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**Franz Neumann on the Rule of Law and Capitalism:  
The East Asian Case**

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Much of the social science literature in the area of capitalism and the rule of law is based on the seminal work of Max Weber (1978; 1954) on the emergence of the market and the related development of rational forms of law. Put simply, Weber's proposition is that the operation of the market demands a high degree of calculability which requires legal rationality; this legal rationality is provided by the development of formal law and the rational administration of justice. The notion that economic rationality nurtures the growth of legal rationality has significant ramifications for the study of newly industrialising countries, and warrants scrutiny in the context of the growth of capitalism in East Asia—whether it be in China, Indonesia or Singapore.

In focusing on the relationship between the growth of capitalism and the emergence of the rule of law, a first and important task is to critically examine the Weberian proposition that the growth of the market is associated with a development of legal rationality, or the rule of law. Franz Neumann (1986, 1944; also in Neumann and Kirchheimer 1987) is one influential theorist who elaborates on the Weberian thesis by arguing that the rule of law may assume a different character depending on the particular form of capitalism. Thus, Neumann, on the basis of his analysis of legal structure in the late Weimar and National Socialist periods in Germany, argued that the application of 'legal standards' rather than formal law was appropriate for certain forms of capitalist structures. In this context, the main objective of this paper is to examine the utility of Neumann's analysis of the relationship between the rule of law and capitalism in understanding the development of law and legal institutions in East Asia; and, in so doing the paper will also endeavour to illustrate the manner in which this theoretical framework can be deployed.

A key proposition is that East Asian 'legalism' relies mainly on the use of *legal standards* rather than *formal legal norms*; and that the use of legal standards is characterised by the selective application of law. The importance of legal standards, rather than formal rational law in the Weberian sense, lies in that they may be regarded as a response to the highly cartel-like arrangements that characterised more complex forms of capitalism. These new forms of capitalism, as manifest in East Asia, require a high degree of legal flexibility and discretion; in other words, they require situation specific legal standards rather than the application of general legal norms. In a similar manner, Neumann pointed out in his work on Nazi Germany that property was constituted in terms of the enterprise rather than in terms of the rights of the legal person (natural or juristic).

This account, rather than assuming an unproblematic relationship between rationality and capitalism, differs significantly from the standard Weberian account and raises a range of issues pertaining to the manner in which the notion of the rule of law is conceptualised.

The theoretical issues concerning the relationship between the rule of law and capitalism—central to the argument of the paper—will be examined with a view to exposing the limitations of the liberal model of legalism in generating an understanding of East Asian legal systems. More specifically, it will be argued that the optimistic Weberian vision of the growth of liberal capitalism and market rationality remains highly problematic in East Asia. The validity of this optimistic vision is clouded mainly because this scenario is based on a distinctive model of liberal capitalism that requires an assertive bourgeoisie demanding legal restraint on the exercise of state power. By contrast, the model of capitalism that has evolved in East Asia is notable for the emergence of a strong and interventionist state which is distinguished by the absence of an assertive and autonomous bourgeoisie.

In light of this, it will be argued that this distinctive form of state driven capitalism in East Asia produces its own brand of legalism. For this reason, the variegated relationship between the rule of law and capitalism, in the East Asian context, is better explained in terms of Neumann's mode of analysis than in terms of the conventional Weberian model which was primarily concerned with accounting for the growth of industrial capitalism in the West. More generally, it is impossible to underestimate the importance of Weber's seminal work and the notion of legal rationality and his influence on the intellectual debates over legal theory that raged both in the left and right during the period of the Weimar Republic.<sup>1</sup> Hence, it would be both relevant and helpful, as a preamble, to briefly examine the classic work of Weber on the relationship between capitalism and law as it provides a contextual background to Neumann's work.

## **WEBER AND FORMAL RATIONAL LAW**

In seeking to understand the emergence of capitalism in Europe, Weber identified several unique aspects of social structure—economy, polity, religion, and law—as being of special significance in understanding the emergence of capitalism in Europe. In this regard, Weber singled out law and legal institutions as key elements in the explanation of the growth of capitalism in Western Europe. In European law, he discovered 'unique features which made it more conducive to capitalism than were the legal systems of other

civilisations’ (Trubek 1972: 722), and it was for this reason that Weber proceeded to undertake a detailed examination of law and the relationship between law and capitalism in his classic study *Economy and Society* (Weber 1978).<sup>2</sup> In this work, Weber sought to understand the emergence of legal rationality in the West by constructing different typologies of legal systems. To this end, he posited a taxonomy of legal systems in terms of two main criteria: ‘the way legal systems handle the characterising of formulating authoritative norms (“lawmaking”), and of applying such norms to specific instances (“law finding”)’ (Trubek 1972: 722). Stated differently, the criteria are the generality and universality of legal norms on the one hand, and on the other, the extent to which the legal system is differentiated from other systems, or the degree of ‘system’ autonomy.<sup>3</sup>

On the basis of this typology Weber identified four different categories of legal forms in terms of the degree of generality and differentiation of legal norms. This four-fold classification is summarised by Trubek (1972) in the diagram below:

		Degree of Generality of Legal Norms	
		HIGH	LOW
Degree of Differentiation of Legal Norms	HIGH	LOGICALLY FORMAL RATIONALITY	FORMAL IRRATIONALITY
	LOW	SUBSTANTIVE RATIONALITY	SUBSTANTIVE IRRATIONALITY

Source: Trubek 1972: 729

In Weber’s view, the distinguishing characteristic of European law was the emergence of formal and rational legal structures. It is rational in that legal norms have a high degree of universality, and it is formal in the sense that this rationality is located within a differentiated and autonomous legal system. For the purpose of this essay it is the universality of legal norms (*law finding*) and its relationship to capitalism that are of special interest. As Weber noted:

first, that every concrete legal decision be the ‘application’ of an abstract legal proposition to the concrete ‘factual situation’; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually constitute a gapless system of legal proportions or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be construed rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualised as either an ‘application’ or ‘execution’ of legal propositions, or as an ‘infringement’ thereof, since the ‘gaplessness’ of the legal system must result in a gapless ‘legal ordering’ of all social conduct’ (Weber 1978: 658).

After identifying the notion of legal rationality as the basis of European law, Weber went on to relate the emergence of the modern bureaucratic state to the rise of formal rational law. Following an account of the structure of formal law, Weber proceeded to examine the relationship between the economic and legal substructure; in other words, between *economic rationality* and *legal rationality*. Weber argued that, first, a rational legal system conducive to the functioning of modern industrial capitalism, and second, that legal rationality in Europe existed prior to the growth of industrial capitalism, making Europe more pre-disposed towards the expansion of capitalism. Admittedly, there is considerable ongoing debate in the literature as regards the specific mechanisms that link the market and economic legal rationality (Trubek 1972; Ewing 1987; Kronman 1983), much of which has centred around Weber’s analysis of the anomalous ‘English case’.

Whatever the outcome of this debate, it is clear that the emphasis and importance attached to the rule of law was primarily because it provided a measure of calculability and a means of guaranteeing the right of contract. It was the legal security provided by the general law that was critical for the development of capitalism. For instance, both the English and German legal systems (common law vs codified law respectively) are ‘highly rational, insofar as they increase calculability and facilitate capitalist economic relations’ (Ewing 1987: 495). For Weber, only a rational legal system could provide the predictability required for capitalism, and relatedly, it was argued that the modern state is consistent with a type of domination that is based on the employment of formal legal rationality in governance. A rational legal system nurtured the competitive market which in turn ‘encouraged the further rationalisation of the law, a rationalisation which made possible the development of the centralised nation-state’ (Trubek 1972: 15).

Given this conceptual and theoretical framework, there is an obvious and straightforward implication for the study of East Asian legal institutions, namely, that as capitalism expands, so should the rule of law. In other words, political domination will be

exercised on the basis of the rule of law rather than the ‘rule of men’; or, to put it in familiar Weberian language, this expansion of market relations is likely to lead to a shift from patrimonial to legal domination. For example, in the Indonesian context, Crouch (1979) has concluded that the New Order regime displayed an ‘increasing emphasis on greater regularity, bureaucratisation, and rationality, eventually bringing reform minded officers into conflict with generals holding patrimonial-style fiefdoms’ (Crouch 1979: 587). However, the inference drawn by Crouch in the Indonesian example highlights a more general problem in applying the Weberian model to the new forms of capitalism in East Asia. But, of course, in the Indonesian context, the ‘rule of law’ or form of legal regularisation of the market has coexisted with personal forms of rule. The paradox of East Asian capitalism is that a degree of legal regularity and security—and Weber was right about the importance of these features—has co-existed with the absence of general legal norms. Moreover, for example, in both Indonesia and Singapore, regularisation of the economy has not led to the development of general or formal law, or a shift from personalised forms of rule.

### **LIBERAL CAPITALISM AND GENERAL LEGAL NORMS**

Weber’s analysis of the relationship between economic calculability and formal law is unable to capture the manner in which although legal categories may remain static, social function of these categories may vary under different structures of capitalism and forms of market economy. The Austro Marxist Renner whose probing early work greatly influenced Neumann, argued that ‘this constant divergence between legal norm and social efficacy provides the only explanation for the evolution of law’ (Renner 1949: 52). Renner illustrates this argument by pointing out that the notion of property as a legal category plays a vastly different role in simple commodity production where producers of goods are independent artisans who own the means of production, unlike the situation that prevails in a modern complex capitalist economy. Renner’s argument demonstrates the need to analyse the evolution of the legal institution in terms of the distinction between legal categories which may remain static and the social functions of these categories which are more dynamic. Therefore, the critical analytical task is to understand the role played by legal categories under different economic structures. For example, the recent work of Orren (1991;1995) on the development of the liberal employment contract in the US has drawn attention to the way labour was transformed from a service relationship to a

form of property. In this respect, Orren adopts the methodology advocated by Renner. She notes that:

[while] this historical uncovering is itself a process of interpretation, guided by abstract, transhistorical, definitions of labor and property ... the primacy of labor in this uncovering takes on added temporal, i.e., historical, dimension[s] (Orren 1995: 386).

The argument is that Weber's notion of legal rationality—even though the method is historical—is rapidly transformed into a transhistorical abstract concept; it is seen to arise out of the structure of modernity. For this reason, the explanation is unable to account for—to use Renner's terminology—the divergence between legal categories and their social functions. Such an explanation would call for a historically specific analysis of the relationship between legal institutions and various forms of capitalism and modernity.

Indeed, Weber's model of the rule of law implicitly assumes one specific form of capitalism: the model of a liberal competitive capitalism. In this form of liberal capitalism, the legal system resolves conflict between individual economic agents. However, a noteworthy feature of Neumann's argument is that the general or formal law, central to the Weberian argument, presupposes a distinct form of capitalism, namely, a liberal competitive capitalism. As he notes, the general law which

became increasingly the central consideration of the liberal system of law, was related to the economic theory of classical liberalism; this, however, was not only an abstract theory, but at time the description of a reality' [*sic.*] (Neumann 1986: 188-9).

Essential to this competitive capitalism is the legal institution of freedom of contract and trade, and therefore, in this form of competitive capitalism the expectation that contracts will be performed must be calculable. However, in order to be calculable it presupposes that legal norms can be exactly determined. Furthermore, Neumann adds that general law has 'functions transcending the needs to competitive capitalism, since they secure personal liberty and personal equality' (1986: 257). The point here is that the category of legal rationality, or indeed, as Renner has emphasised, the legal category of property, is historically specific to a certain form of capitalism.

### **RULE OF LAW AND CAPITALISM: NEUMANN'S APPROACH**

Against this background, the legal theory of Neumann<sup>4</sup> (1944; 1986) offers an alternative way of conceptualising and understanding the relationship between capitalism and the rule of law. Neumann—a member (albeit somewhat marginal) of the Frankfurt School—used Weber's notion of formal-rational law to develop and explore an alternative account of capitalism and the rule of law. Much of the impetus for Neumann's work came from his

desire to understand the legal changes in the Weimar Republic and also during the period of Nazi rule, which witnessed the decline of formal law creating what Neumann has called ‘a state of deformed law’. A feature of Neumann’s thesis is that the incomplete, and even reversal, of the development of general or legal norms as identified by Weber arises on account of the fundamental tension between social and economic inequalities generated by capitalism.<sup>5</sup> Neumann’s argument is dialectical in that it locates the sources of moves towards deformed law in the very structures of capitalism and sovereignty. His argument is two-fold: first, that capitalism is inherently dynamic, and is increasingly characterised by the concentration of capital in the form of cartels and monopolies—a far cry from the model of equal competition envisaged by liberal competitive capitalism; secondly, that the tensions within capitalism provide a structural context for the desire to assert state sovereignty (what he calls a ‘state of exception’) because it implies particular decisions as against the application of general legal norms that submerge sovereignty. Therefore, according to Scheurman:

in this view, unchecked state sovereignty results from this tension: it is bourgeois society’s sad attempt to overcome the gap between its implicitly egalitarian legal ideas and real social and economic inequalities by means of sacrificing the former for the latter (Scheurman 1995: 104).

It is this complex relationship between capitalism and formal law which enables Neumann to develop an account of legal rationalisation. This, unlike Weber’s analysis, places a strong emphasis on the problematic relationship between capitalism on the one hand and formal law and sovereignty on the other. Scheurman’s recent contribution places great emphasis on Neumann’s attempt to understand the tension between sovereignty and the rule of law. This arises in part out of a complex engagement with Schmitt<sup>6</sup> who counterposes sovereignty (politics)—the ability to make a decision—with that of normative principle (morality), or in Weberian terminology, general legal norms. Schmitt suggests that there is some fundamental tension between these competing forces of morality and politics. The arena of politics for Schmitt is constituted by a division into friends and foes; this, therefore, implies the need for sovereign decision (a ‘normless exception’) to protect this political division which in turn may override normative principles (i.e., general legal norms).

However, Neumann was interested in placing this ‘state of exception’ within the framework of political sociology. The conflict between the ‘prerogative state’ and the ‘normative state’ reflects a more fundamental tension between capitalism and sovereignty.



General legal norms are an attempt to subsume and limit the power of sovereignty; and, for Neumann, as Scheurman suggests, law ‘is not simply a manifestation of that power but embodies a noble and unfinished attempt to make authority tolerable’(Scheurman 1995: 102). Implicit in this argument is that legal norms are more than a means of providing a degree of economic calculability; it has a deeper normative content. However, Scheurman’s account fails to give adequate attention to the fact that this tension between sovereign decision and general legal norms arises out of the structural context of changes in the underlying political economy that propels the economy towards a form far removed from that of a competitive economy; this economic transformation in turn renders democratic rule highly problematic. It is this complex problematic relationship between capitalism, democracy, and general legal norms that accounts for the fundamental tension between sovereignty and general legal norms (or rationality).

Neumann’s contribution to the analysis of the rule of capitalism and law is threefold: first a methodological contribution to the study of the dynamics of legal institutions; second, an analysis of the legal form and categories under systems of capitalist concentration marked by a strong influence of cartels; and, finally, a normative account of the importance of general law in securing personal liberty. With regard to the last, Neumann, along with other left wing German social democratic theorists such as Heller, Kirchheimer and Fraenkel were instrumental in defending the importance of conception of a liberal rule of law under social democracy from attacks by conservative legal theorists/jurists.

In methodological terms, Neumann’s analysis builds on Renner’s (1949) work on the evolution of legal institutions by enlarging upon Renner’s fundamental insight that the disjunction between the economy and the legal system drives institutional change. As already noted, this leads to the proposition that the Weberian notion of general law was useful to the needs of competitive capitalism, though of course, Neumann constantly emphasises that the general legal norms had an ethical component which went beyond the functional needs of capitalism. Nevertheless, the development of capitalism away from competitive capitalism towards monopolies and cartels, and more particularly, the inequality generated by the concentration of capital is likely to create tension between legal rationality and capitalism, constantly shifting the legal system towards exceptional forms of rule.

From this perspective, Neumann is able to argue for a shift towards legal standards rather than formal or general law that have universal applicability. Legal standards reflect the dominance of situation specific public policy standards in legal determination—a tendency for ‘decisionism’ to replace normative principle—which become more significant as competition is replaced by cooperation between producers. More generally, Neumann argues that modern capitalism is increasingly characterised by state intervention which makes legal rationality highly problematic. According to Neumann,

the state intervened ‘by subsidies which prevent the natural capitalist selection, by tariffs, by the prevention of imports, by prohibiting the establishment of new undertakings, and by the compulsory creation of cartels’ 1986, 268).

This type of state intervention invariably leads to the decline of competitive capitalism, which in turn has far reaching implications for the structure of legal rationality. The crucial point of Neumann’s argument is that universal law is replaced by situation specific law which requires the use of external substantive criteria. One consequence of this is that the boundary between administration and justice is breached to an extent that administrative decision making becomes the crucial means by which economic exchange is regulated. Furthermore,

the replacement of formal rational law by legal standards of conduct means that the boundary between jurisdiction and administration is shifting and that the realm of administration increases, but so that administrative decisions—which means political decision—are taken in the form of judgements of ordinary civil courts (Neumann 1986: 278).

What is being suggested here is that state intervention plays a determinate role in this form of capitalist development, and that legal institutions and categories will play a different role under these economic structures.

However, another aspect to this argument is that the adoption of legal standards is related first to the challenges, and then subsequently to the collapse of parliamentary democracy. As Neumann points out:

the system of pluralism, and the changed structure of the economic system, naturally strengthened the power of the government as against that of parliament. Although Parliament was formally sovereign, its power subsequently decreased in proportion to that of the government, or better, that of the ministerial bureaucracy increased (1986: 272).

In other words,<sup>7</sup> Neumann’s contention appears to be that the political structure of this form of monopoly capitalism undergoes a transformation similar to that which is occurring in the economic arena. Increasingly, supportive of this view is that the political system in these situations is characterised by contracts and agreements between various

groups in society rather than a parity between independent and autonomous economic agents which was characteristic of competitive capitalism. Thus, Neumann observes that the political structure of the Weimar Republic was transformed into the idea of 'parity' between classes to an extent that:

whereas liberalism ignored the existence of class conflict, and felt the recognition of legal freedom and legal equality to be sufficient, this period of collectivist democracy recognised the existence of class conflict, but attempted to transform the conflict into cooperation of classes on the basis of parity (1986: 269).

While Neumann was referring specifically to various provisions in the Weimar constitution, it is clear that his analysis points in the direction of what could be characterised as 'corporatist political structures'.

In order to utilise these insights to construct a more workable framework for the analysis of legal institutions, Neumann's notion of legal standards of conduct (which was clearly influenced by developments within the Weimar Republic) are better integrated within Damaška's (1986) notion of a policy implementing legal institution. For Damaška, one method of classifying legal institutions is by identifying, first, the extent to which they serve to resolve conflict between private parties (conflict resolution model), and second, the extent to which institutions attempt to complement the policy objectives of an activist state. In a policy implementing type of legal institution the purpose of law 'is directive, sometimes even hectoring: it tells citizens what to do and how to behave' (1986: 82). According to Damaška, an activist state inspired by a set of common goals or purposes sees law as an instrument to achieve its objectives. He argues that the choice of a model of legal process is determined by three criteria: political ideology; the way judicial authority is organised; and, the objective of legal proceedings. In comparison with Damaška's account, the strength of the framework used by Neumann is that it allows us to examine and explore the political economy of legal institutions. More specifically, Neumann's suggestion that forms of capitalism are increasingly characterised by state intervention and corporatist political structures may require policy implementing types of legal institutions. While the ideological elements suggested by Damaška are valuable, more relevant for our purposes is the underlying corporatist structure of the political economy which leads to the adoption of institutions that are designed to implement the policy objectives of the state. From Neumann's standpoint, these policy implementing institutions take the form of situation specific legal standards rather than general legal norms.

Neumann's analytical framework may be usefully employed to explain the nature and distinctive character of the legal systems in East Asia, which differs markedly from the model of liberal capitalism that underpins the Weberian model. What is distinctive of East Asian capitalism, as noted earlier, is the presence of a strong or developmentalist state. To a large extent, this type of industrialisation process underpinning East Asian capitalism serves to determine the nature and form of this state intervention (see Gerschenkron 1962; Moore 1966). For example, later industrialisers—requiring extensive intervention in order to secure infrastructure, credit and markets for the emerging industrial economy—are therefore, more likely to develop an interventionist form of state. This pattern of late industrialisation in East Asia has led to the formation of a developmentalist state characterised by a high degree of autonomy and capacity (Haggard 1990; Wade 1990). What is important to note is that state intervention secures market access and resources for domestic capital; therefore, capital is embedded in political structures within the state. This pattern sharply distinguishes the East Asian experience even from that of late industrialisers such as Germany. More importantly corporatist political arrangements have played a significant part in the development of East Asian economies which are dominated by institutionalised bargaining between enterprises and the state; and, at times within the state itself. As Unger and Chan point out,

the East Asian model of corporatism borrowed heavily from Japan's experience earlier this century, when the Japanese state had begun erecting corporatist structures to control and coopt the lower classes, to prevent them from becoming autonomously organized (Unger and Chan 1995: 33)

Importantly, this form of East Asian capitalism with a strong state has decisively shaped the legal system in favour of 'legal standards' rather than the development of general legal norms, thereby creating the conditions for the dominance of exceptional forms of state. In short, the relevance of Neumann's analysis for the study of East Asian capitalism is two-fold: first, it provides a model of the relationship between a highly regulated and state directed capitalism and the emergence of situation specific legal standards; second, it suggests that corporatist structures will lead to the reinforcement of exceptional forms of rule.

These arguments are further supported in Neumann's significant contribution to the analysis of law under Nazism (Neumann 1944). He argues that the main dilemma for National Socialism was to fulfil the commands of the leader, and of enacted law at the same time. This was achieved through the use of legal standards of conduct in the legal

system. As he notes, their ‘main purpose is to bring into line the enacted law with the will of the leader’ (1986: 295).

This analysis is particularly relevant to an understanding and analysis of the emergence of capitalism in the authoritarian states of East Asia. It is often assumed that in these newly industrialising states, characterised by strong patrimonial leadership, that the rule of men will give way to the rule of law as capitalism gradually takes hold. However, the evidence from East Asia does indicate that personal forms of rule can, and do coexist with a high degree of legal calculability and centrality. Hence, the suggestion that it is the operation of legal standards rather than formal rational law provides a means of reconciling the rule of law and the rule of men. It is of interest to note in this connection that Neumann, in his analysis of National Socialism, pursues his discussion of what he terms ‘deformalised’ law and the ‘legal chaos’ that beset the Fascist state. Apart from the analysis of legal standards, he notes that property changes from being a subjective right attached to an individual person and becomes aligned to the enterprise as an economic and social unit. This radical change in the theory of property is summarised as follows:

for positivism the plant is a technical unit in which the property owner produces, while the enterprise is an economic unit in which he pursues his business policy. Institutionalism transforms the plant into a social community (Neumann 1944: 449).

According to this view an enterprise is evaluated in terms of the extent to which it meets state objectives. This reconceptualisation of the nature that property provides is a valuable framework for understanding corporatist political economies of East Asia where the processes of market reform go along with strong state influence or state linkages. For example, in China and Vietnam, economic liberalisation has forced formerly state owned enterprises to operate within the market, but this liberalisation has not been associated with a fundamental transformation of ownership rights. Therefore, in this context, while property may be understood in liberal terms, its social function, as Renner (1949) points out, is vastly different. In these types of political arrangements traditional conceptions of property have little meaning in that the critical issue is the extent to which an enterprise is able to fulfil the social or collective objectives of the state. From this perspective, these enterprises may be regarded as being more akin, to what Neumann calls, ‘institutions’ rather than constituting a legal person (natural or juristic).

Neumann’s analysis of Nazism is of special significance as it helps to locate the exceptional state within a broader perspective of political sociology. As previously noted,

the initial starting point of his analysis is the problematic relationship between sovereignty and the law; and it is this tension which leads to the constitution of the exceptional state. For the reasons given earlier, East Asian political economies could be dominated by this particular form of the state, i.e., as a state of exception; this is often characterised by a 'polycentric' organisation where groups and individuals compete within the state. Consequently, a key element of this form of the state is its disembodied or fragmented character. Fraenkel (1941) argued that this form of state is best described as a 'dual state', i.e., a state wherein the element of executive prerogative or exceptional rule exists alongside a normative state that provides an element of legal predictability for capital.

For Fraenkel, in the dualistic state,

every single act of legislation or fiscal policy expressing the will of the state is the result of a particular agreement. The constitutional history of the dualistic state is the history of perpetual compromises (1941: 154).

Contemporary China represents the clearest manifestation of this kind of dualistic or fragmented state outlined by theorists such as Fraenkel and Neumann, where for example, different legal structures and organisations apply to different elements within the state, creating what Li (1996) refers to as a 'dual hierarchy'. Li, refers to:

a situation in which two entities, the party committee and administration, function simultaneously at various levels, but with the former having final decision-making power (Li 1996: 47).

In a similar fashion, it may be argued that the increasing globalisation and (state driven) economic liberalisation of the PRC is producing a fragmented legal system. In the economic area this is evident in significant legal reforms, e.g., in the commercial field (Li 1996; Potter 1995) to provide legal certainty and calculability (although this does not necessarily imply the existence of general legal norms). However, in other non-economic legal fields, executive prerogative remains dominant (Li 1996). In these analytical terms, the legal structure of the PRC may be seen to bear a marked resemblance to the exceptional state analysed by Neumann and Fraenkel, and this analysis may well be extended to apply to other corporatist regimes in East Asia, such as Indonesia. However, the significant theoretical point which emerges from this analysis is that the optimistic Weberian analysis of the development of legal rationality (general legal norms) alongside economic rationality or the market is improbable in the East Asian context. Moreover, the state regulated corporatist political economies of East Asia are prone to produce the forms of exceptionalism analysed by Neumann in relation to the legal structure of National

Socialism. In brief, for these reasons, East Asian legal structures are likely to be highly disembodied and fragmented.

## **CONCLUSION: TOWARDS A HISTORICAL SOCIOLOGY OF LEGAL INSTITUTIONS**

To recapitulate the argument, a key proposition advanced in the paper is that the value of Neumann's analysis of the law and legal institutions lies in its analytical capacity to understand the role of institutions in a historical context. While Weber's analysis of the emergence of rational law arises out of a historical methodology it is not able to go beyond a conception of modern law being the summit of abstract rational process of modernisation. In other words, it merely identifies the emergence of liberal markets as the end product of a modernisation process in which there is only one path to modernity.

The weakness of this perspective lies in its inability to appreciate the fact that capitalism is not only compatible with different political structures but also that there are different forms of capitalism. Thus, for example, from the perspective of East Asian capitalism, what is most interesting is the fact that an authoritarian and corporatist political economy exists alongside forms of legalism and the rule of law that differ significantly from the Weberian model. Neumann's main contribution was to examine the social foundations of the rule of law, and therefore, to argue that different forms of capitalism will lead to a range of legal institutions. In essence, as in East Asia, increasing state intervention in market economies and corporatist political structures may lead, in the Weberian sense, to the adoption of *legal standards* rather than general *legal norms*. The value of this analysis for a contemporary understanding of the rule of law is anchored in particular types of political and economic structures. In other words, the rule of law is historically specific and embedded within the context of a distinctive form of East Asian corporatist political economy. Different forms of capitalism, it is expected, will produce distinctive legal structures. Stated differently, this suggests that there exists a variegated relationship between the rule of law and capitalism.

Implicit in Neumann's analysis of legal institutions is also an explanation of the differences between Prussian and English legal institutions, a problem, which of course, was of great interest and theoretical concern for Weber. Both legal trajectories—the English and Prussian—represent rationalised legal systems: one represents a liberal legal path, and the other, a 'Prussian' authoritarian legal path. While both systems correspond

to the need for liberal competitive capitalism they are shaped by very different sets of social forces.

The 'Prussian' path of codified law can be understood only in terms of the role played by the bourgeoisie in constitutional developments. In Prussia, the weakness of the bourgeoisie led to the alliances with landed property owners and the monarch. This weakness of the bourgeoisie was reflected in the emphasis on the rigidity of formality of general legal norms which were seen as a means of restricting the intrusion of the state into the economic sphere. By contrast, in England, the dominance of the bourgeoisie was reflected in the importance attached to parliamentary supremacy which implied that:

social changes can only be brought about by legislation and the supremacy of legislation is emphasised because the bourgeoisie had a large share in the legislative process (1986: 254).

The relevant point of comparison between the two systems—the English and the Prussian—lies in the respective role of the bourgeoisie and democratic institutions. One implication of this argument is that the *form* of legal institutions is determined not only by the form of capitalism, but equally by the strength of the bourgeoisie and the extent of parliamentary democracy. Incidentally, the implicit connection between the democratic structures and the rule of law provides strong argument against those such as Schmitt (1976) and Hayek (1976) who have argued that the rule of law is made problematic by the democratic process.

The historical sociology of legal institutions enables Neumann to develop an ethical and normative defence of the generality of law from a social democratic standpoint. Accordingly, it is suggested that the generality of law has an ethical function independent of its economic role. The former is premised on the fact that:

the generality of law, the independence of judges, and the doctrine of the separation of powers, have, therefore, functions transcending the needs of competitive capitalism, since they secure personal liberty and personal equality (Neumann 1986: 257).

In the political debates surrounding the Weimar Republic the foregoing argument enabled Neumann to maintain that the general legal norms needed to be buttressed by a strong legislature; and furthermore, that this could only be provided by extending political and economic equality to the working class. Unlike those conservative theorists who view mass democracy as a threat to the liberal rule of law, Neumann not only argues for its compatibility but contends that it can only be defended by its extension to provide real



political and economic equality. (Scheuerman 1995). In short, even within liberal models of competitive capitalism the dominance of general legal norms remains incomplete.

The historical sociological method implicit in Neumann's mode of analysis provides a fruitful way of looking at East Asian legal institutions. East Asian political economies, characterised by a weak bourgeoisie, are often embedded in corporatist structures operating in forms of capitalism dominated by strong states. For this reason, it may be argued that the emergence of general *legal norms* is an unlikely prospect; rather, we find that *legal standards* emerge and are used to regulate economic exchange. In other words, these diverse trajectories reflect not only the role and influence of the strong state in East Asia, but also underscores the importance of the central role played by the bourgeoisie in the development of liberal legal norms. In the liberal West European situation—albeit in different degrees—the emerging bourgeoisie saw legalism as a means of restraining the power of the state. This is evident in the gradual shift from the feudal concept of property as a service, to the idea of property as a universal right. In this transition from particularistic to universal norms, legislative assemblies play a central role in the development of general law and in restraining the power of the state which was perceived to be critical.

In the East Asian context the absence of an independent autonomous bourgeoisie (even from the perspective of the relatively weak Prussian case) and the presence of a strong state has led to the adoption of 'liberal' juridical categories and institutions—the language of legalism—to buttress the power of the state. Rather than the law reflecting and balancing the divergent social interests created by the market, the state uses law to promote the market. In this latter conception, law is seen in instrumental terms as a means to an end.

In summary, this essay should be seen as an attempt to provide an alternative framework, deploying the work of Neumann, for the analysis of the relationship between the rule of law and capitalism. The value of this analysis lies in the fact that it places the development of legal institutions clearly within a historical context. The adoption of this historicist perspective enables one to understand the relationship of general legal norms to a specific liberal, political, and economic order. In this argument, the main weakness of Weber's analysis is in the reification of this liberal political and economic order.

More specifically, the contemporary relevance of Neumann's work lies in its implicit analysis of the relationship between what we have termed corporatist political

economy and legal systems. This emphasis on the evolution of legal standards and the emergence of exceptional forms of state action provides a much more fruitful and insightful theoretical framework for understanding and analysing the emergence of the rule of law in many newly industrialising countries. In these newly industrialising countries such as those in East Asia, legal institutions are likely to play ‘a policy implementing’ rather than a ‘conflict resolution’—to use Damaška’s terminology—role. In other words, legal institutions are seen primarily in terms of the accuracy of outcomes. Furthermore, what needs to be emphasised is that the policy implementing legal institutions are connected to the corporatist political economies of East Asia. The ‘rule of law’ in East Asia, is a historically contingent product of a specific political and economic structure.

## NOTES

1. See Scheurmann (1995) for an excellent account of these debates. Scheurmann's work is the best introduction to the work of Neumann and the intellectual context in which he worked.
2. There is a substantial literature on Weber and the law. See Trubek (1985, 1972); Kronman (1983); and Ewing (1987). Much of this recent literature has dwelt on Max Weber's analysis of the anomalous case of English common law. A less legal theory-focused political sociology literature has concerned itself with the shift from patrimonialism to legal and rational forms of domination (see Bendix 1978).
3. Luhmann (1985) has developed this idea of 'system autonomy'.
4. Neumann was a member of the Frankfurt school and his work needs to be located in terms of the dominant concerns of this school. However his work on Nazi Germany had a more explicitly political economy focus in comparison with the work of Adorno and Horkheimer (1979).
5. The studies of both Neumann and Kirchheimer provide an alternative to the conservative legal theory of Schmitt (1976; 1985a; 1985b). These studies are significant because they attempt to rediscover the radical potential of formal or general law. See Scheurman (1995) for an excellent overview of these works.
6. See Schmitt (1985b) whose work, especially on legal rationality is greatly influenced by Weber. For an analysis of Schmitt's political theory see Bendersky (1983) Schwab (1989) and Scheurmann (1993).
7. In fact, the relationship between democracy and general legal norms or the rule of law remains an area that has been explored (albeit with some important differences) by the recent work of Habermas (1994).

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