# Jurisprudential Theories of Regulation of Financial Cooperative Societies in Tanzania: A Case of Primary SACCOS' Credit Advancement

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**Abstract**

Jurisprudence is a philosophy of law through which legal concepts, design of legal and regulatory frameworks, and historical backgrounds of legal systems are understood. In that perspective, this study discusses jurisprudential theories of regulation of financial cooperative societies in Tanzania with specific concentration to Primary SACCOS' Credit Advancement (PSCA). The discussed theories are; natural law theory, social contract theory, command-and-control theory, sociological theory, law and economic theory, legal instrumentalism theory, and market failure theory. It is important to note however that, market failure theory is not yet adopted as a jurisprudential theory rather it is a general economic theory of regulation. It is therefore suggested in this study that, market failure theory is to be adopted as one amongst jurisprudential theories of regulation. Its adoption promises the better and conducive legal and regulatory framework for not only effectiveness of PSCA but also sustainability of other economic activities in the country. Because, market failure theory has an essential nature of positively impact changes from traditionally rigid and hyper-regulation form of legal and regulatory frameworks to more market friendly regulatory culture. This change is highly looked-for.

**Keywords**: Legal Theory, Jurisprudence, Theories of Regulation, Primary SACCOS, Credit Advancement.

## 1.0 Introduction

This study discusses jurisprudential theories of regulation of financial cooperative societies in Tanzania with specific concentration to Primary SACCOS' Credit Advancement (PSCA). In the course of discussion, it is concluded that, the legal and regulatory framework governing PSCA in Tanzania is framed on the basis of various jurisprudential theories of regulation upon which the legislature and the executive intended to

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achieve their regulatory aims and purposes. Crucial part of this revelation is that, legal scholars are armed with options to choose relevant theory while conducting their research in this area which to date is yet to be widely explored. Due to the nature of subject matter of this study, theories of regulation can be grouped into two groups. These are; general economic theories of regulation (market failure theory, capture theory, and economic theory), and jurisprudential theories of regulation. This study however, is limited to discuss jurisprudential theories of regulation relevant to the regulation of PSCA in Tanzania. Notwithstanding the limited scope of the study, the discussion is extended to market failure theory as part of jurisprudential theories because this study is advocating for its adoption as jurisprudential theory of regulation.

## 2.0 Jurisprudential Theories of Regulation

### 2.1 Natural Law Theory

Natural law is understood in many forms by various natural law jurists depends on their own perspectives and ideologies. For example, *Stoics* conceptualise natural law as a divine law, *Cicero* conceptualise natural law as the law of reason, and *Aristotle* conceptualise natural law as an unwritten rules, while *Grotius* conceptualise natural law as the principles of morality.[2] Generally however, natural law can be deduced to the law of nature and reason that embodies principles of morality and justice. A human being as a rational being ought to exercise any rights with reason. For example, laws against homosexuality practices found their basis from natural law. It is against the order of nature when two men marry since a human nature dictates that, marriage is a union between a man and a woman.[3] Thus, natural law embraces principles of *'ought'* than those of *'is'*. Ideologies and perspectives of natural law jurists gave birth to theories of regulation namely; natural law theory, and social contract theory.

Natural law theory embodies several ideas of what law is, these are; (i) law is a universal order equally governing all men, (ii) law protects inalienable rights of individuals, (iii) the law of nature is superior to positive law, (iv) positive law derives its validity from the natural law, (v) valid law is connected to morality and justice, (vi) positive law is effective when embodies principles of natural law, (vii) law need not to be written but

[2] S.R. Myneni, *Jurisprudence (Legal Theory)* (Asia Law House 2004).

[3] The Law of Marriage Act [Cap. 29 RE 2019], s 9 (1).

exercised by rational being by way of reason, (viii) law is natural, God's given and it is not man-made.[4]

As a theory of regulation, natural law theory seems to impose on regulation of human behaviours and exercise of reason. That, law subjects can only perform well when they exercise reason in their conducts and eventually make even positive law an effective law. On one hand, the assertion may be supported in the sense that, many problems that are found in positive law are not originated from positive law itself but within individuals responsible for enforcement of positive law. For example, corruption laws are not effective in deterrence of corruption crimes because, regulators or the regulated lack morals and ethics to refrain from committing those crimes.

On the other hand however, natural law theory is criticised to advocate for ineffective law. For example *Hume* (1711 – 1776), criticises natural law theory as it advocates for absolute principles that cannot function as good regulatory principles because one cannot derive an *'ought'* from an *'is'*. Further criticism by *Hume* entails that, natural law theory, is not a good theory because it advocates for universality of law, an idea that contradicts sovereignty of states to make their own laws based on their environment, culture, and people's beliefs. *Hume* further entails, even a sense of good and evil is subjective to emotional reactions and morals are not equal and uniform.[5]

In addition to the criticism by *Hume*, natural law theory can further be criticised for advocating for the law that embodies multiple shortcomings. First, natural law cannot stand the test of time and place. It is as if, the law is static while in actual fact it is a dynamic tool imitating change in societies. Thus, what was a sense of reason in medieval societies for example, may not necessarily be a sense of reason in modern societies. A sense of reason can be influenced by other factors such as societal development other than human nature. As different forms of changes and developments occur in societies, relying solely on human nature and reason may lead to a bad law or regulation.

Second, natural law lacks consistency and uniformity which are important characters of law and justice. This is necessitated by the fact that, basing on different factors such as human nature, reason, environment, culture, and societal development, what is a sense of right and wrong may not always be the same to everyone. Thus, maintaining consistency and

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4 Myneni (n 2) 371 – 391.

5 ibid 374 – 375.

uniformity seems to be problematic. Third, natural law embodies with it enforcement problems. In modern societies for example, law enforcement organs such as police and courts of law are responsible in bringing wrongdoers to justice. Since natural law is unwritten law, and lacks consistency and uniformity, it becomes difficult to enforce. Fourth, natural law being unwritten law, contradicts long established legal principles of *nullum crimen sine lege* (there is no crime without a law), and *nulla poena sine lege* (one cannot be punished without a law). In modern societies, for the law to exist, it must be codified following proper procedures of law enactment for the use in a society. Natural law does not match up to this requirement.

Despite the criticism, as a theory of regulation, natural law theory is relevant in regulation of conducts of players in PSCA. It remains important to acknowledge that, principles of natural law such as morality, justice, and ethics are essential to the enactment of an effective law. It is for this reason, a sense of morality, justice, ethics, and professionalism is embodied in positive law to make it effective and rational. For example, in regulation of PSCA, code of conducts and ethics that regulate morals, ethics, and professionalism of players in PSCA is codified.[6] But also, offences against morality are codified into a criminal law as crimes against the state.[7]

## 2.2 Social Contract Theory

Primarily, social contract theory is a theory of the state or sovereignty of the state and establishment of the legal system or law. It becomes theory of regulation because it answers very important questions of (i) how the law came about? and (ii) how people became regulated by the state?. The underlying concept of social contract theory entails that, originally a human being existed in a state of nature with neither state nor laws to regulate their daily activities and conducts. This led to hardships, oppression, and also without protection of life, property, and liberty. People desired this protection and hence entered into social contract of two forms of which one form involved *pactum unionis* and the second form involved *pactum subjectionis*.[8]

The form of *pactum unionis* entails that, individuals desired safety and protection of both human life and accumulated wealth, while the form of *pactum subjectionis*, is the notion about individuals coming together and

6 The Cooperative Societies Act, No. 6 of 2013, s 134.

7 The Penal Code [Cap. 16 RE 2019], Chapter XV.

8 Myneni (n 2) 391 - 396.

agreed to exchange obedience to sovereignty with protection of their lives, properties, and liberties. Accordingly, states came into being and also laws to regulate conducts of its people. However, there are three important different views of social contract that are offered by '*Thomas Hobbes* (1588 – 1679), *John Locke* (1632 – 1704), and *Jean Jacques Rousseau* (1712 – 1778)'.[9] *Thomas Hobbes* maintains that, in a social contract, people surrendered all of their rights and freedoms to sovereign and the latter enforce conformity and compliance in addition to the protection of their lives and properties. That, state authority has absolute power over its people, and that no subjects should have any right against the state. Further, people had obligation to obey state authority in all situations good or bad. But, state has an obligation to obey natural law and to be bound by it. Thus, views of *Thomas Hobbes* about social contract suggest that, state has an absolute power over its people and it cannot do wrong by its people.[10] Problem of this view is that, it disregards sovereignty of the people in participation of public affairs, and it maintains that government authorities can do no wrong.

Views of *Thomas Hobbes* promote authoritarian governments that disregard rights, freedoms, and liberties of its people. It is also places government authorities as almighty that cannot fault. These ideas do not align with modern societies. In Tanzania for example, its constitution uphold sovereignty of the people. It is the people who have power to elect, remove, and re-elect governments, and that governments are accountable to the people.[11] Views of *Thomas Hobbes* were also challenged in the Tanzanian court of law where the court demonstrated that, it is a fallacy to say that President can do no wrong.[12] Thus, views of *Thomas Hobbes* about social contract have no place in modern societies.

On the other hand, *John Locke* maintains that, in a social contract, people allowed the sovereign to maintain law and order and also enforce the law of nature. Because, governments have a duty towards protection of individual lives, their freedoms, and their properties. People did not surrender all of their rights rather they maintain some of it such as, human lives, freedoms and liberty, and property rights. That, governments do not have unlimited sovereignty over its people but has an obligation to enforce natural law.[13] The good side of this view is that, it maintains sovereignty of

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9 ibid 392 – 393.

10 ibid

11 The Constitution of the United Republic of Tanzania 1977, art 8.

12 *Sheikh Mohammad Nassor Abdulla v The Regional Police Commander, Dar es Salaam Region and Two Others* [1985] TLR 1.

13 Myneni (n 2) 393 - 395.

the people in some areas but problem of this view is that, it places governments under the obligation to enforce natural law.

While, *Jean Jacques Rousseau* maintains that, in a social contract, people through general will establish state and laws to guide them. People did not surrender their freedom and rights to a person but to an independent sovereign. If the state authorities and laws are contrary to the general will of the people, it can no longer have validity to exist. The concept of the general will entails that, decisions are to be made by majority citizens because majority view is right than minority view.[14] Although, *Jean Jacques Rousseau* upholds sovereignty of the people in public affairs, his views on superiority of the majority view over minority view do not align with modern societies. For example, this view disregards different groups in communities, and also disregards individual rights that may not necessarily align with the entire community.

*Jean Jacques Rousseau* view is the relevant view of social contract theory of regulation adopted in Tanzania. Social contract theory through the legal and regulatory framework governing PSCA in Tanzania is seen in the requirements of the law to which demands submission of Primary SACCOS to the Government of Tanzania. Once registered, Primary SACCOS needs approval from regulators to do almost anything relating to their PSCA endeavours. For example; amendment of their bylaws, investments, expansion of their businesses, or seeking loan from banks or other financial intermediaries requires an approval from the Bank of Tanzania or the Tanzania Cooperative Development Commission as the case may be.[15] However, Primary SACCOS maintains the right to challenge decisions of the Government of Tanzania which are arbitrary or detrimental to their growth, development, and sustainability.[16]

Nonetheless, it is important to note that, Tanzania negates views of *Jean Jacques Rousseau* on superiority of the majority view over minority view. Both majority view and minority view are at equal footing of importance but it depends on circumstances to which either majority view or minority view is needed. For example while it is a norm to require majority view for decisions in the Tanzania's National Assembly, it is equally sufficient to have minority view in the election of the President of the United Republic

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14 ibid 395 – 397.

15 The Cooperative Societies Act, No. 6 of 2013, ss 53, 54 (1), and 72 (2) - (4); the Savings and Credit Cooperative Societies Regulations, G.N. No. 115 of 2016, regs 21 (1), (4), 22 (1), 23 (1) - (2), 82 (2), and 84 (2); *See also* the Microfinance (Savings and Credit Cooperative Societies) Regulations, G.N. No. 675 of 2019, reg 50 (2) (e).

16 The Microfinance Act, No. 10 of 2018, s 53 (1) – (3).

of Tanzania. The Constitution of the United Republic of Tanzania 1977 provides that:

> Mgombea yeyote wa kiti cha Rais atatangazwa kuwa amechaguliwa kuwa Rais iwapo tu amepata kura nyingi zaidi kuliko mgombea mwingine.[17]

The provision entails that even if Presidential Candidate may not obtain majority vote but obtained the highest vote than his/her competitors, is the President Elect. The highest vote in essence is minority view.[18] In a business world as well minority view hold importance in decisions. For example in partnership business, when a single partner (who may also be a Primary SACCOS) refuses a change in the nature of the partnership business, decision that is supported by majority partners cannot be implemented. As the law require consent of all partners in changing the nature of partnership business.[19] Thus, views of *Jean Jacques Rousseau* on social contract theory are adopted with modifications.

## 2.3 Command-and-Control Theory

Command-and-control theory is a result of legal positivism based ideologies and perspectives that is also known as imperative theory of law or as Austinian theory of law.[20] Legal positivism is understood in the sense of law emanating from statutes that is obligatory, binding, and sanctioned. Legal positivism is said to be born in the 19th century as a result of positivist movement.[21] Concept of legal positivism entails that, laws are commands and they should apply under the principle of law as it is and not as it ought to be. Thus, legal positivism is an opposite of natural law that emphasis on what law is ought to be than what law is.

Positivists maintain that, legal analysis should be done independently from sociological and historical inquiries. Further, positivists believe that, good decisions are logically deduced from pre-existing rules without an alternative to 'social aims, policy, or morality'.[22] There are various theories developed under the auspicious ideologies and perspectives of positivism such as, command-and-control theory, pure theory of law, and

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17 Art 41 (6). In essence the provision can be translated to mean 'any presidential candidate shall be declared duly elected President only if he has obtained the highest vote against other presidential candidates.'

18 Issa Shivji, et al, *Constitutional and Legal System of Tanzania: A Civics Sourcebook* (Mkuki na Nyota 2004).

19 The Law of Contract Act [Cap. 345 RE 2019], s 194 (b).

20 Avtar Singh, *Introduction to Jurisprudence* (Wadhwa and Company Nagpur 2006).

21 ibid 423 – 461.

22 ibid

utilitarian theory of law.[23] However, due to the nature of this study, command-and-control theory is more relevant positivism theory behind design of the legal and regulatory framework governing PSCA in Tanzania.

Command-and-control theory is an expansion of the command theory propounded by *John Austin* (1790 – 1859) who is the founder of analytical school of jurisprudence.[24] According to *John Austin*, law is characterised by three distinct features namely; law is a command, law is made by a sovereign, and law is enforceable by sanctions.[25] Sovereign is further explained to mean political sovereign (state) or non-sovereign entities such as clubs whereby club members are bound by the established laws.[26] Command-and-control theory therefore, entails that, commands are laws that can be made by legislature, regulatory bodies, or entities and they are enforceable by established authorities that embodied with control power.[27] However, Austin distinguishes commands made by legislature and regulatory bodies as positive law from commands made by non-sovereign entities as positive morality.[28] Positive law is defined to mean codes, statutes, and regulations that are applied and enforced in the courts of law.[29] Positive morality is defined to mean a set of rules that stating what the law ought to be or recommended.[30]

Relevance of this theory to the design of the legal and regulatory framework governing PSCA in Tanzania is built from the fact that, the framework embodies both command (legal) and control (regulatory) aspects. The command aspect of the framework embodies both positive law (State Regulation - Legislation) and positive morality (Self-Regulation - Policy, Contracts, and By-Laws made by Primary SACCOS). The control aspect of the framework embodies both State-Regulatory-Institutions and Self-Regulatory-Institutions.[31] Challenging aspect of the command-and-

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23 ibid

24 ibid 17; *See also* John D. Finch, *Introduction to Legal Theory* (Universal Publishing Co. Pvt. Ltd 2009).

25 Singh (n 20) 82; *See also* Patrick J. Fitzgerald, *Salmond on Jurisprudence* (Universal Law Publishing Co. Pvt. Ltd 2006).

26 Singh (n 20) 17.

27 ibid 18; *See also* James E. Penner, *McCoubrey & White's Textbook on Jurisprudence* (Oxford University Press 2008).

28 Singh (n 20) 18.

29 Bryan A. Garner, *Black's Law Dictionary* (Thompson Reuters 2009).

30 <www.quora.com> accessed 18 September 2018.

31 For further information about legislation and institutions governing PSCA in Tanzania see; Rosemary J. Mukama, et al, 'Inauspicious Design of the Legal and Regulatory Framework Governing Primary SACCOS' Credit Advancement in Tanzania' (2020) 14 African Research Review 2, 24.

control theory is that, it concentrates on rigid regulation that amounts to hyper-regulation. Traditionally rigid and hyper-regulation form of the legal and regulatory framework is detrimental to the regulated. For example the legal and regulatory framework governing PSCA in Tanzania is characterised with multiplicity of laws and regulators. Multiplicity of laws and regulators proved to be a legal challenge affecting Primary SACCOS to achieve their principal objects.[32]

## 2.4 Sociological Theory

Unlike analytical school of jurisprudence, sociological school of jurisprudence deems fit to analyse law using sociology sequence. Sociologists ask questions such as, what is the purpose of law? How does the law functions in the society? Does the law serve the purpose to which was enacted? For them understanding the purpose to which the law was established and whether or not it serves that purpose is vital. Contrary of which it becomes ineffective law that need to be discarded. Thus, this school is responsible for development of sociological theory that guides understanding of the law by looking its function to societies.

Sociological theory is said to have been found by *Augustine Comte* (1798 – 1857) because he was the first to employ the term sociology in connection of an independent discipline.[33] Sociologists maintain that law is a community tool because, it functions in society, it regulates both community interest and individual interests, and that the jurists are to concentrate on action of the law and not on individuals.[34] *Roscoe Pound* submits however that, characteristics of the sociological theory include concentration of the law is given to the functionality of the law than its theoretical underpinning. Law is regarded as a functional institution connecting with discipline directly impacting the society. Law discards analytical positivism and historical jurisprudence. Another characteristic is that sociologists are in two categories when conducting legal studies. There are those who take empirical approach to study the functional aspect of law and others who takes realistic approach to study law basing on courts of law ruling and decisions.[35]

Moreover, sociological study of law takes four forms. First, is conducting inquiries which seek social origins of laws and legal institutions. Under

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32 ibid

33 Singh (n 20) 36.

34 ibid 35 – 36; *See also* Vijay Ghormade, *Lectures on Jurisprudence and Legal Theory* (Hind Law House 2014); *See also* Venkata G. C. Subbarao, *Jurisprudence and Legal Theory* (Eastern Book Company 2001).

35 Singh (n 20) 35 – 36; *See also* Ghormade (n 34) 193.

this category, concern is on content and factors that shaped and are shaping laws and legal institutions. Second, examine impacts of laws on various aspects of society. Third, conducting inquiries on which laws are to be enforceable in the society. The end result is prescriptions addressed to persons who make and administer laws and not the society as a whole. The prescription for administration is in different category from the prescriptive rights of laws themselves. Fourth, attempt to find criterion by which to test the validity of laws.[36] Sociological theory is relevant to an examination of the extent to which the legal and regulatory framework governing PSCA in Tanzania enables Primary SACCOS to achieve their principal objects.

It is more so because sociological theory has a direct bearing to the obligation of the Government of Tanzania towards cooperative societies in the country to which Primary SACCOS form part. The law provides that 'the Government [of Tanzania] shall provide and create conducive social, economic and legal environment for the development and prosperity of cooperative societies'.[37] That being the case, sociological theory of regulation is useful to be employed in both empirical approach and realistic approach studies. These studies will determine how functional and purposeful the legal and regulatory framework governing PSCA in Tanzania is. Views of sociological theory are closely related to theories under legal realism.

## 2.5 Legal Instrumentalism Theory

Legal instrumentalism theory was found in realism ideologies and perspectives that came as a result of legal realism movement.[38] Legal realism is a combination of both analytical positivism and sociological approaches. It takes what law is but emphasises on effects of law in societies. The theory lays down concept of law as a social phenomenon 'with social impact that is possible instrument for social change. Thus, it should be codified, interpreted, and understood as an instrument of achieving the end in actual social context'.[39] Furthermore, legal instrumentalism theory imposes the law to be a legal tool that helps communities to their goals. The law that hinders communities to achieve their goals is 'toothless'. The law of this nature must be improved to enable communities to achieve their goals.[40] Legal instrumentalism theory

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36 Singh (n 20) 35 - 36.

37 The Cooperative Societies Act, No. 6 of 2013, s 4.

38 Myneni (n 2) 531.

39 Steven M. Quevendo, 'Formalist and Instrumentalist Legal Reasoning and Legal Theory' (1985) 73 California Law Review 1, 119.

40 ibid

emerged in late 18th century but it was until early 19th century when it gained momentum. The period of 19th century proved to be monumental for it redefined the theory as a modern instrumentalism. This period also witnessed legal practitioners employing common law rules for community transformation particularly economic transformation.[41] There is a slightest difference between sociological theory and legal instrumentalism theory. The former embraces both empirical approach and realistic approach to study law, while the latter embraces only realistic approach citing only judge-made law is a genuine as opposed to legislature-made law.[42]

Legal instrumentalism theory is relevant theory of regulation as it advocates for the legal and regulatory framework that is a tool for enabling societies to achieve the desired end. Legal instrumentalism theory is also crucial into studying as to whether the legal and regulatory framework governing PSCA as the legal tool, enables Primary SACCOS to achieve their principal objects (the desired end). The aim is to have in place the legal and regulatory framework that assist Primary SACCOS to achieve their principal objects such as to advance adequate credit to members, to improve income generation in their members' households, and to improve economic realities of Tanzania. Thus, legal instrumentalism theory is concerned with ensuring that the law is a tool or means to achieve an end, of which society is desire to achieve. It is in this spirit that the Government of Tanzania expresses its commitment to ensure supportive legal environment for cooperative societies' success in Tanzania pursuant to Section 4 of the Cooperative Societies Act.[43]

## 2.6 Law and Economic Theory

Economic analysis of law emerged at the time economics emerged as a distinct field of scholarship around 19th century. The analysis is done under the guidance of the law and economic theory that is concerned with impact of laws regulating the economy and the performance of the economy. The law regulates economic activities in society because economic attributes such as money, production, and distribution of wealth may cause crimes in the society. Thus, regulation of economic activities helps in not only prevention or mitigation of crimes but also brings low income earners into mainstream of development and progress.[44] Furthermore, just like economics aimed at improving living standards of the people for the

41 ibid

42 Singh (n 20) 46 – 47; *See also* Gokulesh Sharma, *An Introduction to Legal Theories* (Deep & Deep Publication Pvt. Ltd 2008).

43 No. 6 of 2013.

44 Singh (n 20) 6 - 7.

welfare of the society, the law is also aim at the same.[45] Accordingly, the law and economic theory entails that, in order to improve the economy of communities, the legislature must make good laws that can promote economic and social welfare of individuals in communities.[46]

The law and economic theory was developed at the end of the 19th century and it came in full circle in the 20th century.[47] Law and economic theory facilitates empirical legal studies so as to offer comprehensive and useful information on legal reality to the legal fraternity and the Government.[48] Relevance of this theory as theory of regulation of PSCA cannot be denied. Because, the theory is essential to empirical studies that sets to study the degree to which the legal and regulatory framework governing PSCA in Tanzania enables Primary SACCOS to achieve their principal objects. Since PSCA is in the area of economic law, this theory forms a crucial part of discussions about effectiveness of the law into improving economic realities of communities through PSCA.

## 2.7 Market Failure Theory

Market failure theory originated from economics discipline.[49] Theories of regulation of the economy under the economics discipline include market failure theory, capture theory, and economic theory. Capture theory of regulation entails that, regulation of financial services is less concerned about public good, rather it is a *modus operandi* whereby different groups in community prioritise promotion and protection of their individual and private interests. A great deal of financial services regulation facilitates interests of small business and non-business groups.[50] Moreover, economic theory of regulation, admits likelihood of the capture theory by groups' interest other than individual interests of business entities. The difference between economic theory and capture theory is that the former serves private interest of political effective groups and the latter serves interests of private groups.[51]

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45 ibid

46 ibid; *See also* V. D. Mahajan, *Jurisprudence and Legal Theory* (Eastern Book Company 2013).

47 Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011).

48 ibid 2.

49 Richard A. Posner, 'Theories of Economic Regulation' (1974) 5 The Bell Journal of Economics and Management Science 2, 335; *See also* Brian Dollery and Joseph Wallis, 'The Theory of Market Failure and Policy Making in Contemporary Local Government' (2001) University of New England School of Economics Working Paper Series in Economics.

50 ibid

51 Posner (n 49) 343.

Compare to capture theory and economic theory, market failure theory is more relevant theory of regulation of PSCA in Tanzania. Market failure theory of regulation is also known as public interest theory of regulation.[52] It entails that, regulation of market is natural and that State Regulation can only be justified as an intervention to cure market imperfections. This theory further establish that, State Regulation is only set to define property rights, providing low cost enforcement process, and ensuring restoration of the market to the previous condition prior to market failure.[53] In that perspective, market failure theory of regulation advocates for new regulatory culture upon which players in markets are at liberty to use their own experiences to gain economic advantages and prosperity.

Philosophy behind market failure theory propounds notion that players in the market can achieve greatness by 'improvising' through market experiences and directions. And that uniqueness exists in markets and therefore markets cannot run homogeneously disregarding unique feature that can lead to transformation of business entities and development of communities. Thus, this theory promotes Self-Regulation over State Regulation since Self-Regulation supports innovations. Nonetheless, State Regulation retains its prominence to cure market imperfections and systemic risks that may be brought by market innovations. Market failure theory supplements already existing jurisprudential theories of regulation namely; sociological theory, law and economic theory, and legal instrumentalism theory. It is also embrace essential nature to cure rigidity and hyper-regulation form of legal and regulatory frameworks resulting from command-and-control theory.

For example the legal and regulatory framework governing PSCA in Tanzania does not embrace unique features of employee-based Primary SACCOS that are different from community-based Primary SACCOS. While the latter cannot advance credits against salary, the former has such an opportunity but is not at liberty to do so. It is a mandatory requirement of the law to advance credit against shares, savings, and time deposits of a member.[54] This requirement may work out well with regard to community-based Primary SACCOS but the experience is not the same with employee-based Primary SACCOS. It is true that, members sometimes fail to keep pace with payment of shares, savings, and time deposits. While in this state, a member with financial need cannot successfully apply for a

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52 ibid

53 Harry McVea, 'Financial Services Regulation under the Financial Services Authorities: A Reassertion of the Market Failure Thesis?' (2005) 64 The Cambridge Law Journal 2, 413.

54 The Cooperative Societies Act, No. 6 of 2013, s 41 (1); *See also* the Microfinance (Savings and Credit Cooperative Societies) Regulations, G.N. No. 675 of 2019, reg 33.

loan from Primary SACCOS. Through employee-based Primary SACCOS, there is a window to advance credit against salary because payments from an employee member in form of shares, savings, time deposits, and loan amount, are ordinarily deductions from salary disbursed to Primary SACCOS. But employee-based Primary SACCOS are disadvantaged by legal rigidity resulting from command-and-control theory through which it cannot advance credit against salary of the employee members.

Nonetheless, employee members are not barred from seeking loan from banks or other financial institutions that can advance credit against salary. Implication of this reality is that both employee-based Primary SACCOS and their employee members are tricked. Because, Primary SACCOS has failed to achieve its principal objects such as facilitating financial operations of a member, and an employee member pays high interest rate against credit advanced by banks or other financial institutions. Ultimately, the purpose of existence of Primary SACCOS is defeated. Although cooperative philosophy demands that members must first appropriate funds in form of shares, savings, and time deposits to Primary SACCOS before taking funds out in form of credit, the philosophy befitting codification as a general rule with regard to employee-based Primary SACCOS. Exceptional rule to the general rule must allow employee-based Primary SACCOS as market experiences and directions so dictate, to advance credit to employee members against salary where members are in difficult circumstances to honour their financial obligation through payment of shares, savings, and time deposits.

The exceptional rule is expected to not only cure rigidity of the regulation but also to embrace unique feature of employee-based Primary SACCOS different from other forms of financial cooperative societies. Thus, market failure theory has potential to easy this rigidity by allowing Self-Regulation upon which Primary SACCOS can operate and innovate or spot opportunity of this nature. Further, by insisting of Self-Regulation (though not exclusively in its entirety), market failure theory has potential to cure multiplicity of laws and regulators resulting from command-and-control theory. It is for these reasons, this study advocates for the adoption of market failure theory as jurisprudential theory of regulation. Its adoption is a good starting point to influence a change in the legal and regulatory framework governing PSCA in Tanzania.

## 3.0 Concluding Remarks

This study submitted on various jurisprudential theories of regulation of PSCA in Tanzania namely; natural law theory, social contract theory,

command-and-control theory, sociological theory, legal instrumentalism theory, law and economic theory, and market failure theory. While the first six (6) theories are discussed as jurisprudential theories of regulation, the last theory is advocated to be adopted as jurisprudential theory. As submitted herein above, market failure theory of regulation advocates for Self-Regulation as it promotes innovations but also supports State Regulation as a suitable regulation only if it comes in to cure imperfections caused by Self-Regulation.

Thus, its adoption as jurisprudential theory of regulation is desired as it has potential to impact the change of the legal and regulatory framework governing PSCA in Tanzania. The change is anticipated to lead to the formulation of market friendly regulation susceptible to the growth, development, and sustainability of PSCA in Tanzania. Adoption of market failure theory as jurisprudential theory of regulation also supplements already existing jurisprudential theories namely; sociological theory, legal instrumentalism theory, and law and economic theory. Adding market failure theory to the list completes the puzzle needed for influencing or enhancing the making of the better and conducive legal and regulatory framework governing PSCA in Tanzania.

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