor in this regard is globalization. Globalization of international standards and economic trends exerts pressures on developing states in order to meet its demands, as such states are committed to carrying out international obligations imposed by international treaties and declarations. The developing states' right to develop is initially constrained by these obligations and further still by the prescriptions of the financial institutions if their assistance is required. The IFIs do not include in their calculations the international factors that might devastate development efforts within developing states in their economic development equations.[67] Nevertheless, as Anghie indicates, the burden will always be on the state to make structural reforms in order to be compatible with the international institutional demands in order to become normalized within the system.[68] As a result, states will have to bear the consequences of such international demands in the political, legal and economic spheres. Otherwise, the international community will outcast the non-complying states with all the consequences that follow.[69]

In the case of international economic law, international organizations, such as the World Bank, the IMF, and the WTO have great influence over the international financial order. This is due to the fact that the World Bank and the IMF possess, through their lending power, economic and political leverage over recipient states. On the other side, the WTO regulates the order through which international trade shall operate. For example, the WTO demands regulatory changes before even being a member of the organization.[70] Whereas developing states, especially after being liberalized, will have to abide by WTO rules in order to secure their economic demands.[71] Accordingly, as for IFIs, internalization of the international economic order's requirements takes place through the conditions of these institutions in return for their financial support; the so-called "conditionality". While for the World Trade Organization (WTO), its inputs with regard to the domestic economic laws of the

[67] Anghie, *supra* note 21.
[68] Anghie, *supra* note 21, at 261.
[69] *Id.*
[70] In order to be a member of the WTO, states must undertake some legislative changes, *available at* https://www.wto.org/english/thewto_e/acc_e/how_to_become_e.htm.
[71] *Supra* note 35.

member states are represented in its entry requirements. Moreover, such laws that govern international trade and investment have a great impact on the national economies and income distributions within states. For instance, the "race to the bottom phenomenon", which is a result of decreasing social protection and wages in order to attract foreign investment.[72] This is why, in addition to the normal sources of international commitments, the conditions that these institutions impose for releasing their funds, or the regulation of trade, constitute an additional source of commitment, especially for the developing states that extensively depend upon these institutions in order to adjust their macro/microeconomic demands.[73]

The forces of globalization act implicitly and explicitly through a reciprocal process of internationalizing and internalizing legal norms. On the international stage, international law obliges states to respect and enforce its norms over other internal ones. As long as the state accepts to be bound by international obligation,[74] it will have to respect its requirements through the embedment into its policies on the one hand, and the removal of any obstacles for implementation on the other. The powers of globalization, especially with regard to international economic requirements, internationalize certain aspects of state governance in order to be in line and coherent with other international market policies. Matters such as taxation, privatization, corporate governance, liberalization, and deregulation of the market system are considered to be of international concern; since they are vital for the free flow of capital.[75] Through such processes, the global market will consider whether to grant a given state access to participate in ongoing economic activities, or to recognize it as an undesirable party. It is essential to indicate here that the World Bank, in its recent lending operations, was depending on the mutual transfer of such legal knowledge.[76]

Furthermore, the role performed by multinational and transnational corporations that operates within states, especially those in the legal field, stretches the transfer of legal knowledge and traditions across a state's borders.[77] Such mechanisms internalize the

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[72] Susan Marks, *Exploitation as an international legal concept, in* INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES, 281-308 (2008).
[73] *Supra note* 32. See also,
[74] *See,* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW. (1st ed. Oxford University Press) (2014).
[75] *Supra* note 35.
[76] *Supra* note 34.
[77] *Supra* note 34.

rules of the international actors within the national governance system of the states, sometimes willingly and at other times coercively.[78] Correspondingly, international law has not only globalized the rules upon which international relations are built. It also developed mechanisms that allowed the internalization of its rules within the domestic law of the nation state.[79] Despite the separation between what is political and what is economic at the international level, the mutual interaction between the international principles in general, and the domestic policies of the states that eventually establish the legal nature of its governing order, indicate otherwise. Thus, the utilization of the rule of law for the achievement of either political interests or economic leverage is being enhanced by different international legal mechanisms and global forces.

[78] Through either the enactment of undesired regulations in order to meet the conditions of foreign investors, or to deregulate and remove restrictions on operations against the best interests of the state for the fulfillment of international obligations, as with the case of the GATT agreement.

[79] CHARLOTTE PEEVERS, THE POLITICS OF JUSTIFYING FORCE: THE SUEZ CRISIS, THE IRAQ WAR, AND INTERNATIONAL LAW 31 (1st ed., Oxford University Press) (2013).

III. Economic Development and Governance through the Rule of Law

This chapter covers the evolution in the relationship between law and economic development. In this regard, and as Trubek has indicated, economic development is the interaction between law, economics, and their institutional practices.[80] Accordingly, this chapter begins by identifying the essence of the reliance on legal norms as a foundational base for development, as it is claimed to be. It also highlights its essentiality to the IFIs when imposing their structural changes on developing states. Then, it demonstrates the relationship between the two disciplines during different historical phases and their institutional practices, starting in the 1950s till the 2000s. Such changes in the rule of law with regard to development entailed a change in the role of the state and the way it exercises its sovereign powers over its economic and social policies, which is covered within the third section of this chapter. The last section delineates the outcome of such interactions with regard to the main objectives of the neoliberal project, namely trade liberalization and an increase in foreign investment flows and protections.

A. Why the Rule of Law is Necessary for Economic Development Generally, and to the Neoliberal Paradigm in Particular?

In this regard, it is essential to make a distinction between classic liberalism and neoliberalism on the one hand, and the different types of neoliberalism on the other. Some might link liberalism to the political and economic methodology of neoliberalism, as they might appear similar. Nevertheless, there are some major differences between the two approaches. Whereas liberal philosophy was based on individual freedoms and the separation between what is public and private, neoliberalism focuses on the rules that control and govern entire economic, social, and political spheres in their entirety.[81] For liberalism, the role of the state is very minimal, often described as the "night-watchman state".[82] Its role is limited to maintaining public order and the protection of the society domestically through law enforcement,

[80] David Trubek, *The "Rule of Law" in development assistance: Past, present, and future*, *in* 4 THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, 74-79, (2006).
[81] Thomas Lemke, *'The birth of bio-politics': Michel Foucault's lecture at the Collège de France on neo-liberal governmentality*, 30 ECONOMY AND SOCIETY, 190, 200 (2001).
[82] Dag E. Thorsen & Amund Lie, What is Neoliberalism?, UNIVERSITY OF OSLO, DEPARTMENT OF POLITICAL SCIENCE, 4 (2006).

security, defense, and providing non-excludable goods.[83] From the economic point of view, liberalism believes in *laissez-faire* as a governing principle for private market relations and the government.[84] This is when economic transactions within the market are free from the state's interventions in order to ensure the individual freedoms of the parties, and the role of the state is limited to monitoring the market.[85]

Contrary to liberalism, neoliberalism depends on a strong interventionist state model for the implementation of its methodology.[86] Both German ordo-liberalism and US neoliberalism were based on market-oriented ideologies.[87]As for ordo-liberalism, its ideology is based on economic liberty, which grants to the state the authority required to achieve such an objective.[88] On the other side, neoliberalism is more inclusive. In that regard, the market is what governs the actions of the state. In other words, the different state's policies are being based, oriented, and governed by the market.[89] The economy, in that regard, is not a separate domain from other social and political activities. On the contrary, it is the governing rationality for different human practices within the different social spheres of the state.[90] Furthermore, and due to such market-oriented governance, individuals under neoliberalism are also subjected to being uniquely controlled, due to assuming responsibility for social risks, such as illness, unemployment, or poverty as the responsibility of the individual himself and not the state.[91] Such an approach of "self-care" or the "technology of the self" shifts economic and social burdens from the government to the individual under the umbrella of proper regulations.[92] For both ideologies, the rule of law is the paramount element that is being instrumentalized, and through which economic objectives are to be achieved.[93] The unique characteristics of the legal rule qualify it to be the ideal instrument for the implementation of such ideologies.

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[83] *Id*, at 4.
[84] Luc Nijs, NEOLIBERALISM 2.0: REGULATING AND FINANCING GLOBALIZING MARKETS 30-32, (Palgrave Macmillan) (2016).
[85] *Id.*
[86] *Supra* note 81.
[87] *Supra* note 81, at 192-200.
[88] Supra note 81, at 196.
[89] *Supra* note 81.
[90] *Supra* note 81 at, 197.
[91] *Supra* note 81, at 201.
[92] *Id*.
[93] *Supra* note 81, at 195-198.

The legal rule possesses distinct features that do not exist in other types of norms. As Kelsen indicated, "law commands obedience not because of its goodness, or its justice, or its rationality, but because of the power behind it."[94] The legal rule is the construct of the social structure through which citizens within a given state are governed. It has a coercive power behind its application which is attributed to the state; as the entity entitled to serve out punishment whenever a violation is committed. One of the legal features of the law is predictability.[95] This is an essential feature for the legal rule since it requires, and presumes, prior knowledge of the rule in order for punishment to be legitimately served upon violation. Nationally, the state, represented by the legislative authority, is the one entitled to enact laws. Moreover, punishment shall be executed through the authority mandated to do so. However, a legal decision should be rendered, deciding the existence of guilt, in order for the punishment to be legitimized. In this regard, Cohen argues that legal rulings are not the logical outcome of the already-existing rules.[96] He also emphasizes that the implementation of the legal rule could be subject to many influences, such as social, political or economic ones.

The normative power that the legal rule possesses makes it tempting for any entity to induce a change in a given community. It is the perfect tool to be instrumentalized to foster such change. As Hale emphasizes that law is powerful in regulating distributive and barging powers within the society, it is best described as:

> an element of the context, constitutive of bargaining power, and influential on the outcome, not as a single bloc it directs, but rather as an almost definitely long list of particular legal rules, each of which has a part in the strategic calculations of the parties.[97]

Accordingly, law as a coercive tool regulates market fluctuations within a given state according to its economic governance policy. In this regard, there are two scenarios for the market system to operate. Either power is handed to the state as a sovereign

[94] Hans Kelsen, *On the Pure Theory of Law*, 1 ISR. L. REV. 1, 7, (1966).
[95] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 849 (1935).
[96] *Id.*
[97] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, HARVARD LAW SCHOOL, 351 (1991).

power over its citizens, and the struggle starts in order to prevent the abuse of power; or, delivering such power to, and allow its exploitation by, the ruling class.[98]

This is why it is not a surprise that the IFIs have such an interest in the rule of law; since it is so essential for the purpose of the transformation of national economic governance systems into a neoliberal form. It provides protection for foreign investment, stability for trade regulations, and, in case of neoliberalism, restricts unwelcomed interruptions to market operations. Additionally, it provides institutional protections to such practices through the practices of legal institutions. Moreover, sufficient knowledge is required in order to exercise coercive power efficiently.[99] Such knowledge is represented by the embedded politicians and legal specialists who believe that there is only one way for the markets to operate, which is the one dictated by the IFI and the international order.

Nevertheless, the coercive nature of the law allows its exploitation, either through the way it is enacted, or the way it is implemented. If either of the two phases were subject to an influence, the coercive nature of the law will serve such interests. Such interests might not be stipulated within the articles of law. However, its application will serve such interests without any explicit indication. In describing such a case, Kennedy emphasizes in his 1991 paper, The Stakes of Law, the deductions of Foucault in that regard, as he expresses that, "negotiations in the shadow of the law is just not part of its project". What is more, and with regard to the other element of the rule of law, as Cohen illustrates, the law is what judges decide, and not what the rules indicate, as an emphasis on its functionality.[100] This indicates how the circumstances of creating the legal norm and its driving forces could be mystified. That is how abusive using the rule of law could be, which explains the frustrations of the developing world in using such methodology in exchange for financial assistance to attain economic growth and development. Consequently, the exploitation of such normative power, especially when it comes from entities alien to the developing state, under the coercive need for financial support, is to be considered a violation of its sovereign integrity and a challenge for its authority.

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[98] *Id*. at 353.
[99] Gerald Turkel, *Michael Foucault: Law, Power, and Knowledge*, 17 J. L. & SOC'Y, 178 (1990).
[100] *Supra* note 95.

B. The Different Integrations of the Rule of Law in Economic Development

This section will explain the different interactions between law and development, starting from the postwar period. Law had different integrations during the different stages of economic development. The essentiality of the rule of law to the development project was present from the beginning. Starting from the postwar period, the strict formalism of the law was used in order to enforce state economic agendas, such as the ISI. The use of law for the purposes of development was obvious in the domain of public law, as economic operations were regulated by the state. However, within the liberal market model from the beginning, law was regarded as an important element for development. Accordingly, the coherence between the rule of law and the liberal market model was fundamental for restricting governmental interferences within market operations. Nevertheless, such interference became essential in the neoliberal model; not to interrupt the market with restrictions, but to safeguard its operations through private law and to allow markets to govern.

1. Instrumentalizing Law by the State during the Postwar Period (1950s-1960s)

After the end of World War II, the developing states realized that they were strongly dependent on the developed with regard to manufactured goods. They were mainly exporting raw materials and natural resources to the developed states since they did not possess the technology to converting such resources into the end products they needed. Most of the developing countries during this period realized that their dependency on the developed states must come to an end because of the disturbance to the flow of goods during the two World Wars. Moreover, and after the rise of decolonization movements and nationalism, developing states rejected the idea of being economically dependent on the developed ones. As a consequence, developing states started to adopt the industrial development approach for the purpose of manufacturing needed commodities domestically, without the need for foreign assistance, in an attempt to become similar to the developed world.[101]

The interaction between law and development was limited during the period of the 1950s and 1960s.[102] The emergence of such interdisciplinary study was based on the Western paradigm, which considered important the role of the state for achieving

[101] *Supra* note 95.
[102] Trubek, *supra* note 80.

market progress.[103] The rationale behind law and development studies was to replace the legal education formalism that might hinder free market development through transplanting modern rules and institutional frameworks that enhance such objectives.[104] Law was being instrumentalized by the state in order to impose order. The objective of its use was to eliminate any obstacles that hinder economic progression.[105] On the national level, the enactment of the legal rule was usually for national purposes that the governing authority within a given state deemed essential.

In order to support such a national strategy, a given state, which is represented by its legislative authority, will issue laws that guarantee the implementation of these strategies. Import Substitution Industrialization (ISI) was the economic development model that was followed by many developing states during this historical phase. Accordingly, for the fulfillment of this national vision, issuing laws that limit importing unnecessary commodities, increase tariffs on other products, or direct national spending for certain projects will be the logical authoritative choices. In order to support national industries, the state in this mode of development resorted to imposing tariffs, manipulating change rates, imposing currency controls, issuing import licensing, and subsidizing credit.[106] Nevertheless, ISI as an economic model was criticized for being inefficient with regard to export performance and agriculture, resource allocation, and for increasing rates of unemployment as a result of shrinking the role of the private sector. [107]

Law in this regard was meant to maintain a certain economic order that is imposed by the state among the different actors within its jurisdiction. In addition, law was the regulatory framework that governed commercial transactions within the state's domestic market. Regardless of the level of interference of law within a market-oriented or planed market economy, its formal presence was completely attributed to the state's governance system. For instance, and with regard to capitalism in Europe, the objective of legal formalism was for the mere distinguishing between the public and private spheres. Moreover, the function of legal norms was limited to the

[103] *Id*. at 75.
[104] Trubek, *supra* note 102, at 76.
[105] *Supra* note 34, at 6.
[106] Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, 56 (2006).
[107] *Supra* note 32.

identification of the essential elements required for the primitive markets to operate, such as right, fault, and will. This resembles to a certain extent the old classical legal thought as described by Kennedy.[108]

That is why economic governance and market operations were regulated in accordance with public law. Unlike the subsequent period, as will be seen in the next section, market governance shifted form the area of public law to private law as an effect of liberalization. In addition, social norms were not fully incorporated into the field of law and development studies. This is why the economic policies of the developing states were a reflection of their national political integrity and sovereign independence after the end of the war and decolonization. This indicates that the ideology behind the establishment of legal norms, in that sense, whether it was for criminalizing an act or regulating market behavior, is the same: to support national governance.

At the international level, law was not in the scope of interest of the IFIs after their establishment in the 1950s. The main focus then was the developmental purposes that these institutions were established for. The World Bank and the IMF were not interested in the employment of the legal rule for the benefit of developmental objectives, especially given that they were supporters of the ISI policy. In addition, there were already bargaining agreements between the developed states and the developing ones; where the latter would provide raw materials and natural resources in return for manufactured products from the former.[109] As a consequence, the mutual interaction between law and development, whether at the domestic or the international level, was very limited. Nevertheless, the interruption of that system started with the oil crisis in the beginning of the 1970s. Accordingly, law was used as means of governance, regardless of the objective of the legal norm.

2. Law as an Element of Development: The Rise of the Rule of Law as a Common Objective for Neoliberal Development and Social Movements (1970s-1980s)

At the end of the 1960s, and in the beginning of the 1970s, major economic shifts started to emerge as a result of the increasing number of states that managed to

[108] *Supra* note 106.
[109] *Supra* note 54.

become decolonized, the competition between the Western and Eastern Blocs for market dominance, and the increased role performed by other international economic actors, such as the World Bank and the IMF. In addition, and after determining the preceding period's economic and social downfalls, the new development paradigm recognized the mutual interest in the rule of law for achieving economic growth and maintaining social rights. The preceding period, which was dominated by classical legal thought,[110] was criticized for individualistic formalism that was based on the "will theory".[111] It ignored the main social rights of several groups, such as labor rights, which gave rise to pluralism and institutionalism. The advocates for these social rights demanded recognition of the new social norms through the rule of law, with regard to both regulation and implementation.[112]

Both the proponents of social rights and free market liberalism recognized the importance of incorporating the legal rule as an element of their schemas. But this time, integration of law was different from that of the 1960s, since law was not only regarded as an instrument for policy implementation. The new purpose of utilizing law was aimed more toward attaining an institutional juristic change within the state. The change will perform a dual role in this concern. Initially, it will ensure the free mode of market operation, thereby fulfilling neoliberal objectives. Secondly, restraining the state from interfering within the market, and the fulfillment of social demands and democratization through the same regulatory and institutional changes.[113] The new development paradigm aimed to replace the old formalism with a new one, not only at the regulatory level, but also at the institutional one, which is represented by the judicial authority. In this regard, the legal protection that is provided through court practices was essential for guaranteeing both social rights and free market operation. Such protection was required against state interventions that might undermine these objectives. Consequently, change would tackle both the law-making process and its implementation.

With regard to the developing states, the pressure was extremely high due to the increase in market forces, and the demands required by the international financial

[110] *Supra* note 106.
[111] *Supra* note 106.
[112] *Supra* note 106, at 41.
[113] *Supra* note 80, at 84.

institutions in return for financial assistance. Meanwhile, after the rejection of the NIEO proposal, the developing states gave up and were incorporated into the neoliberal market. Such incorporation required additional financial resources that these states did not possess; thus, the only resort they had with regard to financial assistance was the BWIs in order to overcome the economic gap. The liberalization model demanded a market free of state intervention through the deregulation of its rules, and by transferring public enterprises to private ownership. Such change was in the agenda of the Bretton Woods Institutions and was introduced as the Structural Adjustment Programs (SAP). The program introduced the new market approaches that were formulated by the neoliberals in the West during this period, which encouraged the developing states to adopt export-led growth, maintain a free market, privatize state-owned enterprises, and the increase in foreign investment as essential requirements for economic growth. This completely free and unrestrained market-oriented approach eliminated and restricted state interference within market operations. It shifted the state's economic policy and governance from the domain of public law to private, under the supervision and protection of judicial review. In short, it regulated the deregulation of the market.

However, as Trubek emphasizes: "markets do not create conditions for their own success."[114] Several market shocks, severe inequalities, and the increase in poverty were the outcomes of this development paradigm. Accordingly, the second phase of integrating the rule of law was criticized because of the contradictions between the democratic/social project and neoliberal market project. The contradictions between the two projects were because of the different foundational principles of the two approaches. Whereas the neoliberal market proponents advocated for a deregulated free market, they would not accept democratic social restraints on the market for social purposes.[115] Moreover, the issue of distribution was overlooked, maybe intentionally, by the neoliberal market approach, while it was essential for the socially-inclined, even if it required state intervention within the market. Furthermore, the sole focus of the free market advocates for the integration of the rule of law for the purpose of making national economies more desirable for foreign investments; while disregarding the imbalance that could occur between different sectors of the

[114] *Supra* note 34, at 6.
[115] *Supra* note 102, at 89.

population.[116] Lastly, and with regard to the IFIs' economic behavior, this development paradigm was criticized for its systematic intervention within the state's sovereignty through attaching regulatory conditions to the loans, interfering in the developing state's domestic policies, and their exercise of sovereign powers.[117]

It was obvious that the primary objective of the neoliberal approach was unleashing the powers of the market through freeing up trade and enhancing foreign investment. Social considerations were a secondary objective in its agendas. Whenever there is a contradiction between the two interests, the market is the one that ought to prevail. Such outcomes entailed another transformation in the relationship between law and development. However, this time the rule of law is not a prerequisite for development, but it is an end in itself for the next development paradigm.

3. The Rule of Law as an Objective for Neoliberal Economic Development (1980s-2000s)

After reviewing the integration of law and development within the 1950s-1960s, and its utilization for economic objectives, then the emergence of a unique form of the rule of law during the 1970s-1980s that was distinguished from the former, and after reviewing the critique that encountered its application, a new realization was reached by the neoliberal economic scholars that restricting the role of the state was not desirable for market operations.[118] On the one hand, they recognized the necessity for state intervention in order to compensate market failures, such as for social protection. On the other hand, state intervention should be directed more towards market protection through more empowerment of private law over public.[119]

The neoliberal advocates realized that the scope of economic development should be more inclusive and not only rely on the market for attaining development. However, the social objectives that were invoked during the preceding period ought to be incorporated not only as an economic development objective, but also as means of achieving developmental objectives.[120] Human rights and advocates thereof from the developing countries did not possess the power to create a development paradigm that

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[116] *Id*.
[117] *Supra* note 17, at 213.
[118] *Supra* note 34, at 7-8.
[119] David Kennedy, LAW AND DEVELOPMENT ECONOMICS: TOWARDS A NEW ALLIANCE 54, (2013).
[120] Trubek, *supra* note 34, at 8.

was based on their social demands in their confrontation with the developed states and neoliberal powers.[121]Accordingly, human rights became utilized for economic development in this phase, since they will improve the political climate within the state that will eventually favor the encouragement of foreign investment, fostering economic growth.[122] Nonetheless, it is worth mentioning here that what is considered to be social or human right has a broader interpretation within the scope of development. The World Bank, for example, utilizes the word "rights" to indicate basic requirements, such as education and health care.[123] This wider interpretation for individual rights makes it different from the scope of rights illustrated by the international human rights institutions.[124]

On the other side, the integration of law in this new paradigm also changed. The rule of law is not an element of economic development anymore, unlike the preceding section. It became "an end in itself."[125] Instrumentalization of the rule of law was also one of the distinctive features of this development model. Unlike the utilization of law in the ISI model during the 1950s-60s, the instrumentalization of the law here had its own characteristics. At the domestic level, the rule of law here is meant to restrict bureaucratic discretion, implement liberal policies, empower and enforce contractual and property rights obligations that arise from the market, constraining public norms through private ones, and the formalization of informal rights.[126] In addition to the above, and as for the institutional function of the rule of law, this instrumentalization incorporated the elimination of judicial discretion in the interpretation of the statutes, and the encouragement of judicial review over other sectors, as will be displayed in the case of the Supreme Constitutional Court in Egypt within the next chapter.

At the international level, such instrumentalization had different manifestations. It entailed a stricter regulation of free trade, harmonized international private law that eliminates the social vulnerabilities of different judicial applications, and the creation of parallel dispute settlement mechanisms that protect private foreign interests in case national courts are untrustworthy, mainly with regard to developing countries.

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[121] Antony Anghie, *supra* note 4, at 76.
[122] *Supra* note 17, at 225.
[123] Rittich, *supra* note 17, at 226.
[124] *Supra* note 17, at 226.
[125] *Supra* note 34, at 9.
[126] *Supra* note 119.

Moreover, the rule of law in this sense also integrated the national legal systems through the maintenance of its simplicity and harmonization with the rest of the international order. It also required the standardization and formalization of international payments systems and banking regulations.[127]

The neoliberal development paradigm in this regard required wider and deeper interference within state governance. The old objectives of liberalizing markets, ensuring the free flow of capital, and the increase of foreign investments were the same in the new development paradigm, but were more structurally supported from the formalist point of view. This developmental paradigm had the blessing of the developed states and the BWIs.[128] Meanwhile, the competition between the Western and Eastern Blocs on seducing the emerging economies was still ongoing. However, the collapse of the Soviet Union marked an end to this competition. Furthermore, the pronouncement of the Washington Consensus as a neoliberal economic cure for the underdeveloped economies emphasized, on the one hand, the neoliberal economic victory, and on the other the absence of alternatives for developing states. Nevertheless, and due to subsequently severe economic crisis, the neoliberal consensus was subjected to a tough questioning, especially with the rise of the Asian economies which disregarded neoliberal policies through the adoption of state-led export-oriented approaches.[129] Such consensus, as previously indicated in Chapter Two, became the new IFI conditionalities in return for their financial assistance.

In an attempt to handle such criticism, the World Bank conveyed its new development approach through the adoption of the Comprehensive Development Framework (CDF). It was introduced as another more holistic economic policy that aims at achieving economic growth along with the preservation of certain social structures through good governance and the rule of law.[130] The World Bank in that regard continued shifting from project-based to policy-based lending by attaching conditions that are associated with releasing of funds, as in the SAP.[131] The CDF preserved the structural adjustments that were required within the older policies, yet had its unique

[127] *Id.*
[128] *Supra* note 32.
[129] *Supra* note 32.
[130] *Supra* note 17, at 204.
[131] *Supra* note 17, at 209.

implementation mechanisms.[132] Unlike the previous policies, it was recognized as having a "polycentric normative order".[133] It involved the imposition of restrictions on the state's authority, more reliance on the judiciary and its institutions, the involvement of other informal actors with regard to governance (such as NGOs and civil society organizations), the use of soft laws, the acknowledgment of non-legal normative sources that emanate from civil society and other market actors, and the inclusion of human rights as a developmental end in itself.[134] It rendered the economic paradigm more toward emancipation rather than development. Nevertheless, this developmental policy was criticized for "market centered agendas for social justice",[135] as it altered the conceptions of social objective, such as gender equality and labor rights, in order to suit market objectives and to maintain economic growth. This is not to mention the instrumentalization and categorization of social objectives depending on whether or not they induce and fulfill the market objectives of the CDF.[136] Such interreferences within the recipient state's sovereignty invoked concerns regarding the limitations of the scope of operations of the IFIs and their mandates, as indicated earlier in the previous chapter.[137]

It would seem that neoliberal development presents itself as a panacea. As if all the justice, morality, and equalities are integrated within its programs. It implemented and enhanced the rule of law, alleviated poverty, fostered economic prosperity and growth, eliminated inequalities, and no doubt improved distribution. Each development paradigm holds the same promises; nevertheless, the developing states were never "civilized" enough to implement any of these policies correctly. For neoliberal development, the right answer to any economic or social problem always lies in the free market-oriented order. It demands changes through the power of law, to be implemented by the rule of law, and to be protected by the legal institutions which apply the law. The heavy reliance on the rule of law as a foundational objective within the consecutive development paradigms makes it as if it will end all economic and social miseries. However, after each failure, a new development paradigm appears

[132] *Supra* note 17, at 210.
[133] *Supra* note 17, at 220.
[134] *Id*.
[135] *Supra* note 17, at 232.
[136] *Supra* note 17, at 233.
[137] *Supra* note 17, at 235.

which claims more inclusivity than its predecessor; furthering the demands and determining deferent assignments for the developing states to perform.

C. The Different Integrations of the Role of the State in Relation to Neoliberal Economic Development

Starting in the 1980s, the IFIs' economic policies were pro-market fundamentalism that enhanced market-oriented structural adjustment that transform the economic role of the state to be more supportive and favorable for investing in the private sector.[138] Prior to this moment, economic independence was the dominant motive behind the actions of the post-colonial states. Developing states were eager then to end Western economic dominance through self-reliance on national resources and industries. Nevertheless, and after the industrial sparks faded away due to multiple political and economic factors, the neoliberal market approach dominated the picture of the global economy, especially after the collapse of the Soviet Union.[139] In each neoliberal policy starting from the end of the 1970s to the beginnings of the 1980s, there has been a different role for the state to perform.

It was obvious from the beginning how liberal proponents did not welcome state intervention within market operations. Accordingly, they advocated for freeing the market from states interference.[140] However, neoliberal proponents dominated and illustrated how the role of the state is essential for the protection of market liberalization and the attraction of foreign investments. The adoption of the rule of law by the neoliberal movements was fundamental for the implementation of their policies. Nevertheless, with every economic downfall, a new neoliberal policy emerges justifying a new style of developmental intervention in order to modify the equation of economic growth and prosperity. Accordingly, the issue of state sovereignty was highly contested because of the consecutive interferences in the domestic affairs of developing states.

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[138] *Supra* note 131.

[139] Because of Western seduction to its market-oriented policies through the different political and economic means, different trade and investment agreements, and the IFIs' practices. For more, *see*, David Kennedy, *The" Rule of Law," Political Choices, and Development Common Sense*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 95, 95-173 (2006).

[140] *Supra* note 106.

It is clear with regard to neoliberal methodology the separation between the political and economic sovereignty of the state. It is also well recognized in the realm of international law that states have the right to exercise their sovereign powers within their territory.[141] They possess sovereign immunity against international interventions within their domestic affairs. However, it seems that economic interventions, either from one state within another, or from an international institution within a state, do not fall under this category of foreign interventions. This could be due either to the fact that they are recognized as legitimate, or this is not recognized as an intervention at all. In that regard, I believe both are correct. However, the image gets more complicated when it is compared with human rights interventions. It depends on where one stands. In case of domestic policies and interests for economic development, the market and economic growth are considered more important than social interests, which permits interferences even if it were at the expense of social or human rights concerns. Nonetheless, it is different from the international point of view, where human rights violations require immediate intervention, even if it entails in some cases destroying a whole economy, whether by military intervention or economic sanctions. The bipolarity of the doctrine of interventions in that regard is very clear.

In addition, and in relation to the IFIs, it seems that the political limitations within their mandates do not solve the case in hand, since recent policies aimed at limiting and binding the state through restricting the introduction of changes to market regulatory rules, and further, through outsourcing some of the state's function to other independent agencies, such as central banks. The new IFIs' policy aims at constitutionalizing these internationally required economic reforms and blocking the way for any other domestic interference, even from democratically elected delegates.[142][143] The South African case manifests just such a deduction. Before the national party handed power to the African National Congress (ANC) after attempts to end the apartheid regime, and in order to reserve some of its powers, the party reached

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[141] MALCOM SHAW, INTERNATIONAL LAW 409-462, (Cambridge University Press) (2003).
[142] *Supra* note 17, at 221.
[143] *See,* Michalis Spourdalakis, *The Miraculous Rise of the "Phenomenon SYRIZA"*, 4 INTERNATIONAL CRITICAL THOUGHT 4, 354-366 no. 3, (2014).
[143] *See,* Michalis Spourdalakis, *The Miraculous Rise of the "Phenomenon SYRIZA"*, 4 INTERNATIONAL CRITICAL THOUGHT 4, 354-366 no. 3, (2014).

a deal with the ANC to employ the Washington Consensus as an economic reform strategy. It engaged with such reforms through adhering to structural adjustment programs set by the IMF and the World Bank. They signed the GATT agreement and adopted the neoliberal market approach. As a consequence, for such economic engagements, the ANC lost its discretion in appointing another governor for the central bank other than the one in office during apartheid because of its constitutionally-guaranteed independence. They could not conduct any economic maneuvers or introduce any changes because of the constitutional, organizational, and conventional obligations that they were committed to. The ANC found themselves locked-in economically and had only virtual control over the state without any economic powers for redistribution.[144]

The adoption of the rule of law and good governance techniques caused the erosion of the sovereign rights of states, and redefined their role with regard to commitments toward their citizens.[145] As the IFIs' requirements created a state of contradiction between what should and should not be done, such as whether social rights took precedence over market liberalization or the opposite when there are contradictory interests. Whereas developing nations struggled to restore part of their social and economic integrity, lost due to colonization, the subsequent economic development strategies stripped them of their future hopes for better social conditions. That is due to the limitations that these policies imposed over public spending for social interests and any subsidies for elevating economic pressures over the deprived.[146] The dilemma in this concern is that the IFIs legitimized the interference in state governance, based on the wide and vague interpretation of their mandates with regard to the scope of development and political restrictions. Since the borders in that regard were and still are not well-defined, this increased the chance of a collision with the political prohibition barrier.[147]

There are two kinds of pressures that developing countries endure. The first is because of the international financial requirements and rules, as previously indicated. The

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[144] *See* for more emphasis on how such neoliberal policies restrain the developing nation's economic freedoms, Naomi Klein, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM, 199-203 (2007).
[145] John Linarelli et al., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY, (Oxford University Press) (2018).
[146] *Id.*
[147] *Supra* note 17, at 235.

second is the aspirations for development and the improvement of their economic conditions. In addition to the huge pressure that is exercised upon developing states because of globalization and international demands, these states were additionally blamed for governance deficiencies. The idea was integrated since the inception of postwar development programs. Developing nations were regarded as underdeveloped and barbaric communities who were so because they were not part of the West.[148] Such pre-integrated presumptions of the developing states made the excuses for the different development policies not functioning seem plausible. As a consequence, why would the BWIs, for instance, take the blame for the non-functioning economic governance policies that they adopted so long as the blame was already placed on these developing communities. This goes without considering that the developing states were disadvantaged in comparison to the developed ones; since the latter stand on higher ground when it comes to negotiating economic terms within the global institutional order.[149]

What is more is that there is a lack of evidence with regard to the essentiality of the rule of law for achieving economic development and attracting foreign investment.[150] In one of his lectures, Erik Jensen questioned the causality between the rule of law on the one hand, and economic growth and development on the other, indicating that a state like India does not have proper application of the rule of law, yet they are economically advanced and have high growth rates.[151] Furthermore, this economic order, in addition to the prior constraints, imposes sanctions over states for the protection of foreign investments through other legal methods that are not subject to state control, such as arbitration. This also burdens the states in two different ways. Initially, it creates a state of "regulatory chill", which will be discussed later.[152] Secondly, it makes the state liable for certain circumstances that are beyond its control. As a consequence, instead of being a method for improving the conditions of the developing states, economic development became a system of governance and control over their national economies and state administration.[153] In that regard, neoliberal economic development would govern domestic markets through the

[148] *Supra* note 32.
[149] *Supra* note 17, at 211.
[150] *See* Erick Jensen's lecture, *available at* https://youtu.be/SpOzJFCrpRQ.
[151] *Id.*
[152] *Supra* note 17, at 221.
[153] *Supra* note 35.

implantation of self-operating private laws that guarantee the liberalization of market operations and investment protection through the rule of law. This would be realized either through the structural adjustments that the BWIs undertake, which is the prevailing scenario, or through other market forces such as international trade rules and other international investment and trade agreements. Such interaction between governance through the rule of law on the national and international levels shall be demonstrated in the next section with regard to international trade and investment.

D. Defusing the Legal Matrix of International Economic Law: The Application of the Rule of Law in the Case of International Trade and Investment

One of the main objectives of the neoliberal market approach is to encourage foreign investment and the free flow of capital across the globe. This claim was based on the great benefits that investment might bring to states, especially the developing ones. As it increases the flow of foreign currency within the state's economy, increases job opportunities, and even, but not always, facilitates the transfer of know-how from the developed economies to the least developed. For neoliberal proponents, investment was essential for the developing states to promote economic growth and to achieve the desired economic development. In this concern, and as an indication for its importance for the international economic system, and in order to exercise and impose more economic governance over the international market, the World Bank established in 1966 the International Convention on the Settlement of Investment Disputes (ICSID).[154] The ICSID is considered one of the subdivisions of the World Bank.[155] The mission of the ICSID is to settle international disputes through the mechanism of arbitration. In this regard, the relatively newly established organ strengthened the grip of Western dominance over the developing states' national economies through possessing its own dispute settlement mechanism.

Although there are other options for foreign investors to settle their investment disputes with states through arbitration, such as resorting to the United Nations Commission on International Trade Law (UNCITRAL), or the International Chamber of Commerce (ICC), the ICSID is the most favorable destination for two main

[154] Julian D. Mortenson, *The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J., 263 (2010).
[155] *Supra* note 13.

reasons. Firstly, ICSID is subject to the rules of the Vienna Convention on the Law of Treaties, as it is established through an international convention. Secondly, it has a unique binding power over states since signatory members consent to recognize an award rendered pursuant to this convention as binding and to be enforced within the state's territory as if it were their national courts' final judgment.[156] Other international dispute settlement mechanisms do not possess such binding power. As a consequence, foreign investors usually prefer inserting ICSID into their agreements with states as a resort for dispute settlement, avoiding submission to the adjudication of the state's national courts, especially within developing countries.

In that regard, as the developing world considers developing states as immature economically, foreign investors also consider the same with regard to application of the rule of law. Accordingly, as long as there are no international agreements that restrict resorting to ICSID as a dispute settlement mechanism, it will be the primary choice. Many regional investment agreements were concluded in order to avoid such an extreme and expensive choice. Most of these regional agreements were conducted between developed states, or developed states and other states with high production capabilities, as the CETA, NAFTA, and TTIP agreements.

As a response to neoliberal market demands, many states concluded bilateral international agreements (BITs) in order to foster the development process, through encouraging foreign investors within the state's via the treaty. The number of bilateral and multilateral agreements grew extensively starting in the 1960s, especially after establishing the ICSID in parallel to the increase of neoliberal dominance over the international economy. The collapse of the Soviet Union in 1989 furthered the interests of capitalism, and likewise foreign investments.[157] Accordingly, many states, especially the developing ones, concluded bilateral and multilateral treaties with developed states in order to increase the flow of investment and foreign capital within their economies. As indicate earlier, foreign investors usually favor including the ICSID in their agreements. Accordingly, most of the concluded agreements had the ICSID clause. The states, back then, underestimated the consequences of joining the ICSID convention and agreed to its insertion within their investment agreements.

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[156] Mortenson, *supra* note 154, at 265.
[157] Muthucumaraswamy Sornarajah, *The clash of globalizations and the international law on foreign investment*, CANADIAN FOREIGN POLICY JOURNAL 1, 3 (2003).

However, dramatic consequences appeared shortly, mainly within the developing states, as it was an excessively expensive mechanism for dispute settlement.

According to a study conducted within the European Union, to defend a case in front of the ICSID will cost around USD 8 million, which is a considerably high cost for developing states.[158] Moreover, and with regard to the arbitral awards that grant compensations to the foreign investor, there are almost no limits for the amount that might be indicated within the award. For instance, Ecuador was obligated to pay USD 1.77 billion in compensation to a US petroleum company.[159] The amount was increased after counting interest and legal costs and reached USD 2.4 billion, which amounted to the annual health expenditure for seven million people within Ecuador.[160] This is not to mention the fact that the only party that has the power to bring a case before the ICSID is the foreign investor.[161]

Such huge expenses for merely entering and losing an investment case before an international investment arbitral tribunal had major consequences. It created a phenomenon called "the regulatory chill"; which is when governments abstain from enacting regulations or implementing them, even if they were in the interests of the state, in order to avoid the drastic consequence of investor-state arbitration.[162] In one case, Newmont vs. Indonesia, the Indonesian government adopted a policy for increasing export values and rates of employment, which proposed a restriction on exporting unprocessed minerals. Before this policy entered into force, taxes were increased on unprocessed minerals. As an objecting response, the US mining company (Newmont) filed a case before the ICSID claiming damages for the acts of the Indonesian government. In response, and in order to escape the severe consequences of such arbitration, the Indonesian government had to lower taxes for Newmont to withdraw the case. This example emphasizes how states are being stripped of their sovereign powers within their own territory. This created a huge problem within the developing states with regard to enacting new laws that might have an impact on

[158] Luke. E. Peterson, *Out of Order, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION. PERCEPTIONS AND REALITY, 483-488, Michael Waibel, Asha Kaushal, et al. eds, (2010).
[159] *Id.*
[160] *Id,* at 158.
[161] *See,* International Investment Arbitration Under Scrutiny (2015), *available at,* http://www.s2bnetwork.org/wp-content/uploads/2015/03/IIAs-report-Feb-2015-2.pdf.
[162] Philip Hainbach, *The EU's Approach to Investor-State Arbitration in the Comprehensive Economic and Trade Agreement (CETA)*, TRANSNATIONAL DISPUTE MANAGEMENT (2016).

ongoing business that involved a foreign party. It made the developing state governments refrain from issuing laws that might be in the interest of the state and its citizens, since any change subsequent to the investment agreement might become a future investment dispute.[163]

In response to such threats, many states started either to withdraw from the ICSID convention, terminate investment agreements, or amend the terms of those agreements. For instance, Ecuador, Bolivia, and Venezuela withdrew from the ICSID convention. South Africa banned its entrance in any new investment agreements, and terminated agreements with Belgium and Luxemburg.[164] Even powerful economies started to avoid such dispute settlement mechanisms through establishing regional alternatives, such as CETA or the proposal for establishing a European investment court instead. Accordingly, if the developed states that enjoy the luxury of having an alternative are trying to escape this internationally created system, what is the case for developing states who have limited choices, if not but to submit to such global forces? Otherwise, such states will not be favorable destinations for foreign investment, which contradicts the neoliberal development strategies.

The discrepancy here has multiple dimensions. Primarily, the developing states are disadvantaged with regard to international investment in comparison to the developed ones. This due to the fact that the developed states have more advanced industries and stronger economies which direct the flow of investment to the weaker and needier economies on their terms, mainly in the developing world. Moreover, the developing states will have to open their domestic markets if they require any financial assistance from the IFIs because of conditionality. Although the developing states previously consented to the terms of their lending agreements with the IFIs, behind such agreements are coercive essential and basic economic demands. Furthermore, the policy lending strategy that the IFIs have followed recently obliges developing state

[163] Michael Waibel, Asha Kaushal, et al., *The Backlash against Investment Arbitration: Perceptions and Reality*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION, (Michael Waibel, Asha Kaushal, et al. eds., (2010).
[164] UNCTAD, Recent Developments in the International Investment Regime, (2018), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwi51JKR7offAhUPyYUKHWmkA6UQFjABegQIAxAC&url=https%3A%2F%2Functad.org%2Fen%2FPublicationsLibrary%2Fdiaepcbinf2018d1_en.pdf&usg=AOvVaw3v7x5yji7WN3Fct-iWephn.

governments towards deregulating their market system, to privatize what is publicly owned, and not to intervene within its operations.

By adding investment arbitration to the equation, the developing state will be deprived of most, if not all, of its sovereign rights, even in the case of investment disputes. This is not to mention the interference in internal policies of the state by capitalistic corporations. It is worth mentioning in this regard that every international investment treaty carries an infinite number of possible investor-state disputes. The net result of such an equation is that the developing states are cornered with regard to their market practices through the deprivation of their sovereign powers domestically, and the imposition of a high level of protection on foreign capital transactions internationally. Such an underprivileged situation expresses the extent to which developing state economies are subject to distortions.

In addition to the abovementioned, and as for international trade, such international treaties were not, as might be presumed, for trade purposes, but rather for distribution.[165] Modern international trade is the result of many wars that were initiated during the eighteenth century for the sake of trade liberalization.[166] However, the coercive nature of the legal norms that construct the contractual obligations upon which trade was built replaced the use of force in the next centuries.[167] Such formalism guaranteed unrestricted bargaining that does not consider social or moral concerns with regard to any of the parties and made it acceptable to them.[168] The consecutive trade agreements continue to prioritize economic interests over social rights.[169] Accordingly, the current trade system, whether with regard to its ongoing operations or the way it was regulated, does not consider social rights in the first place, nor the developing states' disadvantaged position in the system.

As a demonstration, the international governance system restricted the movement of migrants between states. Initially, states were trading in products that were produced by their own labor. There were no migration laws that restricted the mobility of labor. Nevertheless, and after the fight against slavery, collective migration became

[165] *Supra* note 145, at 110.
[166] *Id.* at 124.
[167] *Id, at* 166.
[168] *Id.*
[169] *Id.*

prohibited. As a result, the new trade order with regard to power and capital mobility became rigid with regard to the first and extremely flexible for the second.[170] Capital in the new trade order transfers to where the cheapest labor is located. The matter was ensured by the neoliberal structural reforms undertaken by the IFIs, and enhanced by the above-mentioned investment mechanisms. Current international economic governance requires the existence of weak economies that are always in need of economic assistance in order to be fertile soil for the economic demands of the developed nations. Such economies will be constrained by their domestic private laws, international economic legal requirements, and the desperate need for any foreign capital to enter their economies in order to feed the hungry stomachs of their citizens. All of these birds are being hit by one stone, namely the rule of law.

E. Other Choices: Exceptions to the Neoliberal Economic Development Failures

As previously indicated, the current international economic order coerces developing states into submitting to its demands through the rule of law. Nevertheless, it is also a fact that some developing states managed not to follow the neoliberal economic model and employed their national development plans, especially with regard to building their economic capacities. The Asian Tigers are an exceptional example of such economic progress, and an achievable one. The Asian example demonstrated that developing countries, despite the economic pressures that they were subjected to, had a way out. This also indicates that developing state governments possessed alternative economic choices, that may be economically harder and more painful, other than submission to neoliberal pressure. Resorting to the IFIs for financial assistance and implementing their conditional structural reform is a hard choice, but it usually appears easier and more suitable than undertaking major economic reforms, or subjecting the political leadership to heavy economic and political criticism that might endanger its stability and sustainability, as in Egypt's case for instance.[171] South Korea, Taiwan, and Singapore are a role model for developing states who followed different development roads other than the neoliberal development paradigm.

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[170] *Id.*

[171] See Chapter 4 of this paper, which will chart the transformation of the Egyptian economy from state-led to market-oriented, following the neoliberal model.

There are many common features between these states and the other developing states who did not manage to achieve such economic progress. Initially, these states were colonies, as were most of the developing states. They were economically underdeveloped and had to struggle against various economic challenges. These states also began their economic development journey around the same period as most of the developing states, during the 1960s-70s. Nevertheless, the major difference between these states from the other developing ones is how their political leadership employed the state's interventionist powers. The common element between the three aforementioned states is that they initially began, as many other developing nations did, with the ISI as a development model. Yet, either during its adoption, or directly after, they adopted state-led, export-oriented development policies motivated by the limited natural resources they possessed.[172] In all three examples, the state performed a paramount role in the economic development policy and within market operations. Furthermore, the political leadership managed to maintain equity levels within their communities.[173]

1. South Korea and Taiwan

With regard to South Korea and Taiwan, the economic development of both nations was greatly dependent on the state, in what is called the "statist approach."[174] In this manner of development, economic development policies are based on the state's major plans for development, which the private sector also had to follow.[175] The state's role also extended to the prevention of the formation of economic coalitions, such as what happened in Indonesia,[176] in order to not divide economic actors between winners and losers.[177] In the South Korean case, the state's role was stronger than that of Taiwan, as in the former it played a leading role, while in the second it was a supporting one.[178] Both states realized the downsides of ISI as a development policy, so they adopted Export-Oriented Industrialization (EOI) in the early 1960s. Both

[172] Hayam Kim & Uk Heo, *Comparative Analysis of Economic Development in South Korea and Taiwan: Lessons for Other Developing Countries*, 41 ASIAN PERSPECTIVE, 17 (2017).
[173] *Id.* at 19.
[174] *Supra* note 172, at 21.
[175] *Supra* note 172.
[176] Maria M. Wihardja, Siwage D. Negara, *The Indonesian Economy from the Colonial Extraction Period until the Post-New Order Period: A Review of Thee Kian Wie's major works*, 61 ECONOMICS AND FINANCE IN INDONESIA, 41-52, (2015).
[177] *Supra* note 172, at 21.
[178] *Supra* note 172, at 22.

states granted incentives to export-oriented industries and maintained a low foreign exchange rate.[179] With regard to South Korea, ISI policy remained in use selectively in order to support export goods manufacturing by providing the necessary materials.[180] The economic focus was on light industries because of the lack of capital, while the focus on heavy industries occurred gradually after the exports sufficiently increased. [181] Both states gave great attention toward establishing high-quality human capital through different means of human development, such as education. As a result, such human capacity became a great asset that assisted these states in achieving further development through manufacturing high-tech products.[182]

Unlike most of the developing nations, both states avoided becoming subject to economic interventions, either by the IFIs or the developed states. Both states also imposed some sort of control over their private and state-owned companies in order to guide their economic development. As for South Korea, it did indeed rely on international loans in order to finance parts of its development policy.[183] However, these loans were not attached to the type of economic policy they performed, nor demanded its shift to another economic development policy. Nevertheless, it was not until the 1990s, and for the sake of joining the Organization for Economic Cooperation and Development (OECD) with the developed states, that South Korea had to liberalize its financial sector. Such economic transformation caused a change in the interest rates, which private banks tried to take advantage of, contributing to the financial crisis in 1997.[184] While in Taiwan's case, the state depended more on domestic capital through its own stock market, alongside domestic savings.[185] Moreover, the Taiwanese firms and banks avoided depending on foreign loans, which made domestic capital the primary source of financing for Taiwan's economic growth.[186] Yet in both cases, both states succeeded in realizing significant and steady economic progress without increasing inequalities within their communities.

[179] *Supra* note at 172, at 23.
[180] *Supra* note 172, at 24.
[181] *Id.*
[182] *Supra* note 172, at 25.
[183] *Supra* note 172, at 33.
[184] *Supra* note 172, at 33.
[185] *Id.*
[186] *Id.*

According to the Gini index,[187] South Korea maintained similar income inequality rates, of 0.344 and 0.336, between 1965 and 1989 respectively.[188] Taiwan also managed to do the same, maintaining its income inequality levels during the same interval, at between 0.322 and 0.292.[189]

2. Singapore

As for Singapore, it is a considerably new state in comparison to prior two states above, since it gained its independence from the Federation of Malaysia in 1965.[190] Its economic development policy started right after independence. Singapore adopted a mixed development approach that employed both the free market and state led development.[191] The country had limited resources but an excellent location that needed to be utilized. Accordingly, trade liberalization was essential due to the forces of the globalized market in order to restore its place as an economic hub.[192] In addition, the development plan also involved opening up to foreign capital as a catalyst for economic growth, besides maintaining the stability of its fiscal and monetary policies.[193] Nevertheless, due to the limited domestic market, and similarly to South Korea and Taiwan, Singapore also adopted an export-led industrialization policy. It also invested greatly in education and infrastructure projects. Furthermore, although the market was liberalized, the state also intervened in order to guide it toward its industrial policy, which indicates that it was not entirely a free market.[194] Singapore also relied on State-Owned Enterprises (SOEs) or Government Linked Companies (GLCs), and avoided privatization as a neoliberal demand in order to be able to steer its industrial policy.[195] Moreover, and contrary to the requirements of the Washington Consensus with regard to deregulation, Singapore maintained a heavily

[187] The Gini index, or coefficient, is a measurement model that uses income statistics in order to measure income distribution and inequality within a certain population. For more, see the World Bank Gini index, *available at* https://data.worldbank.org/indicator/SI.POV.GINI.
[188] *Supra* note 172, at 19.
[189] *Id.*
[190] Nathan Peng & Phang Sock-Yong, *Singapore's economic development: Pro- or Anti-Washington Consensus?*, 6 ECONOMIC AND POLITICAL STUDIES, 33 (2018).
[191] *Id*.
[192] *Supra* note 190, at 34.
[193] *Id*. at 34-35.
[194] *Supra* note 190, at 38-39.
[195] *Supra* note 190, at 40.

regulated labor market, a managed exchange rates for its currency, maintained land ownership, and adopted unique social welfare policies.[196]

3. Indonesia

Indonesia almost passed through the same developmental phases as the three previous examples. It began with a period of economic stabilization, rehabilitation, and partial liberalization from 1966 till 1973.[197] Then it moved to the second phase of rapid economic growth because of the extreme increase in oil prices during the period of 1973-1982, after which it followed the ISI policy.[198] Lastly, the state adopted an export-oriented strategy during the period of 1983-1996. During this period, the Indonesian government started the process of deregulation and liberalization.[199] Nevertheless, Indonesia did not manage to maintain the same economic achievements as the three prior examples, as it suffered from corruption, collusion, and nepotism.[200] Deregulation, especially in the financial sector, made the Indonesian economy vulnerable to the different internal and external economic fluctuations, which grew into an economic crisis that overthrew Soeharto's leadership after 30 years of rule.[201]

The four cases in hand demonstrate how these countries managed to achieve high levels of economic progress, while simultaneously preventing inequalities and promoting social welfare, especially for the first three. The four states did not completely liberalize their markets, especially during the phases of structuring their economies. They also employed different mechanisms in order to control their markets and the paths of their development. They utilized the rule of law, but in favor of their state-led, export-oriented industrial development. In addition, the four states did not permit economic policy changes in return for financial assistance, especially in the foundational development phases, and continued with their industrial export policies. Finally, and after constructing sufficiently strong, productive economies that were capable of enduring global competition, they opened up to the international market. However, and despite the economic progress that these states managed to achieve, subjection to global economic forces had its undesirable economic

[196] *Supra* note 140, at 41-45.
[197] *Supra* note 176, at 45.
[198] *Id*.
[199] *Id*.
[200] *Id.* at 46.
[201] *Id*.

consequences, such as the financial crisis in 1997, and the shortcomings of the Indonesian economy due to unregulated liberalization.

IV. Egypt as a Case Study for the Implementation of the Rule of Law while Transitioning to a Liberal Market-Oriented Economy

This chapter presents a practical legal study to the SAP program that was implemented in Egypt starting in 1991. While many economists have studied the program from the economic point of view, few have done it from the legal perspective. In this regard, whereas most of the legal studies tend to focus on the privatization process, this study focuses more on the investment part, in an attempt to demonstrate how the implementation of the rule of law does not necessarily lead to an increase in investment. The chapter begins with an introduction to the political economy of Egypt, describing its transition from socialist economy to a neoliberal one through the implementation of the SAP. Then it demonstrates the relationship between the IFIs and Egypt, and the implementation of the SAP program. Section Three reviews the regulatory transformations that took place during the period of transition as an element of the rule of law that the BWIs adhere to. Section Four presents an analysis of the impact of following these neoliberal policies on the successive Egyptian investment laws as one of the main objectives of neoliberalism. Section Five presents the other element of the application of the rule of law, which is the legal institutional practice which is presented through the case of the Supreme Constitutional Court judgments with regard to the neoliberal transformation. The last section presents the outcomes of the implementation of the program after applying the rule of law.

A. Historical Background of the Egyptian Political Economy

Nasser, Sadat, and Mubarak were the political leaders of Egypt during the period that this paper covers. Nasser took charge in 1952 after the elimination of the monarchy. Sadat took over from Nasser after his death in 1970. Sadat's presidency lasted till he was assassinated in 1981. Lastly, Mubarak became the political leader of Egypt for thirty years till 2011 Revolution. The features of their respective regimes are as follows:

1. Gamal Abdul Nasser (1952-1970)

Nasser managed to become the president of Egypt after the Free Officers' coup in 1952. After overthrowing King Farouk, and after a short presidency by Mohamed

Najib, Nasser started to shape his political leadership along a more centralized approach. He was a political nationalist with socialist economic ideas.[202] His acts resembled those of many leaders of decolonized states during this period, who had a historic sensitivity with regard to postcolonial powers, and were eager to achieve economic independence alongside their newly-achieved political independence.[203] Nasser had an industrial vision that he wanted to establish in order to end dependency on the West for manufactured products. Accordingly, he undertook an industrial policy that some regard as Import Substitution Industrialization,[204] while others believed that it was certainly an industrial policy, but not ISI.[205] He adopted the planned market economy approach, and relied heavily on the public sector for economic activities.[206] He aspired to convert the state economy from relying on agriculture as a main source of income, to an industrial one, like the developed states.

He started to instrumentalize the law in order to achieve his purposes, such as the issuance of the Land Reform Act of 1956.[207] He regarded the High Dam as his national project, to which he directed most of the country's resources. After losing confidence in Western support, Nasser established strong connections with the Soviet Union and the Eastern Bloc, especially in the military sphere. After a shortage of funding, Nasser announced the nationalization of the Suez Canal in order to finance the High Dam Project in 1956.[208] The decision triggered the "Tripartite Aggression" in response to the nationalization of the Canal. In addition, and because of his unfriendly relationship with the West, Nasser did not depend on the IFIs for financial support. He attempted to nationalize foreign and private businesses, mainly banks, insurance companies, and financial institutions in 1961.[209] Nasser managed to attain

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[202] *See*, KHALID IKRAM, THE POLITICAL ECONOMY OF REFORMS IN EGYPT: ISSUES AND POLICYMAKING SINCE 1952 (American University in Cairo Press) (2018).
[203] *See*, VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD, (New Press) (2008).
[204] Lama Abu-Odeh, *On Law and the Transition to Market: The Case of Egypt*, 37 INTERNATIONAL JOURNAL OF LEGAL INFORMATION, 59-88 (2009).
[205] MOURAD WAHBA, THE ROLE OF THE STATE IN THE EGYPTIAN ECONOMY, 1945-1981, (1st ed., Ithaca Press) (1994).
[206] *Supra* note 202.
[207] NAIEM A. SHERBINY & OMAIMA M. HATEM, STATE AND ENTREPRENEURS IN EGYPT, ECONOMIC DEVELOPMENT SINCE 1805 102, (Palgrave Macmillan) (2015).
[208] *See*, THOMAS LIPPMAN, & BOUTROS BOUTROS-GHALI, EGYPT AFTER NASSER: SADAT, PEACE, AND THE MIRAGE OF PROSPERITY (1st ed. 1989).
[209] *Id*.

considerable development through his planned-market approach.[210] Nevertheless, the private sector's activity deteriorated greatly during his rule due to his economic policies. [211]

2. Anwar el Sadat and The Open-Door Policy (1970-1981)

Sadat took charge of the state while at war in 1970. The economic conditions were so rough that he described it as "below zero".[212] While he was in power, he started to engage with the international economic community by signing the GATT agreement and the ICSID agreements in 1970 and 1971. He wanted to improve the economic conditions and saw in the West a stronger model than the Soviet Union. Subsequently, after the war, he issued a new investment law in 1974 which was named the "Open Door Policy Law," or the law of "Infitah". He was seeking to attract foreign investors to invest in Egypt. Also, he wanted to open the door for Gulf oil money to be invested in Egypt.[213] Yet, till 1979, the amount of foreign investment was disappointing due to many issues, such as the ongoing conflict with Israel and lack of trust in the government after Nasser's expropriations. During his rule, Sadat resumed diplomatic relations with the United States and the IFIs.[214] Many of his dealings then were with the IMF, because of the imbalance of the Egyptian budget and the need for macroeconomic assistance. One of the effects of such economic policies was the Bread Riots of 1977, due to the cutting of subsides which increased prices.[215] The Egyptian economy during his rule was considered a rentier one. It mainly depended on the revenues of the Suez Canal, tourism, and exporting crude oil.[216] Nevertheless, the liberalization of the market started during his rule.[217]

3. Hosni Mubarak and Economic Liberalization (1981-2011)

Mubarak started his rule in 1981 after the assassination of Sadat. During the Mubarak era, the real transition from a state-planned to a market-oriented economy took place. Mubarak's administration relied on the IFIs for economic consultation and

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[210] *Supra* note 202.
[211] *Supra* note 207.
[212] TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT, (Cambridge University Press) (2007).
[213] *Supra* note 204.
[214] *Supra* note 208.
[215] Ikram, *supra* note 202.
[216] Lama abo Odeh, *supra* note 204.
[217] *Supra* note 212.

assistance.[218] The state budget was ruined due to the hard economic conditions and accumulated debts that the state inherited from the Sadat era.[219] Due to severe economic fluctuations, and in order to avoid political instability, the Egyptian leadership's choices were inclined towards engagement in a structural adjustment program with the World Bank and the IMF, which was known as ERSAP. The program aimed to introduce structural adjustments to budgetary and fiscal policy at the macroeconomic level[220], in addition to other structural adjustments to the market at the microeconomic level. The program aimed to liberalize the market and dismantle public sector enterprises through privatization.[221] The project also targeted the promotion of free trade and the attraction of foreign investment. The move to a neoliberal economy was criticized by many scholars, especially for the way it was implemented; since neither the private sector nor the market were ready for such market changes. [222] Moreover, and after the program came to an end, other economic shocks had drastic effects on the Egyptian economy, which caused the program to be labelled an economic failure.[223]

B. Egypt, The IFIs, and the Stabilization Economic Program (ERSAP)

During Nasser's period, Egypt had limited encounters with the IFIs. Egypt merely contacted the World Bank in order to finance the High Dam project. The World Bank was interested in offering such financial support in order that Egypt not resort to the Soviet Union for aid back then.[224] However, Nasser was adamant about his relations with the Soviets. As a consequence, the World Bank called off the operation after raising the money for the project, because of Egypt's strong military relationship with the Eastern Bloc.[225] Relations with the IFIs were then severed till after October War.

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[218] *Supra* note 202.
[219] *Supra* note 204.
[220] *Supra* note 202.
[221] *Id.*
[222] *Id.*
[223] MOHAMMED MOSSALLEM, EGYPT'S DEBT TRAP: THE NEOLIBERAL ROOTS OF THE PROBLEM, (Dar El Maraya) (2017). *Available at,* https://www.academia.edu/33347547/Egypts_debt_trap_The_neoliberal_roots_of_the_problem.
[224] *See*, The World Bank, *available at,* https://openknowledge.worldbank.org/handle/10986/32368.
[225] *Supra* note 202.

After the 1973 war, the political regime decided to direct its foreign policy towards the West, as it is economically stronger than the Soviet Union.[226] Egyptian policy makers were anxious about the IFIs' financial policies, as they considered them unrealistic. The IFIs, from their side, were pushing the changes within the Egyptian economy. Nevertheless, they were frustrated because the Egyptian government accepted their analysis but did not proceed with their solution.[227] The government, in that regard, was against the IFIs' suggested reforms, especially with regard to the pace of implementation. They feared that the IFIs were insensitive towards the economic situation in Egypt. One of the ministers even described the IFIs in that tone, saying: "they are too eager to announce the crime and to pronounce the sentence."[228]As a consequence, the Egyptian officials kept stalling the required changes from the IFIs, while the IFIs kept pushing for such changes in exchange for their financial aid. The decision-making in that phase was influenced by the Egyptian officials, the bilateral donors, and the multilateral agencies.[229]

However, the World Bank did not desire to create tensions with Egypt because of the past encounter with regard to the High Dam. This was the reason why the IMF pushed its economic advice more than the World Bank.[230] As a consequence of the IMF's conditions with regard the macroeconomic reform, the Bread Riots took place in 1977.[231] However, Egypt continued dealing with the IMF and the World Bank to further the stability of the economy. Due to the debt crisis in 1987, and great budget imbalances, Egypt had to sign an economic reform agreement which influenced Egypt's economic policy-making independence.[232] Egypt signed an agreement with the IMF in May 1991, and another one with the World Bank in November 1991.[233] Both agreements aimed to stabilize the economy and enact structural reforms, which was named ERSAP. The program was based on the Washington Consensus' economic principles.[234] It is worth noting that Egypt was among the states with the highest

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[226] KHALID IKRAM, THE EGYPTIAN ECONOMY, 1952-2000: PERFORMANCE POLICIES AND ISSUES 26 (Routledge) (2005). *Available at* http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=308777.
[227] *Id.*
[228] *Id.*
[229] *Supra* note 226, at 27.
[230] *Supra* note 226.
[231] *Id.*
[232] *Supra* note 223.
[233] *Supra* note 202, at 282-283.
[234] *Supra* note 223.

number of attached conditions from the IMF in 1993, after Mauritania, with 56 in total.[235]

It is debated among economists whether the program had succeeded or not in achieving the desired objectives.[236] Some consider that it was partially successful, while others consider it a complete failure.[237] Ikram indicated that the program adopted by the IMF and the World Bank was inconsistent, as it depended upon shrinking the public sector with a simultaneous enlargement of the private.[238] Accordingly, it initially presumed that the private sector had enough resources to replace the public sector. Secondly, it was not confirmed whether or not the private sector was willing to take over the public one and would regard it profitable, which did not happen in the end.[239] The program was also criticized for greatly increasing domestic debt, while reducing foreign debt. Another criticism was that the liberalization of the market failed to secure the state's needs. Furthermore, the percentage of the deficit in 2003 surpassed that of 1989-1990, which was before the implementation of the program.[240]

An explanation for such failure was the economic hit that the Egyptian economy suffered due to the East Asian financial crisis.[241] The second explanation was the tourist attack on the 18th November in 1997 that took place in Luxor, as the incident had a significant impact on tourism which was an essential source of foreign currency to the country. The program overestimated the ability of the private sector to fill the gap that the public sector left. Moreover, the program depended to a great extent on the privatization of the public sector, and the World Bank did not consider that the

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[235] Alexander E. Kentikelenis, Thomas H. Stubbs & Lawrence P. King, *IMF conditionality and development policy space, 1985–2014*, REVIEW OF INTERNATIONAL POLITICAL ECONOMY, 554 (2016), *available at*, https://doi.org/10.1080/09692290.2016.1174953.

[236] Some scholars regard the program as successful, as it achieved its macroeconomic objectives through the fulfillment of foreign debts and decreasing the budget deficit, while other scholars regard it as a failure because of its destructive social consequences and weak economic performance after its end.

[237] Mossallem considered neoliberal development in Egypt, represented by the ERSAP program, as a complete failure. For more, *see*, *supra* note 223; While other scholars deem the program to have partially succeeded in solving some of Egypt's economic problems. For more, *see*, Anton Dobrongov, Farrukh Iqbal, *Economic Growth in Egypt: Constraints and Determinants*, 42 CAIRO, THE WORLD BANK, MIDDLE EAST AND NORTH AFRICA, THE OFFICE OF THE CHIEF ECONOMIST (2006).

[238] *Supra* note 226, at 75.

[239] *Id.*

[240] *Supra* note 223.

[241] *Supra* note 226.

market was not ready.[242] Furthermore, the absence of market competition was an essential factor that was overlooked, since what happened was the replacement of a public monopoly with a private one.[243] On the other side, the program was assessed as a partial success since it managed to reduce the large external debts, which eliminated pressure on the balance of payments and reduced the budget deficit.[244]

C. Transformation to a Neoliberal Market System and the Employment of the Rule of Law

During the early 1970s, and despite the ongoing war with Israel, Egypt started to make some economic moves at the international level. On the 9th May in 1970, Egypt signed the General Agreement on Tariffs and Tarde (GATT), and later the WTO agreement in 1995.[245] In 1972, Egypt signed and joined the ICSID convention, which entered into force on 2nd June 1972.[246] After the war, president Sadat started to open up to investment through law no. 43 of 1974,[247] which was amended in 1977 for further clarifications on the exchange rate of the Egyptian pound.[248] He reestablished diplomatic relations with the United States on 28th February 1974[249] as a step towards further economic and political support for the next phase. In 1979, the Supreme Constitutional Court (SCC) was established for further legal institutional assurance. The Court started to strike down old socialist legislation from the Nasser era, such as the Land Reform Law.[250]

As indicated earlier, Egypt started to recommunicate with the IMF and the World Bank in order to restore its economic balance. After Sadat's assassination, Mubarak took charge of the state and resumed the economic adjustments. In response to the requirements of the economic reforms prescribed by the IMF and the World Bank, the government started to enact pro-market legislation. The companies law no. 159 of

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[242] *Id.*
[243] *Id.*
[244] *Supra* note 202, at 295.
[245] *See*, Egypt's membership profile at the World Trade Organization, *available at* https://www.wto.org/english/thewto_e/countries_e/egypt_e.htm.
[246] *See*, the list of the contracting states and other signatories to the ICSID convention, *available at* https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf
[247] *Supra* note 205, at 189.
[248] *See*, Gerald T. McLaughlin, *Infitah in Egypt: An Appraisal of Egypt's Open-Door Policy for Foreign Investment*, 46 FORDHAM LAW REVIEW (1978).
[249] *Supra* note 208.
[250] *Supra* note 212.

1981 was enacted, substituting other laws in that regard.[251] The privatization movement started through the promulgation of the privatization law no. 203 of 1991.[252] Also, the capital market law no. 59 of 1992 was promulgated in order to regulate stock transactions within the market, which was essential for the privatization process, as it took place through stock purchases. In addition, the new investment law no. 8 of 1997 was issued in order to attract foreign investments. To follow, the Real Estate Finance Law no. 148 of 2001 was promulgated for more real estate ownership encouragement, and the Competition Law no.3 of 2005 was issued to regulate competition and monopoly within the market.

Furthermore, in order to attract foreign capital inflows, and in response to the ongoing market trends, Egypt started to conduct BITs with many states. The objective was to add more assurances and facilitations in order to attract national investors of the state parties to the treaties. Egypt signed 111 treaties and became one of the six highest countries in the world in that regard.[253] Many of these treaties were concluded between the 1990s and 2000s, which indicates the essentiality of foreign investments to the Egyptian economy, and the influence of liberal market policy over the decision-making process.[254] It is also worth noting that Egypt signed the Declaration on International Investment and Multinational Enterprises on 11th July 2007 with the OECD. [255]

D. The Legislative Evolution of Egyptian Investment Law as a Neoliberal Requirement for Foreign Investment and the Rule of Law

Within the period studied for this paper, there were five consecutive investment laws that were promulgated, starting from 1953 till 1997. Each of these laws had different political and economic circumstances that shaped its characteristics. They represent a cross-sectional view of the political and economic conditions during this period. They also represent an indicator of the economic objectives of each transitional economic

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[251] The Law substituted laws no. 26 of 1954, no. 244 of 1960, and no. 137 of 1961. For more, *see*, *supra* note 212.
[252] *See*, *The Privatization Coordination Support Unit (PCSU), the results and impacts of Egypt's privatization program* 5, (CARANA Corporation) (2002).
[253] *See*, OECD, business climate review of Egypt, *available at* http://www.oecd.org/mena/competitiveness/BCR%20Egypt_April29_with_cover.pdf.
[254] *See*, UNCTAD, international investment agreement navigator, Egypt's BITs, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt.
[255] *See*, OECD, investment policy reviews: Egypt, *available at* https://www.oecd.org/countries/egypt/oecdinvestmentpolicyreviewsegypt.htm.

phase. In addition, they demonstrate the legal position of foreign investments during this interval, and where the successive governments stand. These investment laws are Law No. 156 of 1953, which was amended by Law No. 475 of 1954; Law No. 65 of 1971; Law No. 43 of 1974 which was amended by the Law No. 32 of 1977; Law No. 230 of 1989; and, Law No. 8 of 1997. The focus on reviewing these laws will be in the light of certain parameters for relative indicators of economic liberalization as a fulfillment of the neoliberal market economic objectives, such as: the free flow of capital, tax holidays, protection against nationalization, property ownership, dispute settlement mechanisms, and the number of investment agreements signed.[256]

1. Laws Before the Open-Door Policy

a) Law no. 156 of 1953 For Investment of Foreign Capital within the Economic Development Projects and Its Amendments

This law was promulgated on 2nd April 1953 in the name of the guardian of the throne after the military coup of 1952.[257] It was named the Law of Investment of Foreign Capital within the Economic Development Projects. The law was constituted of only seven articles. The first article defined what was to be considered as foreign capital.[258] The second indicated the beneficiaries of this law.[259] The third was concerned with foreign capital transfers to and from Egypt, and their limitations.[260] The fourth article indicated the acceptable limits of wage transfers outside Egypt for foreign experts and labor.[261]The fifth article regulated the establishment of a specialized committee within the Ministry of Commerce and Industry for foreign capital investments and prescribed its duties.[262] Article 6 required the submission of an application in order to enjoy the benefits of this law.[263] Lastly, the seventh article commanded the competent minsters to enforce the articles of this law and to issue the required decrees for its execution, and to declare it as a functioning law the same day of its publishing in the official

[256] These indicators were selected after reviewing the OECD investment report with regard to the MENA region and its recommendations, and the OECD investment check list. For more, *see*, OECD report on the incentives and requirements of investment in MENA region, *available at* http://www.oecd.org/mena/competitiveness/36086643.pdf. *See* also the OECD check list, *available at* https://www.oecd.org/investment/investment-policy/2506900.pdf.
[257] Law No. 156 of 1953 (Egyptian Investment Law, amended in 1945), 1953 (Egypt).
[258] *See*, Article 1, *Id.*
[259] *Id*, Article 2.
[260] *Id*, Article 3.
[261] *Id*, Article 4.
[262] *Id*, Article 5.
[263] *Id*, Article 6.

gazette. [264] The law was amended the following year by the Law No. 475 of 1954. The subsequent law introduced two amendments to Article 1 and Article 3.[265]

During the proclamation of these two laws, the state was in a very delicate transition after the removal of monarchy by military coup. The characteristics of the state's political and economic policies were not clear yet. As demonstrated, the two laws had limited provisions in that their main functions were to define what was to be considered foreign capital and how the state should deal with it. It seems like the law was issued for the state to recognize how to handle foreign capital more than for the investor to assess the environment of their future investment. Both the law and its amendments did not stipulate any incentives, such as tax exemptions, or any exceptional facilitations or incentives. It also did not specify any dispute settlement mechanisms, conditions for investment, or guarantees against property confiscation.

It only identified what was considered foreign capital, established a special committee with certain duties toward investments and the investor, and indicated periodical and quantitative limitations on profit transfers outside the country.[266] However, Article 2 was clear with regard to the purpose of the investment; stating that it should be for an economic development project in fields of industry, agriculture, tourism, transportation, mobilization, or mining. This expresses either a low level of enthusiasm toward foreign investments or the insignificance of its presence during that period. It also did not reveal the nature of the market system at that time. Nevertheless, it was nearer to the liberal approach since there are limited limitations on invested capital.[267] It is worth noting that during this period there were already several ongoing foreign investments within the Egyptian market.[268]

The above-mentioned law stayed in force during all of Nasser's rule. He did not attempt to introduce any changes to the law, with the exception of the promulgation of the Law No. 51 of 1966, designating Port Said as a free zone.[269] It is important to indicate as well that Nasser issued Law No. 21 of 1958 for the Organization and

[264] *Id.* Article 7.
[265] Law no. 475 of 1954 (Egyptian Investment Law Amendment, reformed in 1971), 1954 (Egypt).
[266] *Supra* note 257.
[267] Deregulation is a feature of the liberal market. For more, *see*, *supra* note 81.
[268] *See*, Ikram, *supra* note 202, at 164.
[269] Law No. 51 of 1966 (Free Zones Law, reformed in 1971), 1966 (Egypt).

Encouragement of Industry within the Egyptian Territory. The enactment of this law was in line with his industrial tendencies and ambitions. The law regulated the structure of Egyptian industry and the way it was to be governed.[270] It also indicated what was to be considered as Egyptian-made and specified the role of the state in this important sector. The law, in its attached memorandum, explained how transforming the state into an industrial one was essential for its independence and self-reliance. It is also worth noting that this law did not tackle any aspects of foreign capital or investments within the Egyptian industrial sector.[271] However, the enactment of this law reflects an adherence to the industrialization policies of most post-colonial states during this era.

b) Law No. 65 of 1971 for the Investment of Arab Capital and Free Zones

This law was the first legislative attempt after Nasser's era to open the Egyptian market to foreign investments. This law terminated the effect of the prior investment law and its amendments, previously indicated, and also entered into force the day it was published in the official gazette. The law was constituted of 67 articles that regulated the activity of foreign investments, and indicated the procedures the foreign investor should adhere to in order to invest in Egypt.[272] As is clear from the name of the legislation, the law was meant to address Arab countries, mainly the Gulf, more so than others. However, Article 18 expressed clearly that foreign capital would enjoy the same privileges and guarantees as Arab capital, after cabinet consent and presidential approval.[273] Unlike the preceding law, this one was more detailed with regard to the procedures, incentives, restrictions, and protection of foreign capital investments within Egypt.[274]

Article 2 specified that the invested capital enjoys the guarantees that this law stipulates, which prohibited its submission to state guardianship, nationalization, or confiscation except for public utility in exchange for fair compensation in accordance with the laws in force.[275] The article also indicated that such compensation should be

[270] Law. No. 21 of 1958 (Egyptian Industry law), 1958 (Egypt).
[271] *Id.*
[272] Law No. 65 of 1971 (Egyptian investment law, reformed in 1974), 1971 (Egypt).
[273] *Id.* Article 18.
[274] *Id.*
[275] *Id.* Article 2.

fulfilled within 6 months from the date of the procedure.[276] The article also outlined the procedures that should be followed if a dispute arose between the investor and the authority, which was submission to domestic arbitration.[277] Articles 7, 8, 9, and 10 indicated some restrictions and limitations on the transfer of wages, profits, or capital outside Egypt.[278] Moreover, Articles 19 to 52 outlined the facilities, exemptions, dispute settlement, and procedures for establishing an investment in the determined free zones; with exception to Article 37 that forbade any kind of dealing with Israel.[279] Only Article 5 tackled the tax exemptions that the foreign investor might enjoy.[280] Article 5 indicated a tax exemption for 5 years on the profits resulting from industrial and commercial activities.[281]

During the promulgation of this law, Egypt was at war with Israel. Nevertheless, and despite being the successor to a socialist regime, and the strong military bond with the Soviet Union, President Sadat issued this law in an attempt to attract foreign capital. Yet, as the articles demonstrated, it is clear that the government approached foreign capital cautiously and not with open arms. Guarantees against expropriation were inserted, as well as dispute resolution mechanism through arbitration, in a message to investors that the new administration was not like the old one. Tax exemptions and incentives for foreign investment were modest in this law, as Article 5 was the only one that tackled this subject. Facilities were more extensively provided, but restricted to the free zones. The law was also lacking in any neoliberal requirements that indicated openness and the motivation for attracting foreign investors. It is worth noting here that during the interval of issuing this law, Egypt did not have any ongoing operations with the IFIs.[282]

2. The Open-Door Policy and Laws Thereafter

The focus on foreign investment in Egypt started during Sadat's time in office, when he promulgated Law No. 43 of 1974 directly after the October war in 1973,[283] and

[276] *Id.*
[277] *Id.*
[278] *Id.* Articles 7, 8, 9, and 10.
[279] *Id.* Articles 19-52.
[280] *Id.* Article 5.
[281] *Id.*
[282] *See*, Ikram, *supra* note 226.
[283] Law No. 43 of 1974 (Egyptian Investment Law, amended in 1977, and reformed in 1989), 1974 (Egypt).

three years after his first investment law of 1971.[284] Subsequently, two laws were issued with regard to investment during Mubarak's rule, which were Law No. 230 of 1989[285] and Law No. 8 of 1997.[286] It is worth noting that the three laws followed almost the same policy in dealing with foreign investments, through the limitation of investment privileges and guarantees to certain economic sectors.[287] Tax holidays and duty exemptions were the forms of incentive that these laws offered. The analysis between these laws will be based on the indicators indicated earlier.

a) Protections and Guarantees Against Expropriation

In this regard, Article 7 of Law No. 43 of 1974 prohibited nationalization, confiscation, or the guardianship of invested projects except through judicial authorization.[288] Article 8 of Law No. 230 of 1989 stipulated the same guarantees with the same exceptions. However, it added that such properties shall not be confiscated except for public utilities in return for compensation equivalent to its value. Furthermore, protections against expropriation where indicated within Articles 8, 9, and 10 within Law No. 8 of 1997. In that regard, the law eliminated both confiscation for public utility and through judicial authorization. It expressly restricted the confiscation or nationalization of invested property.[289] In addition, both Laws No. 230 of 1989 and 8 of 1997 indicated that the administrative authorities shall not intervene within the pricing of products, establishments, or determining their profits. Another guarantee was added by Law No. 8 of 1997 with regard to licensing protection. The law stipulated that the investor's licenses, for investment or other utilities, shall not be revoked by any administrative authority as long as no violation was committed regarding the licensing conditions.[290] Accordingly, the three laws granted protections for foreign investment projects. Law No. 8 of 1997 offered the highest protection of the consecutive investment laws since 1953, which indicates governmental interest in

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[284] The law was amended in 1977 to eliminate confusion with regard the correct exchange rate of the Egyptian pound. *See*, Gerald McLaughlin, *Infitah in Egypt: An Appraisal of Egypt's Open-Door Policy for Foreign Investment*, 46 FORDHAM L. REV. 885 (1978). *Available at*: https://ir.lawnet.fordham.edu/flr/vol46/iss5/1.

[285] Law No. 230 of 1989 (Egyptian Investment Law, reformed in 1997), 1989 (Egypt).

[286] Law No. 8 of 1997 (Egyptian Investment Law, reformed in 2017), 1997 (Egypt).

[287] BAHAA ALI EL-DEAN, PRIVATIZATION AND THE CREATION OF A MARKET-BASED LEGAL SYSTEM: THE CASE OF EGYPT 23 (2002).

[288] *Supra* note 283, Article 7.

[289] The article was criticized for not being a permanent guarantee by Ali El-Dean since the law was subject to amendments, and other laws might abolish this article. For more, *see*, *supra* note 287, at 25.

[290] *Supra* note 284.

foreign investment within this period, and growing neoliberal influence in order to secure the market for foreign capital and investment operations.

b) Dispute Settlement

Article 8 of Law No. 43 of 1974 indicated that disputes shall be settled in accordance with the agreement with the investor, and/or in accordance with the international agreements that involve Egypt and the investor's state as parties, or according to the ICSID convention which entered into force by Law No. 90 of 1971.[291] Article 55 of Law No. 230 of 1981 indicated the same as the previous article.[292] The only addition was the insertion of domestic arbitration as a dispute settlement option.[293] In addition to the above, Law No. 8 of 1997 added three additional sections with regard to dispute resolution mechanisms with foreign investors. The first was through a petition committee, the second was a ministerial dispute resolution committee, and the third was a ministerial committee for investment contract disputes.[294] These committees were empowered to resolve investment disputes in an attempt to accelerate the dispute settlement process and to avoid international arbitration.[295] These additional mechanisms demonstrated the multiple options that the state provided for dispute settlement during the 1990s. Such diverse dispute settlement mechanisms emphasized the government's willingness to solve investment conflicts in whichever manner fits the interests of the investor.

c) Tax Holidays and Duty Exemptions

The three laws offered a wide range of tax holidays and duty exemption bundles for different intervals. Article 16 of Law No. 43 of 1974 indicated that such exemptions should last for five years, or up to eight years, depending on the significance of the project for public utility.[296] On a different note, Articles 11 to 16 of Law No. 230 of 1989 stipulated the privileges of the law in that regard. It offered greater tax holidays and duty exemptions compared to its predecessor.[297] The law also extended the

[291] As indicated earlier, Egypt signed the ICSID convention in 1972. *See*, *supra* note 283.
[292] *See*, *supra* note 285, Article 55.
[293] The Cairo Regional Centre for International Commercial Arbitration started functioning in 1979. It is worth noting also that the arbitration law was promulgated in 1994 by Law No. 27 of 1994.
[294] *Supra* note 286.
[295] This committees aims to peacefully resolve investment disputes as a time and cost-efficient alternative to arbitration or litigation.
[296] *See*, *supra* note 283, Article 16 of Law No. 43 of 1974.
[297] *See*, *supra* note 285, Articles 11-16 of Law No. 230 of 1989.

interval for these exemptions, as it indicated that the exemption should be for five years and could be extended for another equal interval for public utility interests. It also stipulated that the exemptions could last for ten years if the projects were founded within one of the new industrial areas, new urban communities, or in a remote location.[298] Law No. 8 of 1997 offered the same period of exemption in a similar manner to the earlier one with regard to investment within and outside of the new regions. However, a separate section was dedicated for the purpose of tax holidays within Law No. 8 of 1997. From Articles 16 to 27, the law stipulated the different types of exemptions that the foreign investor might enjoy. It also extended the duration for these exemptions to twenty years for investments outside the "Old Valley".[299] Thus, law No. 8 of 1997 provided foreign investors with the largest bundle of exemptions, on the one hand, and on the other, it offered the longest duration for tax holidays. The gradual increase in incentives reflects how the government was committed to the implementation of neoliberal adjustments through the encouragement of investment.

d) Real Estate Ownership

In this regard, Law No. 43 of 1974 did not indicate the possibility for foreign investors to own real estate within Egypt. However, Article 19 indicated that the administrative buildings created through the rules of this law are not subjected to the normal leasing law,[300] which indicates that foreign investors are allowed to rent property. Whereas, in Law No. 230 of 1989, the only difference in this subject was indicated within Article 17 with regard to the projects of land reclamation if it took the form of a joint stock company, after cabinet approval.[301] However, Article 12 of Law No. 8 of 1997 granted foreign investors the right to own real estate, such as land and buildings.[302] The switch in foreign ownership policy affirms governmental openness to foreign investors as an important economic partner.

e) Foreign Capital Transfer

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[298] *Id.*
[299] *See*, *supra* note 286, Articles 16-27 of Law No. 8 of 1997.
[300] See, *supra* note 283, Article 19.
[301] *See*, *supra* note 285, Article 17.
[302] *See*, *supra* note 286, Article 12.

Law No. 43 of 1974 stipulated, within Article 21, the means by which the investor shall transfer his capital outside the state. The law required that such transfers occur after a period of five years of it reaching the state, by five equal installments per year, and after the approval of the investment agency board.[303] In addition, Article 22 outlined the criteria upon which the board shall decide the possibility of such capital transfers.[304] In the same regard, Article No. 22 of Law No. 230 of 1989 stipulated that the investor could transfer all the profits, or a part thereof, within the limits of their foreign currency debit account.[305] Article 23 of the same law restricted transferring the capital in its entirety. It stipulated that the allowed limit is equivalent to the value of the project after its liquidation, and by five equal annual installments.[306] The only exception in this regard was if the investor's foreign currency debit account was with one of the banks registered with the Egyptian Central Bank and had an amount equivalent to the desired transfer; otherwise the approval of the investment agency board would be required.[307] Nevertheless, Articles 10 and 10.1 of Law No. 8 of 1997 did not restrict the transfer of capital without prejudice to the rights of the third party.[308] Once more, it is clear how gradual the process of eliminating restrictions on capital transfers was. Such a shift reflects the government's gradual acceptance of the mobility of capital as an essential requirement for foreign investments and commercial operations in a free market.

f) Investment Treaties

As indicated earlier, Egypt became one of the top 6 countries in the world for concluding BITs in order to encourage foreign investments.[309] Many of these BITs were concluded during the 1990s and the implementation of the ERSAP.[310] In addition, the investment law No. 8 of 1997 indicated clearly the importance of honoring international investment agreements. Moreover, it indicated ICSID as a dispute resolution mechanism for investment disputes even if there was not a BIT that

[303] *See, supra* note 283, Article 21,
[304] *See, supra* note 283, Article 22.
[305] *See, supra* note 285, Article 22.
[306] *See, supra* note 285, Article 23.
[307] *Id.*
[308] *See, supra* note 286, Article 10 and 10.1.
[309] See, *supra* note 253.
[310] *See*, UNCTAD, Egypt's concluded BITs, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt.

stipulates so explicitly.[311] In that regard, it is important to indicate that Egypt is among the countries which was most subjected to ICSID arbitrations, totaling 32 cases.[312]

As demonstrated, despite the gradual elimination of restrictions and the increase in incentives starting from 1974 to 1997 in response to neoliberal requirements for an opened and deregulated market, the amount of foreign investment that came to Egypt during this period was disappointing. Many factors – other than investment legal provisions – had an influence and caused the reluctance of foreign investors. These factors could be summarized as follows: (i) the conflict between Egypt and Israel, especially in the 1970s; (ii) the lack of trust in the government because of previous nationalization attempts; (iii) the lack of trust in the government and its unreliable bureaucracy;[313] (iv) the lack of industrial power to produce and export; (v) the inability of the Egyptian market to meet competition at the international level, and;[314] (vi) the quick implementation of market liberalization that was more than the Egyptian private sector could handle.[315] In spite of being a member of ICSID, the GATT, and the WTO, investors were not keen to invest within the newly-liberalized Egyptian market. However, and due to engagement with the international neoliberal market, the Egyptian economy became a vulnerable one with nothing to offer, and willing to accept anything.[316]

[311] *See*, *supra* note 286, Article 7,
[312] *See*, Amr Abbas & John Matouk, *The Middle East and African Arbitration Review 2019*, GLOBAL ARBITRATION REVIEW, (2019), *available at* https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2019/1190120/egypt
[313] *See*, *supra* note 205.
[314] *See*, *supra* note 212.
[315] *See*, *supra* note 223.
[316] *Id.*

Table 1:Review of Egyptian Investment Laws

Indicators / Law	a) Protection and guarantees against expropriation	b) Dispute settlement	c) Tax holidays and duty exemptions	d) Real estate ownership	e) Foreign capital transfers	f) Investment treaties that entered into force
Law No. 156 of 1953 and its amendment by Law No. 475 of 1954	N/A	N/A	N/A	N/A	N/A	N/A
Law No. 65 of 1971	Yes, with exceptions for public utility, and in exchange for fair compensation in 6 months.	Domestic arbitration.	Minimal, specified for the free zones, except for Article 5 that indicates a 5-year tax exemption on profits.	N/A	Restricted by Articles 7, 8, 9, and 10	Only one investment treaty with Kuwait in 1966 (terminated).
Law No. 43 of 1974 and its amendment by Law No. 32 of 1977	Yes, except by judicial authorization.	According to mutual agreement, international agreements, domestic arbitration, or ICSID.	More than the previous laws, with a 5-year exemption that was extendable to 8 years for public utility.	N/A, only regulated renting	Restricted by a lapse of 5 years by five instalments, and after the acceptance of the Investment Agency Board.	114 BITs entered into force after the Open-Door policy, only 15 of them before the implementation of the ERSAP program, and 99 BITs enforced after its implementation.
Law No. 230 of 1989	Yes, with exceptions for the sake of public utility, and through judicial authorization in exchange for fair compensation.	According to mutual agreement, international agreements, domestic arbitration before the Cairo Regional Centre, or ICSID.	More than the previous law, with a 5-year exemption that was extendable for an equal duration, and 10 years for investments in new or remote regions.	Limited to land reclamation and restricted by cabinet approval.	The amount of the transfer is restricted by the amount of foreign currency in the investor's debit account, equivalent to the value of the project after liquidation, and by 5 annual instalments.	
Law No. 8 of 1997	Expressly restricted expropriation or confiscation of foreign investment assets and property.	All of the above, in addition to three newly-established governmental committees for the speedy settlement of disputes, and the avoidance of international arbitration.	Included more tax holidays than the previous laws, the same exemptions as Law No. 230 of 1989, and increased the period of exemption to 20 years for investments outside the Old Valley.	Granted the right for foreign investors to own real estate.	No restrictions without prejudice to any third-party rights.	

E. Institutional Practice as an Objective of the Rule of Law in Egypt

The above sections demonstrated the legislative transformation that took place after the Open-Door policy and the shift toward a neoliberal market-oriented economy. The focus on this section will be on the behavior of the Egyptian legal institutions, represented by the Supreme Constitutional Court (SCC), toward these neoliberal changes. The practices of legal institutions are one of the main elements of the rule of law for the neoliberal paradigm.[317] Because of its importance, the World Bank spent $3.8 billion on judicial reforms within developing countries.[318] Shihata, the General Counsel of the World Bank, emphasized the importance of institutional reforms for the private sector's development.[319] In addition to the legislative aspect, Shihata further indicated that legal institutions participate in creating the legal matrix within which the system operates. Moreover, he illustrated how such institutional practices promote harmonization between legal reforms and the market, which eventually will promote democratization.[320]

In this regard, the establishment of a constitutional court in Egypt took two phases. The first was during 1969, while the second was in 1979. In the beginning, it was named the Supreme Court. The Court was not fully independent of the authoritarian political system back then.[321] Unlike the previous court, the SCC, which was renamed in 1979, had a different system of appointing its judges and was independent of the political system.[322] The establishment of the Court at this phase was part of a political maneuver by the government in dealing with the aftermath of the riots that took place in 1977 against economic changes.[323] The political leadership's objective was to dismantle the socialist economic foundations that Nasser established through the Court's rulings within the areas of housing, privatization, and land reform.[324]

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[317] *Supra* note 34.
[318] Mustafa, *supra* note 212, at 223.
[319] *See*, IBRAHIM SHIHATA ET AL., THE WORLD BANK IN A CHANGING WORLD 228, (Martinus Nijhoff Publishers) (1991).
[320] *Id.*
[321] Mustafa, *supra* note 212, at 78.
[322] *Id.*
[323] *Supra* note 212.
[324] *Supra* note 212, at 120.

The Court had a great role and influence on the shape of the political, social, and economic environment in Egypt, especially during Mubarak's rule.[325] The Court started to become engaged through its rulings in sensitive political matters starting in 1999, although its influential rulings began in 1995.[326] In 1992, the Court started to become more liberalized and progressive through the adoption of an international approach.[327] The Court began to rely on foreign court judgments and incorporate them within its rulings, such as from the United States Constitutional Court.[328] The Court recognized the international conventions that Egypt was member of, such as the International Covenant on Civil and Political Rights and the International Covenant of Economics.[329] The Court began to employ these international conventions within its interpretations and rulings, which was not counted in the governmental calculations. As a consequence, there were many confrontations between the Court and the government with regard to political, social, and economic affairs.[330]

Within the economic development sphere and the neoliberal project in Egypt, the Court had a great role in enabling the privatization program. There were many constitutional constraints that could have led to the abortion of the privatization process. Initially, Article 4 of the Egyptian Constitution stipulated that

> [t]he economic foundation of the Arab Republic of Egypt is the socialist democratic system based on sufficiency and justice, in a manner preventing exploitation, narrowing the gap between incomes, protecting legitimate earnings and guaranteeing justice in the distribution of public responsibilities and expenditures.[331]

As demonstrated, and in contradiction to the neoliberal market ideology, the article explicitly indicated that the economic system of the state is a socialist one. In addition, the article prescribed the role of the state in the economic sphere and mandated it to ensure the just distribution of income and the prevention of the exploitation of its assets.

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[325] *Supra* note 212.
[326] *Supra* note 212, at123.
[327] *Supra* note 212, at167.
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *See*, Article 4 of the Egyptian Constitution of 1971, *supra* note 212, at 244.

Moreover, and with regard to the protection of the state's ownership of economic utilities, Article 30 of the constitution stipulated that

> [p]ublic ownership is the ownership of the people and it is confirmed by the continuous support of the public sector. The public sector be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan.[332]

In addition, Article 33 of the constitution stipulated that

> [p]ublic ownership shall have its sanctity. Its protection and support shall be the duty of every citizen in accordance with the law as it is considered the mainstay of the strength of the homeland, a basis for the socialist system and a source of prosperity for the people.[333]

What is more, Article 59 stated that "[s]afeguarding, consolidating, and preserving the socialist gains shall be a national duty."[334] The articles expressed the sanctity of public ownership, and it granted every citizen the right to defend it as a national duty; which raises another issue with regard to how the people perceived such change. The Nasser era policies had many supporters within the Egyptian population at the time. They were against the privatization project, since for them it represented the opposite of nationalization,[335] and at the same time the core governmental objective was to move towards a market-oriented system.[336] On a different front, the state had to decrease publicly owned enterprises since they became a great burden on the state's budget, as the IMF and the World Bank highlighted. In order to handle such a challenge, the Court had to employ a very wide scope of interpretation for what was to be considered "public sector".

The Court had to manipulate the explicit meaning of the text by adopting a very liberal interpretation that was contemporary to the ongoing economic development process. [337] Accordingly, the Court twisted constitutional articles in order to recognize the privatization law as constitutional.[338] In that regard, and in an interview conducted with Chief Justice Awad Al Murr, he indicated that

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[332] *See, supra* note 212, at 247, Article 30.
[333] *See, Id.* Article 33; *Id*.
[334] *See,* Article 59, at 250.
[335] *Supra* note 287, at 2.
[336] *Supra* note 212.
[337] *Supra* note 212, at 130.
[338] *Id.*

> [t]he constitution in its plain terms said the public sector is dominant and it has to command the process of development in Egypt… Could the court accept this? The public sector is proved to be a complete failure... Everything was wrong with the public sector. It failed in administration. It failed in providing revenues. It failed in every aspect of its life.[339]

He further added that

> [t]he World Bank said that the only solution was to amend the constitution but the government was unwilling. The court faced the real problem. Either Egypt was to move ahead or retreat backward, such was the case when we made our decision... and we have to interpret the constitution in a way that will pave the way for privatization.[340]

It is clear in Al Murr's words how the Court was trapped between what they deemed to be right and what was the best for the country; between their duty and limits as judges to respect the acts of law, and their duty as Egyptians toward their country. It is also obvious how he was convinced by the opinion of the World Bank that a change must take place through changing the constitution, which was a hard decision to take by the government because of the political circumstances back then. Accordingly, he attempted to make that change along with other court members.

Furthermore, it is evident how Chief Justice Al Murr was extremely liberal in his explanation of the situation and to the Court's actions. He continued in his interview, saying that

> What is seen at the time to be a step for progress could be seen the other way around at another time... the government must have alternatives for investing its money in directions pertinent to the public interest... instead of a public sector, which has been considered by the constitution as the only method of development, the court said that the method of development could not be restrained by a specific method, even if it is stated by the constitution… without this, no proper decision would ever happen and the economy in Egypt would have stayed as it was, incapable of advancement.[341]

In stressing his opinion, he further stated that

> a constitutional provision is a living creature. It cannot be interpreted in any way that will impede our society. Impediments in our society

[339] *See*, Mustafa, Chief Justice Awad AL Murr Interview, *supra* note 212, at 130.
[340] *See*, *Id.*
[341] *Supra* note 212, at 131.

> cannot have tools within our constitution... That is why, despite the fact that the ruling was a complete deviation of the terms of the constitution, it is a ruling in the light of our legitimate aspiration. So whatever criticism I have been made against this ruling I will never regret what we have done. It was not only fair, but it is required as a necessity in our society.[342]

The tendency of the Chief Justice was clear toward changing what the constitution stipulated. He and other Court members preformed a legislative role, clearly, through ruling against the stipulations of the Constitution. In theory, the Egyptian economy remained a socialist one; yet in practice, it was a neoliberal one thanks to this ruling. What the Court did was a practical application of what Felix Cohen illustrated in his article, Transcendental Nonsense and the Functional Approach. Law is what courts do, and not what the articles stipulate; since influences, whether political, social, religious, or economical, determine in a significant way the outcome of the rulings which make it predictable.[343] If it was not, the government would not have risked leaving the survival of the privatization policy in the hands of the SCC; since if the Court ruled otherwise, it would have marked a possible end to the program. As Abo Oudeh deduced, the Court was left to take the blame for the results of the program, and the government proceeded with its neoliberal market plans as prescribed by the IFIs.[344] In addition, this confirms and interprets the neoliberal insistence on the importance of the rule of law, on both the legislative and institutional fronts. However, it is important to note in that regard that the Court was not liberal in that ruling only, or just with regard economic concerns. The Court adopted the liberal and wide text interruptions in many other incidents, which some was regarded as political and human rights concerns.[345]

The Court ruled against the government in many political incidents, since the market was the one liberalized and not the political administration. Such active rulings took place in parallel intervals to the structural adjustment program from 1991 to 1997. In that regard, the Court had many rulings with regard to the protection of social and political rights, in response to the expansion in the use of preventative arrest that the government undertook, and subjecting civilians to military trials through Law No. 97

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[342] *Id.*
[343] Cohen, *supra* note 95.
[344] *See*, Abo Oudeh, *supra* note 204.
[345] *Supra* note 212.

of 1992.[346] In addition, and with regard to press liberation, the Court struck down articles within the Egyptian criminal procedures code that dealt with libel cases.[347] The court invoked Articles 10 and 11 of the Universal Declaration of Human Rights and the principles of justice that are shared by all civilized nations in the labor party newspaper case, were the editor was liable for libeling the Minister of Petroleum.[348] As for human rights, the Court's practices managed to enhance the work of many human rights organizations in Egypt within the previously indicated period, such as the Cairo Institute for Human Rights, the Center for Human Rights Legal Aid, and the Hisham Mubarak Center for Legal Aid.[349]

Nevertheless, and as previously demonstrated, the rule of law has been one of the foundational requirements for neoliberal development since the 1970s. It aims to reform national laws and legal institutional practices in order to safeguard liberalized markets and free trade from governmental interferences that might disrupt ongoing operations. The Egyptian example was a demonstration of the application of the rule of law in a developing country through adopting the ERSAP program prescribed by the World Bank and the IMF. The Egyptian government implemented the required legislative changes, in spite of their being contrary to the Constitution. Market-oriented regulations had been enacted and implemented as a formalist structure for market operations.

Both the new market-oriented regulations and the government had the required institutional support needed for enforcing these laws. As previously mentioned, the state would not have implemented the privatization plan without the extremely activist rulings that the SCC rendered due to the public resistance it faced. However, despite such major legislative and institutional behavior changes in the rule of law and its implementation, the economic situation did not improve as was anticipated. This asserts how the neoliberal approach in economic development influenced the Egyptian legislative structure as an outcome of implementing the IFIs Structural Adjustment Programs. It also highlights the degree of significance of the rule of law in realizing economic development and growth. Indeed, it might be essential, but not as significant

[346] *Supra* note 212, at 136.
[347] *Supra* note 212, at 140.
[348] *Supra* note 212, at 142.
[349] *Supra* note 212, at 147.

for development as it was claimed to be. This indicates that there are far more essential aspects to consider rather than the rule of law, at least in the case of Egypt.

F. Evaluation of the Egyptian case:

As demonstrated, and unlike the previously covered Asian examples, Egypt became dependent on the IFIs for economic assistance and support. Such a partnership began with caution after the riots that took place in the 1970s. Later, it became inescapable because of the budget imbalances at the end of the 1980s. The purpose of the ERSAP program was mainly to reduce the pressure foreign debts placed on the national budget. The idea behind the program was simple: To cut public spending and subsidies, and to pay foreign debts. The social effects were disregarded while implementing the program, as poverty levels increased dramatically after the implementation of the program.[350] In fact, it elevated the poverty rate from 21% in 1990 to 44% in 1996.[351] Furthermore, the prices of major commodities and energy products increased, while wages and salaries decreased as a result of a reduction in public spending by as much as 15%.[352]

The program managed to decrease foreign debt to a great extent. However, it failed to attain the expected foreign capital returns. Despite the privatization of more than a third of public enterprises, the privatization policy neither attracted enough foreign investments nor increased Egypt's market share among the developing states.[353] This is not surprising, since Egypt had not been an important destination for foreign investment from the beginning,[354] despite being one of the most eager developing countries in negotiating agreements with regard to investment.[355] Economic returns from international endeavors through joining the GATT in 1970, ICSID in 1972, and undertaking the necessary regulatory adjustments for joining the WTO in 1995 were very weak.

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[350] Karim Korayem, *Egypt's Economic Reform and Structural Adjustment (ERSAP)*, 19 THE CENTER, (1997).
[351] Karen Pfeifer, *How Tunisia, Morocco, Jordan and even Egypt Became IMF "Success Stories" in the 1990s*, 210 MIDDLE EAST REPORT, 23-27 (1999), *available at* www.jstor.org/stable/3012499.
[352] *Id.*
[353] *Supra* note 252, at 5.
[354] *See*, OECD, investment policy reviews 2007, *available at* https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-egypt-2007_9789264034624-en#page15.
[355] *Id.* at 16.

Additionally, the privatization program did not contribute to any increase in the country's exports despite initial postulations.[356] Furthermore, and aside from the privatization program, the investment returns were very minimal as demonstrated in the figures below. Despite the transformation into a neoliberal economy, and the adherence to the rule of law as instructed by the IMF and the World Bank, Egypt remained a rentier economic model in reality.[357] The main resources of income almost remained the same. The only economic difference was the selling off of public enterprises to acquire money to pay foreign debts. The effects of the IMF stabilization program on Egypt were similar to some extent to what happened to the Asian countries in the 1997 crisis.[358] The objectives of the IMF's strategies were similar with regard to safeguarding foreign debts and investments regardless of the effects on the developing states' economies.

After the implementation of the program, the Egyptian pound collapsed against the US Dollar, the government budget was reduced, and the supply of money sharply decreased.[359] Even the essentiality of such procedures was questioned, since the public sector was not losing money in the manner described prior to privatization. 260 out of 314 state-owned enterprises were making profits, and only 54 were making losses; the privatization process might have gone better if it sold off those losing enterprises only.[360] After the program's implementation, gross domestic investment dropped from 28% of GDP in 1980 to 19% in 1998.[361] Meanwhile, the increase in investment during the period between 1990 and 1997 was only 2.7%, in comparison to the 7.2% of middle-income countries, and 12.7% in East Asian countries.[362]

Such indicators prove the irrelevance of the rule of law and its implementation on the one hand, and attracting investments or increasing economic growth on the other. In that respect, when the World Bank was confronted by such disappointing results

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[356] *Supra* note 263.
[357] SAMER SOLIMAN, THE AUTUMN OF DICTATORSHIP: FISCAL CRISIS AND POLITICAL CHANGE IN EGYPT UNDER MUBARAK, (Stanford University Press) (2011).
[358] The IMF's interference in order to handle the Asian financial crisis caused the Asian currencies to collapse further, since foreign capital fled their countries.
[359] Timothy Mitchell, *No factories, No Problems: The Logic of Neo-Liberalism in Egypt*, 26 REVIEW OF AFRICAN POLITICAL ECONOMY, 455, 457 (1999), *available at* https://doi.org/10.1080/03056249908704412.
[360] *Id.* at 458.
[361] *Supra* note 359, at 461.
[362] *Id.*

within the developing states, the response was that it was up to the investors.[363] Accordingly, the structural changes implemented rendered the Egyptian economy vulnerable to international forces, besides walking into the same economic trap as South Africa, and becoming a locked-in economy without achieving real economic gains.

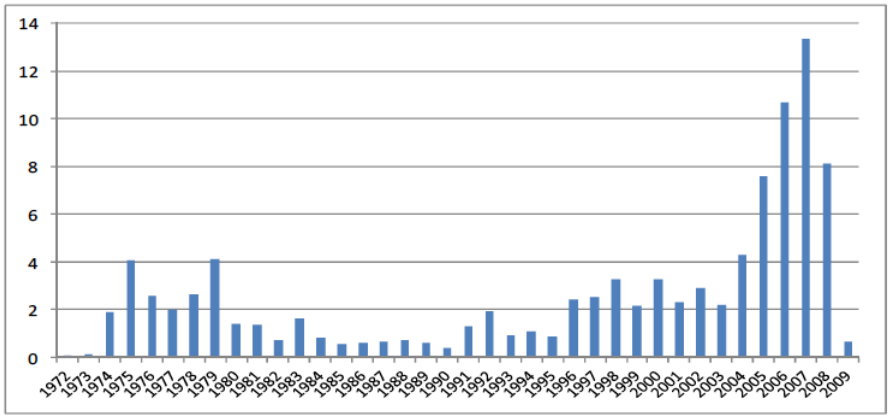

Figure 3: Flow of Real 'Non-Petroleum Greenfield FDI' to Egypt for the period 1972-2009 (in EGP billion at constant 1982 prices)[364]

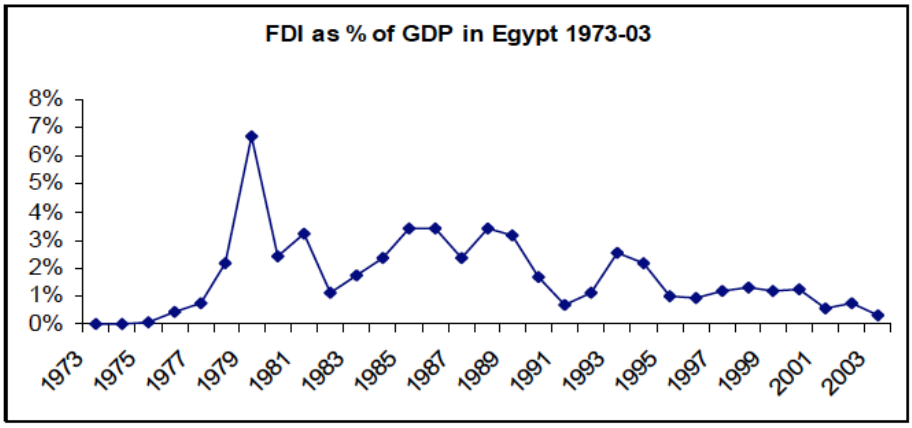

Figure 4: FDI inflows to Egypt as % of GDP (1973-2003)[365]

[363] *Supra* note 35.

[364] Shima Hanafy, *Patterns of Foreign Direct Investment in Egypt—Descriptive Insights from a Novel Panel Dataset at the Governorate Level*, 201512 MAGKS PAPERS ON ECONOMICS (2015).

[365] Nada Massoud, *Assessment of FDI incentives in Egypt*, ECONOMIC RESEARCH FORUM (2003).

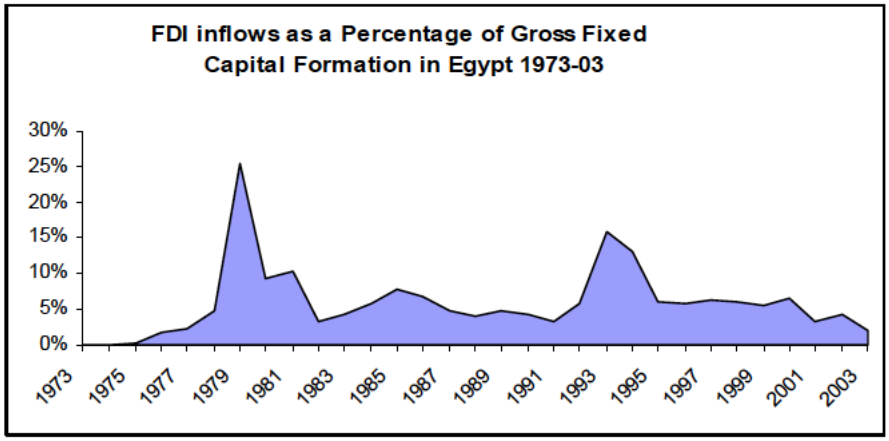

Figure 5: FDI Inflows to Egypt as a Percentage of Gross Fixed Capital Formulation 1973-2003[366]

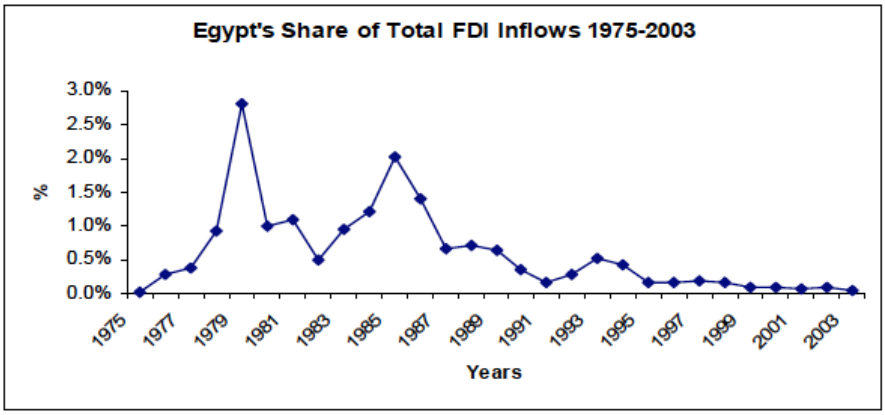

Figure 6: Egypt's Share of World FDI Inflows (1975-2003)[367]

[366] *Id.*
[367] *Id.*

V. Conclusion

This study highlighted how questionable the neoliberal model was in Egypt specifically, and in developing countries in general. It outlined how this economic model was coercively implemented within developing states through the different forces of globalization and through IFI conditionality. Such economic policies ensured Western dominance over the global economic system, which resembled another form of economic colonization. The liberal market approach was suitable for the economic capabilities of the developed states. However, that neither makes it necessarily an ideal one, nor a universally successful model, especially given that the current economic order is a Western product which favors its creators. On the one hand, such a biased system hindered developing states' efforts towards a better economic future. On the other hand, it evoked embedded colonial sensitivity within those developing countries because of being subjected to a double-standard economic system.[368]

The developing states in the current international economic order are being cornered into submitting to the economic demands and conditions of the developed ones, since they do not possess the required bargaining power to alter the system to become more balanced or at least to give more respect to social rights. Furthermore, the role of the IFIs and their recent interferences within the developing states' political systems through conditionality is another nail in the coffin of the developing states' economies. As demonstrated in the Egyptian case, developing states lose part of their economic policy independence through successively coercive interferences, either through the IFIs or other effective international organizations, such as the WTO. The developing states are being pressured to make their economies vulnerable to different foreign economic fluctuations in the interests of the developed. Their economies were integrated into the developed countries' economies with regard to debt repayments, capital transfers, and resource allocation and distribution. The IFIs, from the other side, ensured the security and stability of such a system through their economic policies by ensuring the due payment of foreign debts, the enrollment in international trade conventions, and the developing market's openness to the free flow of capital and investments.

[368] *See*, *supra* note 1.

Such economic dominance was achieved and maintained by the different integrations of the rule of law as a foundational element for economic development. As illustrated, the interaction of law and development took many forms across the different periods. In each, the rule of law appeared to be serving different developmental purposes. However, it did not accomplish the desired developmental role that it was expected to perform within these developing countries, which raised postulations regarding the objectives behind its employment from the beginning. Yet, I believe it was the price that the developing states had to pay in return for financial assistance. Nonetheless, the implementation of the rule of law, as an economic cure in the manner prescribed by the IFIs, furthered the economic suffering of the developing states, and increased the inequalities and poverty levels in their communities.

The Egyptian case in that regard showed the consequences of the implementation of the ERSAP. It managed to fulfil the needs related to foreign interests while completely ignoring social effects within the community. Despite adhering to the regulative and institutional requirements (the liberalized market, opening up to foreign investments, and establishing free trade), economic gains were minimal. These were not the proper solutions for Egypt's economic problems. The neoliberal policy did not even manage to secure the required income from these sources as a substitute for cutting state spending. This affirms that the rule of law is not as significant as it was thought to be, and not even close to how neoliberal marketing would have one believe.

Finally, in order to ensure the sustainability of the economic order, I believe that second thought should be given to the economic interventions' liabilities, whether it be committed by states, international organizations, or even international enterprises. What are the acceptable limits for such interventions, and why is it not regulated as much as military and human rights ones? That is, if it is to be regarded as an intervention in the first place, in the international legal sense. People die, starve, become sick, and even commit atrocities because of economic needs and interests. A clearer threshold is required in order to at least control global economic influences,

until that time comes when the international community realizes how to run a globally-integrated economy.[369]

[369] *Supra* note 1.