

# Beyond the Regulatory State: China and 'Rule of Law' in a Post-Fordist World

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## **Beyond the Regulatory State: China and ‘Rule of Law’ in a Post-Fordist World<sup>2</sup>**

**超越监管型国家：后福特体制下的中国与“法治”**

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## **Abstract**

Investigations into China's law and legal system invariably presume that China's many regulatory problems are problems of a regulatory laggard—that they are problems that stem from China's failure to as yet construct a mature legal system, such as those found in the advanced industrial countries of the so-called “West” (particularly that of the United States). In this paper, I argue that this is not necessarily the case. China may actually, in many aspects, be operating at the very forefront of the regulatory horizon, compelled by its location in a distinctly post-Fordist Asian economic world to confront regulatory problems that are just beginning to seep into the still largely “Fordist” West. Many of China's regulatory problems, in other words, may often be those of a regulatory pioneer, not those of a regulatory laggard, in the sense that many of its regulatory problems are likely to be problems of the post-Fordist world into which we are moving, rather than problems of the Fordist world from which our present regulatory understandings are derived.

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# 1 Introduction: Post-Fordism, Regulation, and the Lessons of China

Investigations into China's law and legal system invariably presume that China's many regulatory problems are problems of a regulatory laggard—that they are problems that stem from China's failure to as yet construct a mature legal system, such as those found in the advanced industrial countries of the so-called “West” (particularly that of the United States). In this paper, I argue that this is not necessarily the case. China may actually, in many aspects, be operating at the very forefront of the regulatory horizon, compelled by its location in a distinctly post-Fordist Asian economic world to confront regulatory problems that are just beginning to seep into the still largely “Fordist” West. Many of China's regulatory problems, in other words, may often be those of a regulatory pioneer, not those of a regulatory laggard.

To make this case, I will first explore, in Part II, the relationship between regulatory structure and industrial organization. Working off of Fernand Braudel's (1988-1992) magisterial study of Western European economic history ca. 1300-1900, I will argue that there is good evidence to suggest that the modern world is moving into a new economic paradigm, that which is often termed “post-Fordism.” I will also show how this transition to a new economic paradigm is likely to entail a transition to a new regulatory paradigm as well—a transition to what has sometimes been termed “the post-regulatory state”.

Then, in Part III, I will explore what all of this has to do with China. Nowhere in the world has post-Fordism so colonized the economic environment than in the regional economic environment of East and Southeast Asia (ESE Asia). And within this region, China is unique in encompassing both advanced and peripheral economic environments. It is precisely for this reason that many of her regulatory problems are likely to be problems of the post-Fordist world into which we are all moving, and not problems of the Fordist world from which our present regulatory understandings are derived.

## 2 Towards a Theory of Regulatory Cycles: The Rise and Fall of the Modern Regulatory State

Analyses of China's law and regulation invariably measure China's performance in these areas by comparing this performance with an idealized regulatory environment that is sometimes referred to as the "regulatory state". This regulatory state is characterized by control by a centralized bureaucratized government. This government operates above and outside both the private economy and civil society: as a neutral 'referee' that structures and sustains the social and economic environments of the state from above, without directly participating in these environments (Majone 1998). It does this primarily (and paradigmatically) through the deployment of publically promulgated, abstract rules—a technique that is commonly captured by the term "rule of law" (Raz 1977; see also Hart 1994).<sup>3</sup>

At least insofar as legal and regulatory analyses of China are concerned, this evaluative paradigm of the regulatory state is often treated as if it is eternal and universal. As perhaps most famously exemplified by neo-institutional economics, it is invariably presumed to be the common normative end-point of contemporary legal development regardless of time and / or space (see, e.g., North 1990). But as we shall see in this section, the presumption is wrong. In fact, both the "rule of law" and the regulatory state is founded upon are indeed the products of a particular time and a particular space. That time is the era of mass-production industrialization, i.e., Fordism. That space is economical-geography core of the Fordist world-economy, as most exemplified by the advanced industrial states of Western Europe and North America, and particularly that of the United States. Such time and space is characterized by the presence of particular forms of social and industrial organization, forms that are neither eternal nor universal. And where these forms are not present, both the regulatory state and rule of law can and do frequently become dysfunctional.

### 2.1 Of 'Economic Cycles', 'World-Economies', and Economic Evolution

The starting point for this demonstration is the economic-historical model proposed in the 1980s by the great economic historian, Fernand Braudel. In the third volume of his *Civilization and Capitalism, 15th-18th Century*, subtitled "The Perspective of the World," Braudel (1992) makes a

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<sup>3</sup> My use of the term here corresponds with what Randall Peerenboom (2002) has referred to as 'thin' notions of rule of law, notions that do not include liberal ideals such as democracy or judicialized protections (or even recognitions) of social and political rights as *necessary* components of rule of law. However, because these 'thicker' notions of rule of law include the thin elements that I focus on in this paper, my argument that the regulatory paradigm rule of law is particular to time and place would equally apply to these thicker visions of this paradigm.

convincing demonstration that at least since the 14th century, the Western European economic world – what he called the Western European “world-economy (economie-monde)”– evolved through a punctuated evolutionary process characterized by a succession of long-term economic “cycles” – what he termed “secular cycles” – each lasting for roughly around 150 years. These secular cycles sport three distinguishing features. First, each cycle is defined by a long-term rise and subsequent decline in European economic activity. Second, each cycle is driven by the invention of new economic technologies. And third, these driving technologies tends to concentrate in and be dominated and controlled by a particular geographic “core” (a city or region), and this control gives that core a certain degree of hegemonic power over the world-economy as a whole for the duration of that cycle (Braudel 1992: 45-88).

For example, the first cycle that Braudel explored emerged in the 12th century, and revolved around a regularized circuit of trade fairs that were held in various places in the Champagne region of France (Braudel 1992: 111-116). These trade fairs were attended by traders from throughout Europe. By providing a place where these traders could routinely meet and hence settle accounts, these fairs facilitated the development of post-Roman Europe’s first transnational credit networks.

But these fairs only meet on certain days of the year, and they were peripatetic. So in the 13th century, the emergence in Venice of a more convenient way of managing international credit relationships, the commercial bank, marked the beginning of a new economic cycle (which Braudel dates from 1378-1498), and the center of the Western European *economie-monde* moved to Venice (Braudel 1992: 116-135). However, because of its cumbersome procedures, Venetian bank financing was generally only suitable for long-term transactions. And in the late 15th century, bankers in Antwerp began developed a more flexible form of financing that facilitated short-term credit—the money market. This initiated a new, albeit relatively short-lived secular cycle centered in Antwerp (which Braudel dates from 1501-1559) (Braudel 1992: 143-157). This is succeeded by another short-lived secular cycle that emerged in Genoa in the middle of the 16th century (1557-1627) that revolved around the development of specialized forms of what we might call public lending (in this case lending to royal families) (Braudel 1992: 157-174), which was in turn succeeded in the early 17th century a cycle centered in Amsterdam and founded upon the development of a rudimentary commodities futures market (Braudel 1992: 175-276).

## **2.2 The Advent of the Modern European World-Economy: From Factories to “Fordism”**

But what really concern us here, insofar as present-day China’s regulatory environment is concerned, are the two most recent of these secular cycles, those associated with “industrialization.” The first of these two, what we might call “early industrialization,” emerged in England in the middle of the 18th century. Its driving technologies were factory-based manufacturing (the English were not the first to develop factory-based manufacturing, see, e.g., Johnson 1995; but they did invent other ancillary technologies, like coke smelting, that made factory-based production particularly efficient, see generally Braudel 1992: 566-570, equity-based capital markets, and the central bank (Braudel 1992: 556-618; see also Ferguson 2008: 52-56). This cycle was succeeded by a second, more advanced industrial cycle which married industrialization and bureaucratic managerialism, producing what Alfred D. Chandler, Jr. (1992) has famously termed “managerial capitalism”, but which we – following the terminology developed by the (Parisian) “Régulation School” – will call “Fordism” (see, e.g., Boyer 1986; see generally Jessop 2001).

The reason why these last two cycles are of special interest to us is because they are what ultimately gave birth to and continue to sustain the modern “regulatory state”—and in particular, that particular component of it that today we refer to as “rule of law”. This is because industrialization introduced three new elements into (Western) European and American societies, elements that are critical to the success of modern rule-of-law regulation. These are (1) the emergence of an integrated, national economic space; (2) a corresponding a standardization of economic activity within this space; and (3) a unique stability in of the economic and social environments that inhabit this space.

In order to see why this is so, we first note that one of the principal distinguishing features of industrialization is its ability to allow producers to taking advantage of economies of scale. Prior to industrialization, production markets were generally limited to the particular city or region in which the producer was located. This is why the core economic centers of the pre-industrial world economies were cities rather than states. But the new technologies associated with industrialization – such as task specialization, mechanization, and bureaucratic management – allowed producers to not only produce goods at significantly less cost, but also to produce increasing amounts of goods without corresponding increases in production costs. This gave producers both the capacity and incentive to greatly expand their markets. With this expansion, what were previously a diversity of local markets became increasingly integrated into a single national market (Braudel 1992: 365-369).

The development of national markets led correspondingly to increasing nation-wide standardization of social-economic life. The trigger for this development lay in the growing size of factory production. These larger production processes created special governance problems, principal of which were those associated with monitoring and management (see also Thompson 1967). A factory owner could only do a limited number of things, and be in a limited number of places, each day. As factory size expanded, the early factory owner's capacity to oversee her organization and her market decreased. The solution to this problem was corporate bureaucratization—Alfred Chandler's "managerial capitalism": a process involving the specialization, rationalization, and standardization of corporate governance institutions and tasks. Specialization reduced the range, and thus the cost, of the productive knowledge that any particular individual actor must acquire in order to contribute to the organization. Rationalization was a condition precedent for specialization, as it ensured that these specialized tasks aggregate effectively into desired organizational output (see, e.g., Taylorism). Standardization – be it the standardization of manufacturing tasks or the standardization managerial tasks (see., e.g., the development of standardized accounting systems, discussed below) – reduced the costs of monitoring by reducing the monitor's need to account for a diversity of specific local practices.

Collectively, these three organizational pillars reduced the design and training costs associated with organizational growth to such an extent that the expanded markets this growth gives access to more than compensated for the costs of the of the growth itself. And the combination of industrialization with managerial capitalism in particular brought the Western world-economy into that new secular cycle that we are calling "Fordism"—a cycle that would emerge in the latter part of the 19th century and be centered in the United States (Chandler 1977; see also Piore and Sabel 1984: 49-54). Particularly in its core geographies – namely those of Western Europe and North America – Fordism, or what we might more properly call "core Fordism", introduced a number of distinctive features into social and economic life. First, the standardization of patterns of work and employment across a growing array of nation-spanning firms produced a corresponding standardization of nationwide social and economic life. As industrial firms expanded to encompass new labor and product markets, their globally uniform organizational and behavioral routines introduced increasingly uniform economic and social practices – such as common labor routines and forms of labor organization, common products and product designs (and product flaws), and through these increasingly common lifestyles – into what were previously diverse and autonomous



regional economic and social settings (Piore and Sabel 1984: 55-65; Chandler 1977: 10-11, 212-214; see also Dowdle 2006: 333-341).

Secondly, Fordism integrated production into the Anglo-European world-economy's core economic processes. Prior to Fordism, Europe's core economic dynamics centered around commerce and finance—production centered economies were associated primarily with peripheral economic regions (see generally Braudel 1992). Rural and working-class living standards actually moved counter-cyclically with regional economic growth, and this counter-cyclical dynamic facilitated a distinctive pattern of short-term boom-bust cycles that dominated pre-industrial economic life (Braudel 1992: 616-617). Because Fordism revolved around a production-based technology (task specialization) rather than a commercial technology, it caused working-class income and living standards in core Fordist geographies to ultimately become integrated into, and move in conjunction with, national economic growth (Boyer 1995: 75-76). This, in turn, worked to smooth out (but not entirely eliminate) short-term economic fluctuations in these geographies, and introduce important aspects of stability into their national economic and social environments (Piore and Sabel 1984: 73-104; see also Patnaik 1997; see generally Kotz et al. 1994).

### **2.3 Core Fordism and the Emergence of the Regulatory State**

Rule of law and its modern regulatory state was a direct response to the onset of Fordism. The creation of nation-sized markets, and later of nation-sized firms, imposed increasing need for national-sized regulatory governance. In pre-industrial America, governance – as famously noted by Tocqueville – was primarily a local affair (Tocqueville 1969 [1835]: 62-98). As well described by Stephen Skowronek (1982: 24-31), its principal vehicles were the parties and the courts. But as markets and then firms grew to encompass ever larger portions of the state, this older pre-modern bases of government proved increasingly inadequate. Large markets require third-party regulation in order to be effective, since the size of the market make its difficult for participants to coordinate in developing private regulatory responses. In fact, a principal proponent of the establishment national market regulation in the US was the business community itself, which saw national regulation as necessary to help stabilize competition. Beyond this, these new nation-sized markets and firms caused new kinds of social problems that traditional localized governance was unable to effectively address. In the US, for example, these problems included threats of oligarchical domination, threats

of market manipulation (i.e., trusts), industrial unrest, and growing occupational safety concerns. (See generally Skowronek 1982.)

So like firms, government, too, had to grow big. And it did so by using the same governance devices that firms had earlier developed in response to their own increase their size — those of standardization, rationalization, and specialization. Indeed, just as the corporate-industrial firm is really just a particular form of private government (see also Williamson 1985), so too can modern government be seen as simply a particular variant of the corporate managerialism (cf. Sabel 1994).

It was out of this new public governance form that the modern paradigm for rule of law regulation was born (see also Dowdle 2005: 333-341). At its heart, rule of law is a device for centralizing and standardizing ‘governance.’ In the common law world, particularly that of the US, the onset of Fordism involved a subtle re-definition of the essence of law: from that inscrutable, ‘noble pile’ of largely metaphysical principles, described by Blackstone (1966: \*443) into being a positivist collection of rationalized rules. The demands of standardization require that these laws now be universal, while the demands of rationalization required them to be (as much as possible) internally consistent and deterministic – or ‘deductive’ – in application. From these two foundational features, the other elements of the regulatory paradigm of rule-of-law (Raz 1977) can be seen to logically derive.

But the modern regulatory state is not simply a replication of the Fordist firm, it is itself symbiotic on the larger, social ordering effects of Fordism described above (see also Dowdle 2005: 333-341). This is because a standardized and rationalized rule-based system only works if the environment it seeks to administer is similarly standardized and rationalized, since without environmental uniformity, an particular rule will likely have diverse (and often unpredictable) affect on different local environments. (Indeed, writing in the 1840s, Alexis de Tocqueville (1969: 71-80, 161) claimed that one of the distinctive sources of strength of the American constitutional order lay in the fact that it did not seek to employ a centralized body of written laws in administering the national state, and was thus able to better address the complex diversity of local conditions and problems that inevitably confronted a country of such size.) And as we saw above, the standardization and rationalization of national social life has been brought about primarily through Fordism. Similarly, the distinctive stability of Fordism also contributes to the effectiveness of the modern regulatory state by allowing these rules to retain their global effectiveness longer.

The dependence of the regulatory state on Fordism for its effectiveness was well evinced in recent international efforts to help Thailand provide social welfare protection to rural populations

made vulnerable by the 1997 Asian Financial Crisis (see generally Pasuk and Baker 2000: 35-82, 97-104). During the Fall of 1998, two such projects were implemented: the World Bank's "Social Investment Fund (SIF)" and the Japanese government's "Miyazawa Scheme." The SIF was a classically Fordist operation. It was framed in rigorously regulatory terms—terms that provide detailed, rationalized, and transparent standards for eligibility, project structure, and fiscal monitoring. Such rigorous regulatory framing, it was believed, was necessary to prevent the cronyism and corruption that had allegedly caused that crisis from corrupting the effectiveness of these projects. But such a framing was simply incompatible with Thailand's largely pre-industrial rural environment, the environment to which that program was principally addressed. Thailand's rural economy is dominated by small enterprises and agriculture, rather than large enterprises and manufacturing (Pasuk and Baker 2000: 82). Its labor force is primarily migrant and seasonal, rather than permanent. Such non-industrialized, highly fluid conditions made it difficult for centralized developmental assistance organizations to identify and target at-risk rural populations, as was demanded by the SIF's Fordist regulatory structure (Pasuk and Baker 2000: 80-81). As of June of 1999, after some 10 months of operation, the SIR could only disburse only 5% of its available annual capital, and it was discontinued the following month.

By contrast, the Miyazawa Scheme was not organized along Fordist regulatory lines. It "abandoned all pretence of careful targeting [and] elaborate bureaucratic procedures," and simply "disbursed funds to local, rural government bodies." (Pasuk and Baker 2000: 81.) Despite this lack of regulatory structure, however, the Miyazawa scheme actually proved much more effective in providing social welfare security to vulnerable populations than the SIF (see also United Nations Economic and Social Commission for Asia and the Pacific 2001). It did this by making use of the relational networks that structured rural economic space in Thailand in the absence of the globally rationalizing logic of Fordism. Fordism and non-Fordism, in other words, create different regulatory capabilities. And the regulatory state relies critically on the particular regulatory capabilities created by core Fordism.

## 2.4 Moving Past Fordism

There is evidence, however, that this latest, Fordist economic cycle is itself coming to an end. And if it is, it suggests that the more recent, regulatory manifestation of ‘rule of law’ and the modern regulatory state could well be coming to the end of its cycle as well.

A possible decline of ‘Fordism’ has variously been attributed to a number of factors. Braudel (1992: 628-632), who saw this decline as beginning in the 1970s, posited that industrialization may have grown to capture all the markets there are to capture (see also Piore and Sabel 1984: 184-187). Deprived of further opportunity to expand into new markets, industrialization’s capacity to catalyze economies of scale no longer brought the economic benefits it had previously. More recently, Michael Piore and Charles Sabel (1984: 258-263) have also attributed it to technological innovations, particularly computerization. As information courses around the planet at increasingly high velocity, they argue, it speeds up and aggravates processes of change, and hence upsets the market stability and uniformity upon which Fordism depends for its effectiveness.

But whatever the reason, there is indeed significant evidence that since the 1980s Fordism has indeed been losing its structural hold on the world economy. This evidence includes the appearance of greater firm emphasis on flexibility of production; the increasing disaggregation of the production process; and the corresponding re-emergence of a counter-cyclical relationship between economic growth and the standard of living of ‘blue-collar’ workers.

Greater firm emphasis on flexibility of production: The Fordist industrial model works by promoting what Joseph Schumpeter famously characterized as ‘static efficiency.’ Static efficiency seeks to maximize output given a fixed input (with quality remaining constant). The more statically efficient a firm, the larger the market that firm can service given a fixed input. Schumpeter contrasted static efficiency with what he called ‘dynamic efficiency.’ Dynamic efficiency seeks to minimize the cost of adaptation to new environmental factors (like changes in consumer demand). Schumpeter also showed that many of the organizational devices that promote static efficiency (like task specialization and task rationalization) impede dynamic efficiency: movement towards one type of efficiency means movement away from the other. (Schumpeter 1976: 84.) Recently, firms in core economic areas have begun focusing on promoting dynamic efficiency rather than on promoting static efficiency. This suggests a movement away from economies of scale, and hence from the principal advantage conferred by Fordist industrialization. (See also Piore and Sabel 1984: 184-187.)

The disaggregating of production processes, and the reemergence of counter-cyclical relationships between regional economic growth and working-class standards of living: As noted above, one of the defining features of the industrial era was the integration of production, commerce and finance functions within the elite firms, creating stabilizing economies of scope that complemented the firms' economies of scale. Firms were able to do this because industrialization represented the first world-economic system in Western history which was defined primarily by dynamics of production (e.g., task specialization and mechanization) rather than those of commerce (e.g., entrepôt trade) or finance (e.g., banking or money markets). Recently, however, elite and core firms have again began focusing operations on commerce, and are increasingly contracting out production functions onto firms occupying more peripheral areas of the world-economy (Zenger and Hesterly 1997; Deyo et al. 2001). This has caused production-based economic activity to again become disaggregated from the dynamics of regional economic growth. The traditionally counter-cyclical relationship between economic growth and the standard of living of 'blue-collar' workers has been re-emerging, even in core Fordist regions, most notably that of the US (Warren 2007; Gallagher 2008).

And since, as described above, there is a symbiotic relationship between the Fordist economic-world and the regulatory shape of the "regulatory state," this transcendence of Fordism – what the Régulation School has termed "post-Fordism" – would also be reflected in corresponding disruptions in the modern, rule of law model of state-based regulation. And indeed, scholars have identified at several recent regulatory trends that are consistent with a closing-out of the Fordism. These include the "hollowing-out" of the state; "judicialization", and the increasing use of "metaregulation" in place of regulation.

The hollowing-out of the state: As described above, one of the effects of industrialization was to unify the nation-state into a single, centralized regulatory entity. Recently, however, regulatory scholars have begun noticing a 'hollowing-out' of the state – a process by which regulatory functions that were formerly assumed by centralized, national-level regulators are increasingly being assumed either by more local actors or by more international actors (Rhodes 1994; Jayasuriya 2001). In other words, the central state is losing its regulatory capacity, not to a particular kind of actor, but simply to its general environment. This would be consistent with a decline in core Fordism, since as we saw it was core Fordism that the regulatory state its distinctive regulatory capacity in the first place.

Judicialization: Judicialization is the name given by Martin Shapiro to a recently observed trend in which courts and court-like bodies appear to be assuming increasing regulatory influence vis-à-vis administrative and legislative actors (Shapiro and Stone Sweet 2003; see also Ginsburg and Chen 2009). But we might recall from our discussion above that prior to industrialization, the courts were often the principal vehicles for the implementation of state policy. This was because courts were better placed to evaluate the implications that distinctive local conditions might hold for regulatory policy (Dowdle 2009). It was only after industrialization began standardizing and rationalizing social life that the bureaucratic, centralized administrative agency could replace the more localized courts as the principal implementer of state policy (Skowronek 1982). A return to more court-centric forms of policy reification would thus be consistent with a retreat of Fordism and its distinctive centralizing and bureaucratizing social logic.

The rise of metaregulation: Regulatory scholars have also identified a shift in the nature of national and transnational regulation—a shift from what we might call direct regulation to indirect regulation. This is the rise of metaregulation (Scott 2003). Metaregulation focuses not on the direct standardization and rationalization of the regulatory environment, but on ‘regulating the regulator’ as it were: on defining and visibilizing the information flows and decisional factors that inform (or should inform) the more direct regulatory behavior of other, generally more localized regulatory entities. This is precisely the kind of regulatory system we might anticipate finding in a regulatory environment in which the stabilizing and standardizing structures that had previously allowed for more direct centralized regulation were being removed, such as would likely be the case if the organizing logic of Fordism were in retreat.

### **3 China as a Post-Fordist Regulatory State**

The symbiosis between rule of law and Fordism means that the transition to a “post-Fordist” world-economy would likely occasion a corresponding evolution in regulatory practice — the development of what Colin Scott (2004) has famously termed “the post-regulatory state.” But what might this state’s various ‘post-regulatory’ regulatory environments look like?

This question is not as easy as it sometimes appears to sound. Scholars have identified various “post-regulatory” regulatory models, such as metaregulation and various forms of “new governance”. But these models are of limited reach, focusing narrowly on the distinctive regulatory needs of the core and still relatively Fordist economies and industries of Western Europe and North America (see,

e.g., Búrca and Scott 2006). World-economies are in fact much more complex in structure than these models account for. In particular, they are composed of both ‘core’ and ‘peripheral’ regions, each with its own distinctive sets of economic and regulatory dynamics (Braudel 1992: 35-44; Deyo et al. 2001). And even within a single region, be it core or peripheral, there will often be a diversity of economic and regulatory environments sporting a diversity of economic and regulatory forms. For example, labor markets operate differently from product markets (Nickell 1999); craft industry markets, which by their nature resist modern rationalization, are organized differently from the markets that are fed by mass production (Piore and Sabel 1984: 26-28); and public goods and services often demand different types of regulatory environments than do goods and services that serve the private sector (Prosser 2005). A post-Fordist regulatory system has to account for the full diversity of environments engendered by post-Fordism, not simply for the rarified environments of core regions and industries.

### **3.1 The East-Southeast Asian World-Economy**

Perhaps nowhere on Earth has the full diversity of a new, post-Fordist world-economy come to be realized than in East and Southeast Asia [“ESE Asia”] (Jessop and Sum 2006: 161-185). The defining structural features of what we are calling post-Fordism – flexible production, the disaggregation of production into production chains, the “hollowing-out” of the regulatory state – are also those that are generally cited as the defining features of Asian capitalism (see also Carney et al. 2009; Jayasuryia 1999). Correspondingly, ESE Asia is also the site of those regulatory practices that have been most influential in the identification of alternative models to Fordist, rule-of-law regulation—such as “administrative guidance” (Ohnesorge 2005; Sabel 1995; cf. Upham 1996), “state-led capitalism” (Lippit 2005: 5); and “Toyotism” (Dohse et al. 1985; Simon 2006). Of course, there is much dispute about whether these alternative regulatory models actually represent improvement on the rule-of-law model—one person’s “network capitalism” is another’s “crony capitalism”. But even critics of a normatively “Asian” style of capitalist regulation find it hard to deny that for better or worse, regulation does seem to work differently in that region.

Of course, similar economic (and regulatory) practices can be found in the economies of the US and Western Europe. But they seem much more clearly articulated in ESE Asia, suggesting a longer period of maturation and development (see also Deyo et al. 2001; Carney et al. 2009). Braudel’s notion of a world-economy is critically identified in part by a roughly dyadic intra-regional distinction between its ‘core’ and ‘peripheral’ regions (Braudel 1992: 35-44). As already described

above, the core regions are those world-economies dominate and control the particular economic technology that drives that particular economic cycle. This allows them to capture the higher-wealth-generating portions of the regional economic system. The more expansive, “peripheral” areas surrounding this core, by contrast, generally specialize in the more low-wealth-generating international economic activities—such as agricultural and raw material production and exportation in the case of the pre-industrial world (where core economic activities focused more-or-less exclusively on commerce and finance) (von Thunen 2009); or agriculture, raw materials, and more ‘up-stream’ production (i.e., textiles) and exportation during the latter *entrepôt* and industrial periods (Krugman 1993).

Only in ESE Asia have post-Fordist economic structures such as flexible production and production disaggregation (production chains) so clearly generated such large-scale core-periphery economic-geographical patternings. As implied by its name, “flexible production” – a key feature of both post-Fordism (Sabel and Piore 1984) and “Asian capitalism” (Jessop and Sum 2006: 161-185) – seeks to maximize a firm’s ability to evolve and respond to market changes. In ESE Asia, one of the principal ways it accomplishes this task is by disaggregating production and outsourcing to upstream production sites production processes that cannot be made flexible in-house. This has resulted in the development of two distinct kinds of productive flexibility, one corresponding to core economic ordering and the other corresponding to peripheral economic ordering. The core economic regions in ESE Asia – primarily Japan, Taiwan and South Korea – completion focuses much more on higher-yielding “design competition”, and firm focus is much more on flexibility in design. This is accomplished by investing in a more diversely skilled work force, what is sometimes called “qualitative flex”. These core firms then contract-out to upstream manufacturing sites manufacturing tasks that are not particularly suited to design-based competition—tasks that tend to be associated with lower-yield, price-based competition. Flexibility in these upstream, peripheral manufacturing tasks is promoted primarily through the casualization of labor, or what is sometimes called “numerical flex” (see generally Deyo et al. 2001).

Of course, similar distinctions in forms of industrial flexibility are found in other parts of the world, including Anglo-European “West”. But what is unique the ESE Asia is that downstream, qualitative flex tends to be concentrated in a particular region of ESE Asia—roughly that defined by largely Japan, Taiwan and South Korea, while upstream numerical flex is primarily associated with the southern and southwestern parts of the ESE region – e.g., the Philippines, Indonesia, Thailand, Malaysia (Deyo et al. 2001). (Hong Kong and Singapore are ‘special’ in this regards: Hong Kong is



a classically “intermediate” region, one sits between the core and the periphery that evinces attributes of both; Singapore is in many ways in its own economic world, being a throw-back to the city-state based, entrepôt economic system that was developed by Amsterdam during its period of economic dominance in the 17th and early 18th centuries.) In the US and Europe, by contrast, both qualitative and quantitative forms seem to be much more mixed together geographically (Arthurs 1996). Perhaps, this is because these regions retain a greater legacy of the more functionally integrated corporate-industrial firm. But for whatever reason, this greater geographic intermingling of both core and peripheral forms of post-Fordism industrial organization suggests a less-developed structural-geographic division between core and peripheral industrial activity—and a correspondingly a less evolved post-Fordist world-economy.

In suggesting that ESE Asia is evolving into a possibly post-Fordist world-economy, I am not arguing that this ESE Asian world-economy is necessarily autonomous. Clearly, that world-economy has been and continues to remain very dependent on the consumer and financial markets of “the West”, most particularly those of the United States (see generally Jessop and Sum 1999: 161-185).<sup>4</sup> But what makes ESE Asia its own, discrete “world-economy” is not insularity or autonomy. In its past, the European world-economy has similarly been highly dependent on other world economies, such as that of the Mideast during the ‘Venetian cycle’ of the 14th and 15th centuries, and that of the ESE Asia during the ‘Dutch cycle’ of the 17th and 18th centuries. Rather, what makes it a distinct world-economy is the fact that its economic geography and corresponding economic-industrial patterning are delineated and constructed by a distinct, integrated set of economic-industrial technologies—transnational banking in the case of the Venetian cycle; global entrepôt trade in the case of the Amsterdam cycle; and – most visibly at least – perhaps flexible production in the case of ESE Asia. From the perspective of the regulatory state, it is the particulars of these technologies – not economic autonomy per se-- that concern us, because as we have seen, it is from these particulars that emerge the distinctive regulatory capacities and capabilities of the regulatory state, its alternatives, and its inevitable successors.

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<sup>4</sup> The ability of ESE Asia to weather the recent international financial crisis of 2007 (see Chhibber et al. 2009: 4) suggests, however, that its dependence on Western markets may be lessening.

### 3.2 The Place of China in ESE Asia's Post-Fordist World Economy

So, if the post-Fordist world economy is more fully defined in ESE Asia than anywhere else, then so too is likely to be the post-Fordist regulatory state (or what following Colin Scott we might call the “post-regulatory state”). And the geography within the ESE region that is likely to have the most experience with this post-regulatory state is China.

Before diving into this argument, I want to make clear at the outset about what I’m not saying. I am not suggesting that China is likely to be the most advanced post-regulatory state, or that it has evolved better or more effective responses to the regulatory problems of post-Fordism. I’m simply arguing that it has probably been the one regulatory environment that has been most effected by the full range of these problems. As I shall explain below, history suggests that in fact, these kinds of what we might call “regulatory pioneers” may function more like canaries in a coal mine than like cutting edge regulatory R&D units. I am therefore not at all suggesting that we should copy China’s responses to these problems when and if the problems of post-Fordism become more manifest on this side of the Pacific. What I am suggesting, however, is that all this suggests that China’s well-documented range of regulatory problems may well be much more relevant to understanding our own conditions and our own futures than we presently are wont to recognize.

In order to understand why China is likely to occupy such a position, we need to recall the point made above that world-economies are actually collections of diverse but integrated economic patterns, and not be a single economic pattern. As we saw, flexible production in core economic regions looks and works differently from that in peripheral economic regions. And because these different patterns are symbiotically integrated, this means a narrow focus on the regulatory experiences of core regions – the principal focus of existing regulatory scholarship -- is likely to miss perhaps critical regulatory issues implicit in the new industrial-economic structuring.

Consider, along these lines, recent ‘post-regulatory’ analyses of post-Fordist Japan. At least up until recently, Japan’s regulatory responses to post-Fordism – most particularly those associated with its distinctive regulatory practice of administrative guidance -- have been often rightly celebrated in the post-regulatory literature, and held up as possible models for Western transitions into post-Fordism (e.g., Sabel 1995; Simon 2006; Haley 2010). Whether or not Japan continues to represent a regulatory model for the West has of course become a matter of dispute (see Ginsburg 2010),<sup>5</sup> but

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<sup>5</sup> But see Haley (2010: 2):

“Yet, measured by almost any standard of well being, the untold—or at least underreported—story is actually one of success. The Japanese today enjoy one of the highest standards of living on the globe. Their per capita

even if it is not, there is still a problem with these analyses—and that is that they are simply not complete.

Recall from our discussion above that the ESE Asian post-industrial, flexible-production world-economy is structured in such a way as to allow core, downstream producers to monopolize design-based economic competition while export less-wealth-generating forms of cost-based economic competition to upstream geographies. Japan sits at the very core of the ESE Asian economy, and thus it is at least possible that it is ‘exporting’ at least some of its social costs – those associated with economic volatility and vulnerability for example – as externalities to other, more peripheral regions in that economy (Deyo 2006; Deyo et al.2001). And this, paradoxically, means that some of its regulatory success is due in some part to the regulatory practices in the recipient states—practices that allow this exportation do take place (this also occurs under Fordims, see Patnaik 1997).

Note that I am not at all suggesting that Japan has been playing a game of ‘bugger thy neighbor’ with these other regions. In fact, particularly during the 1990s, Japan has been quite admirable in its efforts to do what it can to promote improved living conditions in other parts of the ESE Asian region (see, e.g., its Miyazawa Fund, discussed above). But it is still clearly the case that complete regulatory accounting of Japan’s national social-economic-regulatory system would need to examine this system’s effect on and interaction with the more peripheral regions of the ESE Asian world-economy and their national regulatory environments. Our tendency to conflate the boundaries of the national state with the boundaries of its regulatory system discourages us from seeing this.

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income, life expectancy, literacy, equal distribution of wealth, and freedom from official corruption and crime in combination surpass all but a few much smaller European states. With a population a third larger than Germany and twice as large as France and the United Kingdom, at over \$31,000 in 2007, Japan’s per capita GNP (PPP) was higher than any of the four largest continental European nations.<sup>3</sup> Even more significant, as judged by OECD Gini indices measuring the distribution of household wealth, Japan ranks slightly behind the welfare states of Europe.<sup>4</sup> UN data are even more positive. They rank Japan just behind Denmark and just ahead of Norway and Sweden. At worst, the household distribution of wealth in Japan is on par with Canada and the United Kingdom. To complete the picture, infant mortality is among the lowest and life expectancy for men and women, the highest in the world, as is the literacy rate. Its public officials, particularly career judges and prosecutors, have the world’s best record for integrity and enjoy the highest levels of public trust. Equally, if not more significantly, Japan’s per capita rates for violent crimes and victimization are not only the lowest in the industrialized world but have decreased dramatically in nearly all categories since the mid-1950s (homicide and robbery) or 1960s (assault and rape).”

(citations omitted).

In other words, most national geographies are simply too small to capture the full regulatory dynamics of the post-Fordist economic world. And this means that most national regulatory systems have little experience with regulatory structures that have to negotiate between the competing needs and demands of both core and peripheral economic areas in a post-Fordist economic space.

But there is one national regulatory entity in the ESE world economy that does encompass both core and peripheral economic structures; and that is thus likely to be at least somewhat sensitive to the possible social-cost externalities that flow between these two regions in the course of their interaction. That entity is the People's Republic of China.

China, as is fairly obvious, occupied both newly developing and peripheral economic regions. And although its newly developing regions are not yet "core" economic regions, in the sense that they are as yet unable to engage in design-based competition with the outside world, they are able to support, for at least some of the population, standards of living that rival those found in the ESE Asian core economies (see, e.g., Ng and Hills 2003). At the same time, of course, the inland areas of China are clearly "peripheral" – both in terms of industrial product and in terms of living standards - - to the larger ESE Asian economy.

Seen in this light, many of China's most visible regulatory problems are consistent with the regulatory dynamics, discussed above, of post-Fordism in general. China's rising GINI coefficient, for example, parallels the growing economic disparity between core and peripheral economies in the ESE Asian regions (and in the world more generally) (see Jomo 2003, compare Wade 2003). China's difficulties in effectively implementing nation-wide regulatory scheme replicates the "hollowing-out of the state" that post-Fordism seems to be producing (as does one of China's solution to this problem, that of judicialization, see, e.g., He 2009). Problems associated with the treatment of internal migrant labor parallel problems found through the post-Fordist world, as use of migrant labor has proven a particularly effective strategy for inducing numerical flux via workforce casualisation (Deyo 2004; Deyo et al. 2001). Even China's debates over the proper regulation of real property are consistent with the dual role that such property plays in rural economies whose populations both feed and are left vulnerable by upstream production's reliance on numerical flux.

Outside of China, however, these regulatory issues are masked by the superimposition of national boundaries between core and peripheral economies. Growing inequalities between countries are not as studied as high GINI coefficients within a single country. Transnational impacts on industrial relations are not as visible a concern as domestic regulation of labor. And the regulatory complementarities that operate between locales that produce migrant industrial labor and the sites that employ migrant industrial labor, particular on a causal basis, are also rarely explored – at least in the regulatory literatures (e.g., those of law, developmental studies, and political sciences) – when that labor transits national borders. In this way, China – perhaps more than any place else in the world – visibilizes the way that post-Fordist forms of industrial organization are impacting our continued deployment of largely Fordist forms of regulation.

The point of this is not to suggest that China’s regulation is indeed well suited for its new, geographical-economic environment. The point is that due to its scale and geographical-diversity, China, may well be more deeply embedded into and more reflective with regards to this new kind of environment than is any other national regulatory space (see, e.g., Tian 2005).

In this sense, China’s “place” within the new post-Fordist environment of ESE Asia is analogous to that occupied by France in early industrial Europe (see generally Braudel 1992: 315-352). Like China, France’s geographical position in early industrial Europe spanned both core and peripheral regions of that new, emerging industrial space. France actually began industrializing before England, in the early 18th century (Johnson 1995), but because of its geographical diversity could not construct a national economy around this proto-industrialization. And this created in France distinctive regulatory needs—namely, how to meld both core and peripheral industrial-economic patternings into a coherent, national regulatory space.

Of course, other Western European countries would soon follow France in confronting this dilemma. As industrial economies of scale hungered for ever larger markets, the smaller national economies of Western European nations grew into the increasingly global national economies of European colonialism (or, in the case of the United States, of Turnerian westward expansion, see Turner 1920). Like France, these colonialist economies demanded a coherent regulatory integration of what were both core and peripheral economic regions. And as discussed above, the West’s ultimate response to this new regulatory problem of industrialized diversity was the expansion and bureaucratization of the administration—what today we call the “administrative state”.

But it would actually be in France – Napoleonic France, to be precise – where the administrative state would first begin to take shape (Silberman 1993: 89-158). Of course, in France, this distinctly administrative state would often seem to be, and often was, more dysfunctional than functional – particularly after the fall of Napoleon. Perhaps the first person to really identify it as a distinctive regulatory form, Albert Venn Dicey (1982: 183-205), who in the 1880s famously associated it, and not without reason, with pre-modern absolutism (see also Brown and Bell 1998: 4-5) (it would not be until the early 20th century, some one hundred years after its first appearance, that Max Weber would seminally associated bureaucratic administration with industrial modernism). In this sense, while France was the first European nation to “invent” the modern bureaucratic state, it was also one of the last major Western nations to develop an effective bureaucratic state. I will return to this point shortly.

Moreover, France’s explorations into industrial regulation did not end with the bureaucratic state. By the end of the 19th century, Europe would identify two other paradigms for industrial regulation, those of corporatism and socialism. And both of these, too, would find their initial beginnings in France. European corporatism had its root in French dirigisme (Cerny 1990: 166-167; Knapp 2001: 18-25) And Marx himself would identify France as socialism’s principal birthplace— certainly, it was there, particularly in the Paris Commune of 1871, that his political vision was first and most influentially expressed in actual institutional form (Hussey 2008: 237-238).

Of course, France’s pioneering regulatory explorations of dirigisme and socialism were probably even less “successful” than were its pioneering explorations of the early administrative state. If France was a regulatory explorer, it was one who in many ways one was herself generally lost. She was more a Christopher Columbus than a Ferdinand Magellan; more a Tycho Brahe than a Johannes Kepler; more, perhaps, a Roanoke than a Jamestown. But we also have to remember that failure is ultimately a social construct. France’s early regulatory experiments may have largely failed from the utilitarian perspective of social control. But on the other hand, they also appear to have been germinal in catalyzing our ultimate understanding of the modern regulatory state. Today, bureaucratization, corporatism, and socialism remain the three dominant paradigms for industrial regulation in Europe, and perhaps in the world. And as we saw above, all three have their intellectual birthplaces in France. Even before the 19th-century was in full flow, France had already become ‘the new intellectual capital of the new political-industrial world,’ to paraphrase Karl Marx’s (1967: 211) observation to Arnold Ruge in 1843; what his future collaborator Frederick Engels

would term, the “nerve-centre of [modern] European history” (Nicolaiievsky and Maenchen-Helfen 1976: 71).

#### **4 Re-thinking Chinese Law**

So my point is not to argue that we should be looking to China for solutions to post-Fordist regulatory problems. I am not suggesting that China has already founded some new strategy of regulation – some “Beijing Consensus” or “East Asian Model” – that is set to rival and possibly succeed the neo-liberal, regulatory state in regulatory effectiveness. My point is much more modest: it is simply to suggest that China could very well represent the most developed “natural experiment” to-date in the particular regulatory problems that a post-Fordist state is likely to offer. But even such a modest observation ultimately counsels a radical re-think into the way we think about issues of Chinese law and regulation.

We are used to thinking about Chinese law, and its regulatory problems, in terms of a particular model of “development” (e.g., Peerenboom 2007). This is a model that sees regulatory and legal development as a largely teleological phenomenon. The farthest advanced along this teleological trajectory are the regulatory systems of the “advanced industrial” economies – those of the West – and maybe even more particularly, that of what many regard as the most advanced of the advanced industrial economies, that of the United States. Seen in this light, China’s legal and regulatory problems are simply the problems of a lack of regulatory progress. And along these lines, our academic interest in Chinese law (which of course is related to and perhaps largely derived from our practitioner’s interest), lies in-the-main in mapping the particular social, economic and / or political inefficiencies that can be associated with particular, presumptively-laggard aspects of China’s regulatory system.

Again, my point is not to argue that China’s does not indeed suffer from pronounced regulatory problems. My point is to suggest the possibility that at least some of China’s regulatory problems are likely not problems of a simply laggard regulatory system. Rather, like those of industrializing France some two centuries ago, they are problems that the paradigmatically “advanced” regulatory systems of the advanced industrial “West” are themselves yet to confront, or are just beginning to confront. At least sometimes, they could be, in other words, the problems of a regulatory pioneer, rather than those of a regulatory laggard.

Perhaps the most pregnant example of such possibilities lies in China's post-Mao regulation of capitalism. Despite China's rapid economic growth, many scholars, working from neo-liberal political-economic theories that have been well established by Western economic experience, have regarded China's continued, interventionist regulation of its emerging capitalism as remaining dangerously backwards; and as continually threatening China with economic stagnation if not out-and-out economic collapse.

But after thirty years, the stagnation these theories anticipate has yet to appear. In fact, China's economic-industrial system has proven far more resilient than these theories have been able to predict. During the "East Asian Economic Crisis" of the late 1990s, China was a bulwark of economic stability for the region. Ten years later, and again against much expectation, China's economy appears to have helped stabilize what parity demands we should probably be calling the "American Economic Crisis." (Morrison 2009; Wolf 2009; James 2009) Beyond this, many of the conditions and practices that these theories identified as developmental impediments owing to flawed regulations, such as the triangular debt problem of the 1990s, have proved to my much less developmentally problematic over the long term (at least so far) (Foroohar 2009).

And in this, too, we can draw an interesting parallel with the experience of other emergent, new world-economies. In the early 18th century, England's national debt exploded, as England started issuing debt that was to be paid for through subsequent economic growth. This was a radically new concept, as distinctly growth-focused economic theories had yet to be developed (Braudel 1992: 375-337). And economic theorists of the day were as alarmed by England's apparent failure to adequately regulate its national debt as modern-day neo-liberal economists have been alarmed by China's apparent failure to adequately regulate its economic interventionism, and similarly predicted that such practice was unsustainable and would led to inevitable economic collapse. The direness sounding in David Hume's (1993: 302) mid 18th-century predictions regarding England's innovate use of ear-marked taxes to found perpetual public debt would not sound out of place coming from a Western observer of China's present-day (triangular) debt situation:

One does not have to be wizard to guess what will happen next. It can only be one of these two catastrophes: either the nation will destroy public credit, or public credit will destroy the nation.



But of course, neither such catastrophes would in fact be forthcoming. Because what Hume and these other economic thinkers did now know – what they could not know – was that they were living in the dawning of a new economic world—one in which an as-yet-not-understood, emergent industrialization would generate a period of unprecedentedly continuous and stable economic growth, a growth that in turn could facilitate national debt levels far in excess of what was previously supportable.

Again, this is not to suggest that China has discovered a new solution to problems of post-Fordist capitalist regulation. China's economic industrial environments continue to sport serious problems — such as growing wealth inequalities, corruption, and a grossly inadequate social safety net. The point here is simply to suggest that regardless of its many regulatory problems, China's industrial-economic system has simply not malfunctioned in the way that twenty years of neo-liberal economic and regulatory analyses have consistently predicted. This suggests that perhaps, China's industrial-economic system, like that of early 18th century England, may be following a new economic logic—one associated with the post-Fordist world-economy of ESE Asia as distinguished from the advanced Fordist world-economy of North America and Western Europe (see also Jessop and Sum 2006: 161-185).

And this, in turn, gives new possible meaning to many of the industrial regulatory problems that China does face. As the “new economy” increasingly colonizes the advanced economies of the developed West, regulatory problems of the sort confronting China are now showing up in that side of the world as well. These include most prominently increasing disparities in wealth and failing social safety nets due to the growing casualization of employment; increasing regulatory ineffectiveness stemming from inability to monitor our rapidly changing economic environments.

And it is interesting to note that at least some of the most prominent Western regulatory responses to these new kinds of problems have in fact been foreshadowed, albeit not necessarily knowingly, in China. As documented by Cui Zhiyuan (1997) and Susan Shirk (1993: 82-91), for example, precedents for today's new paradigm d'jour of “new governance”, with its focus on consultation and deliberation rather than legality as a means of responding to complex regulatory problems, can be found in local Chinese governance as early as the late 1980s (Shirk ). Similarly, today's Western interest in public-private partnerships resonates with China's earlier experiments in Township-Village Enterprises (Taube 2002). The formation of what are sometimes called “alternative labour organization,” often spontaneous forms of labour organization and mobilization that seek to promote worker interests outside of the traditional paradigm of formal, volunteerist

industrial union—an important new regulatory dynamic in industrial relations with the world-wide decline in unionization (itself a product of the move towards post-Fordism) – can be also found in China in the late 1980s (compare Pun 1999 with Ontiveros 2002). Indeed, the migrant labour shortage recently experienced by Guangdong suggest that alternative labour organization could be significantly more advanced in China than has been generally realized (Chan 2005). And even today, the regulatory implication of this post-industrial kind of labour organization has probably been explored more in China than anyplace else (Chan 2005; Taylor and Qi 2007).

And again, I am not suggesting that all or even any of these experiments have been successful. My point, again, is that China's regulatory problems are not necessarily the problems of a regulatory laggard. In many cases, they could well be the problems of a (largely unknowing) regulatory pioneer. Her regulatory problems are not all problems that we in the West have already solved—in fact, many are problems that we in the West are increasingly confronting ourselves.

## **5 Conclusion**

Western-oriented scholars of Chinese law and Chinese regulation have to be re-orienting themselves to their subject. China's regulatory problems are not always the product of some teleological degeneracy in its formal legal, political and / or economic systems. They are not always problems that we ourselves have effectively solved. The study of Chinese law can do a lot more than teach us about Chinese law. It can also teach us about our own law, our own future, and about ourselves.

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