

Leslie Hannah and Makoto Kasuya Twentieth-century enterprise forms: Japan in comparative perspective

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Twentieth Century Enterprise Forms: Japan in Comparative Perspective

“the dominant scholarly effort was to try to fit the world into simple models and to criticize institutional arrangements that did not fit”

Elinor Ostrom, Nobel Lecture, *American Economic Review* 2010, p.642

COMPARATIVE CORPORATE LAW: THE DISSOLVING CONSENSUS

Corporate laws - and the differential effects of their menus of organizational forms on business efficiency - have recently attracted attention. La Porta and researchers connected with the World Bank proposed the “law and finance” hypothesis: that common law systems (concentrated in the “Anglosphere”)¹ promoted stock exchange development, optimal business contracting, new business formation and economic efficiency.² By contrast the Franco-German civil law systems of continental Europe - and offshoots throughout Latin America and in most of Asia - were less conducive to corporate development. Criticising this view, Guinnane et al in this journal argued that civil law systems had advantages over US common law,³ particularly for SMEs. Downgrading the classic corporation to what they consider its distinctly limited place, they praise innovative

¹ i.e. the US, UK, India, Hong Kong, Australia, Israel and other heirs of British Empire institutions, with exceptions such as Louisiana, Quebec, Scotland, Mauritius or Malta, which retained civil law systems.

² La Porta et al, “Law and Finance” and “Economic Consequences;” Djankov et al “Regulation.”

³ though not the UK whose “private company” law of 1907 they consider similar to civil law hybrid forms, see Guinnane et al, “Putting” and “Pouvoir.”

European forms, notably the GmbH (introduced in 1892 in Germany and 1906 in Austria) and the SARL (introduced in 1925 in France) as offering contractual choices more suited to small and medium enterprises (SMEs) than conservative and inflexible US corporate law.

If either (or both)⁴ of these hypotheses applies to Japan, its economy before 1940 was legally backward and organizationally disadvantaged. Meiji reformers were keen to copy western models but (after an unhappy flirtation with American-style national banking corporations in 1872-9) decided that the clarity of civil law commercial codes was preferable to Anglo-American judicial discretion and Meiji autocrats were increasingly attracted to the “top-down” approach that they detected in Germany. After some discussion of French and English commercial laws - and under pressure to adopt western laws to facilitate reassertion of national control in the treaty ports - the definitive Japanese commercial code of 1899 clearly owed most to Germany’s *Handelsgesetzbuch*. The characterization of Japanese law as an offshoot of German civil law (at least before externally-imposed post-1945 legal Americanisation) is widely accepted. Yet Guinnane et al’s alleged advantage of the German system, the GmbH, was rejected in the interim Japanese commercial code of 1893 and still omitted from the definitive commercial code of 1899.⁵ It was thus not available to Japanese entrepreneurs for nearly half a century after

⁴ arguably the first applies more to large quoted companies and the second to unquoted SMEs.

⁵ The government’s German legal adviser, Roesler, suggested what was effectively a GmbH (a *sakin kaisha* or limited partnership in which *all* partners were limited) in 1884, before German GmbH legislation. It was included in the tentative 1890 commercial code, but omitted from the 1893 implementation (individually authorized *goshi kaisha* then required at least one unlimited partner, conforming to the internationally standard *commandite* form). There was little interest in the GmbH proper: it appears to have first been discussed in a Japanese academic article as late as 1907 (Yamazaki, “Doitsu”).

its introduction in Germany: the *yugen kaisha* was introduced as late as 1940 and never became as widely used in Japan as the GmbH in Germany.⁶

Before concluding that Japanese legislators were incompetent, it is worth noting that lawyers have been skeptical about the hypotheses,⁷ which historians and economists have also questioned: La Porta et al's extensively,⁸ Guinnane et al's more tentatively.⁹ Moreover, the Japanese code of 1899 was much more than a foolishly truncated copy of German law. We argue here that it offered a flexible organizational menu, molded by entrepreneurs to the needs of a developing nation's diverse business organizations. By contrast German corporations - under formally similar laws - were handicapped by illiberal statutory and administrative provisions, later amplified by authoritarian absurdities. Japan and its colonies allowed more legal elasticity, so their corporate laws - *despite* their German roots - well and flexibly served the needs of capitalists - including the SMEs on which Guinnane et al focus - well before the 1940 innovation of the *yugen kaisha*. Germany's *Sonderweg* in corporate matters is not representative even of countries which shared its legal tradition: as we shall see, many had more liberal regimes than Germany and hence more companies per capita, even *before* they introduced the private company form.

⁶ In 1995, there were 1,219,214 *yugen kaisha* and 1,213,034 KKs, a pattern very similar to Switzerland's, whose corporate laws Japan's more closely resembled. By contrast in Germany GmbHs (sometimes in hybrids with other forms which were illegal in Japan) were overwhelmingly numerically dominant.

⁷ Cheffins, "Did law;" Coffee, "Rise."

⁸ Musacchio and Turner, "Does the law."

⁹ Hilt, "Corporate Governance," p. 233; Hannah, "Global Corporate Census," p. 553 n.33.

Various metrics have been proposed to assess the impact of legal menus on levels of corporatization.¹⁰ Guinnane et al count changing stocks (and flows) of registered private companies relative to alternative business forms and we extend their approach in the next section by comparing the numerical stocks of all corporations at decade intervals in five countries over the whole twentieth century (normalised in per capita terms), finding that Germany is the laggard among the advanced countries considered, and soon overtaken by Japan. An alternative measure is paid-up capital of all companies relative to GDP (giving greater weight to large firms), but this is correlated with a variant of our numbers measure in 1910¹¹ and after 1914 differential inflation and deflation make it difficult to compare this measure internationally. We treat private companies as corporations proper but they might be considered hybrids, so the next section compares them with other quasi-corporate forms. Equity market capitalisations relative to GDP (the variant suggested by La Porta et al for assessing the impact of investor protection) are then considered. The following section assesses whether Japan's corporate development typifies a distinctive Asia-Pacific model of pyramided holding companies and family enterprise groups. Although the impact of national laws on the level of corporatization is the main focus of this essay, our conclusion places these findings in the context of related research on the impact of corporatization on growth, on which La Porta et al acknowledge their positive findings are least robust and Guinnane et al are agnostic.

A STATISTICAL FRAMEWORK

Central to our assessment is the notion of revealed preference: if a legal template for organising business is widely adopted, we presume it offers something valued by those taking it up

¹⁰ The World Bank's *Doing Business* indicators use more eclectic metrics, for which long-run historical data are largely lacking.

¹¹ Spearman's rank correlation coefficient for the minority of 34 countries for which both measures are available is 0.78 (Hannah, "Global Census," p. 557)

(at least) and (possibly) by society at large. However, creditors might reasonably view limited liability less favorably than incorporators and Guinnane et al's tentative agnosticism about whether higher take-up of a particular form is efficient or socially beneficial is well taken. It is also conceivable that a system of total liberty would be so abused as to undermine faith in the capitalist system, leading to fewer corporations, but in fact this did not happen, even in the most liberal regime.¹² Flexibility may nonetheless bias the type of company being formed. For example, allowing directors to entrench their position to the detriment of outside shareholders might encourage incorporation by family oligarchs, while discouraging public offerings (though legislation reserved for quoted companies or stock exchange listing rules might separately promote the latter). Guinnane et al interestingly suggest that flexible internal governance rules drove high take-up of the private company, allowing businesses to limit the threat of untimely dissolution inherent in partnerships without taking on the full risk of minority oppression facilitated by classic corporations. They also point to other possible encouragements offered by legal forms, including cheaper registration costs, the ability to entrench senior management or minority veto rights, and lighter regulatory burdens (which in some countries were more attractive than in Germany). Other possible attractions - also varying internationally - included an administrative process capable of registering a company in hours not weeks, minimal publicity, paralegal intermediaries selling "off-the-shelf" companies, regionally-devolved registration offices, the absence of minimum required capital, tax privileges, not requiring an expensive notary to endorse changes in ownership or charter conditions, minimal annual re-registration requirements and (in the extreme) not having secret police and a cowed judiciary endorsing their expropriations. Our measure of the take-up of various business forms captures only the net effect of the whole

¹² Norway, where there was almost total freedom of private contracting for enterprise forms until 1910, had more corporations per capita than elsewhere in Europe, Hannah, "Global Census," pp. 550, 558. However, compare Foreman-Peck and Hannah ("Diffusion," pp. 20-21) for Norwegian opinion, possibly for good reason, favoring a new statutory template.

package of liberal flexibility (combined with any other determinants); other means (econometric or archival) have to be found to distinguish their relative importance.

Comprehensive annual statistics on the numbers and capitals of extant stocks of all multi-owner business forms are not available for most countries for the twentieth century as a whole. Several series are, however, available annually for Japan from 1883 to the present for all forms in the Commercial Code and can be linked to form one continuous series (see appendix). For the four other countries in Table 1 we have similarly comprehensive statistics only for fully corporate

Table 1. Extant Stocks of (Private and Public) Corporations per million people, 1899-1999.

Year	USA	UK	Germany	Switzerland	Japan
1899	1,875	684	174	615	89
1909	2,901	1,044	341	961	117
1919	2,778	1,576	604	1,827	302
1929	3,895	2,412	851	3,177	331
1939	3,584	3,486	415	4,547	452
1949	4,121	4,974	486	4,761	2,081
1959	6,064	6,825	725	6,248	4,861
1969	8,182	9,666	1,265	10,216	7,868
1979	11,358	13,978	3,706	16,807	11,634
1989	14,605	20,181	6,513	23,198	15,527
1999	19,778	23,866	10,846	28,947	19,384

Source: appendix

forms (defined here as Japan's *kabushiki kaisha* (KKs)¹³ plus *yugen kaisha*, in the UK public plus private companies, in the US quoted plus close corporations, in Germany AGs plus GmbHs and in Switzerland SAs plus SARLs).¹⁴ Partnership forms are excluded: necessarily, since - outside Japan - their numbers are rarely reported annually with precision. In order to assess the level of corporatization in these nations of vastly different - and differentially changing - sizes, we have divided the numbers of corporations by their national populations at all dates.

The most obvious feature of the table is that the common law countries (the US and UK) were ahead of both Germany and Japan at the beginning of the twentieth century and remained so at the end. If the corporate form (as defined in this table) had advantages, these two common law nations apparently benefitted earlier and more abundantly. However, the example of civil law Switzerland suggests that legal family was no barrier to rapid catch-up. Swiss corporate law, owing something to German stems, was on a federal rather than cantonal basis and (though Swiss lawyers debated developments elsewhere) developed independently. The number of corporations per capita

¹³ We follow contemporary statistical practice by including *kabushiki goshi kaisha* / *Kommanditgesellschaften auf Aktien* (KGaAs, or limited partnerships with transferable shares) with KKs/AGs. In the twentieth century they were few in either country.

¹⁴ See Table 2 below. France is not included, because its statistics are better on *flows* of new registrations than on *stocks* of extant ones shown in the table: stock figures are only available at irregular intervals. They do, however, indicate that France resembled Germany in numbers of corporations as defined here (according to Bozio's ("Capitalisation," p. 110) extrapolations from a 1921 observation, the figures for 1900, 1909, 1919 and 1929 were (converted to per million terms) 215, 363, 524, and 986), though France probably made more extensive use of *commandites* before the introduction of the SARL private company form in 1925. It then moved ahead of Germany (with more than twice the German per capita level of corporatization in the later 1930s) and remained slightly ahead of Germany at the end of the century (authors' calculation from SIRENE database).

in Switzerland (already ahead of Germany from the earliest available statistical counts) overtook the UK during World War One and the US in the 1930s; it remained the leader of this group for the rest of the century. Moreover, Switzerland was not unique among northwest European countries with civil law regimes: Norway, Sweden, Denmark, Finland, the Netherlands and Luxemburg were all (at various stages of the twentieth century) nearer to the high Swiss than to the modest German levels of corporatization. While common law nations led corporatization at the beginning of the century, civil law nations experienced more rapid growth in corporate numbers, so there was some convergence. It was quite rare for (non-communist) societies to experience a reduction in the numbers of corporations per capita over a sustained period, but some countries managed it. Germany appears to hold the record for the longest sustained early decline (which can be more precisely dated from 1923 to around 1948), but even the US experienced a temporary check in the 1930s depression. Factors other than the (unchanging) legal family evidently determined these variations. Foreman-Peck and Hannah's ("Diffusion") econometric analysis of an international cross-section before 1914 suggests that more fundamental determinants of corporatization were living standards (proxied by GDP per capita) and the degree of liberality and open-ness in economic policy (proxied by open-ness to international trade). The latter is closely correlated with more corporation-friendly legal systems, in both common and civil law nations.

How does Japan fit into this picture? As Table 1 shows, in the early twentieth century it had relatively few corporations. Japan was still an early-stage industrialiser but it had also come late to allowing incorporation without individual state sanction (as had become the norm in western Europe, America and some of the developing world by the 1870s). Nonetheless in the post-war miracle years Japan came to have corporate numbers comparable with other leading nations, and at century-end it had numbers of corporations per million people almost as high as the US and well ahead of Germany. Japan had already overtaken Germany's corporations per capita in the 1930s (when it still had much lower living standards), confirming that adopting a civil law system - even one based on the German code but without the GmbH - did not especially inhibit incorporation.

However, Germany was by then a very soft target. Its declining corporate numbers, beginning a decade before Hitler's 1933 election victory, were further reduced by Nazi policies under his dictatorship. These condemned outside shareholders as leeches on managerial creativity, reduced shareholder protections, restricted dividends and stock issues, expropriated Jewish companies and provided strong incentives for Aryans to convert their corporations to partnership form.¹⁵ Other right-wing authoritarian regimes - such as Japan and Italy - shared only some anti-corporate prejudices and did not emulate the more extreme of these policies. Like many combatants, the Japanese government (on a full war footing in 1937-45) naturally restricted dividends and concentrated existing corporations on armaments production, but its overall numbers of corporations consistently increased, with only slight and temporary setbacks.¹⁶

ALTERNATIVE BUSINESS FORMS

The statistics for corporations in table 1 arguably understate Japan's early position. Statisticians and lawyers (even within the same legal family) draw the dividing lines among enterprise forms in different places, not always using identical logic or language in doing so and sometimes blurring lines of other division nations consider clear. As Elinor Ostrom insists in different

¹⁵ Despite this, the obvious alternative form - *Kommanditgesellschaft* (KG) - was not as popular in Germany as *goshi kaisha* in Japan at the same time. In 1938 (in the boundaries of the Old Reich, i.e. excluding Austria etc) there were 22 KGaAs, 5,493 AGs, 25,625 GmbHs, and 233 *Gewerkschaften* (a total of 31,373 for all corporations), compared with only 13,142 KGs (*Wirtschaft und Statistik*, no 24, 1939, pp. 771-3), so in 1938 including KGs would increase the corporate total by 42%, compared with 138 % for the equivalent *goshi kaisha* adjustment in Japan in that year. Numbers in Germany then perhaps most closely approached Japan's high levels): earlier (but less comprehensive) census data suggest a lower portion were KGs in 1907 or 1924. On German policy see Burhop et al, "Law" and Hannah, "Weimar's Capitalist Spring".

¹⁶ At the wartime peak of 1943, *kaisha* numbers were 11% higher than in 1937 and in 1945's devastated economy remained 4% higher (*Historical Statistics of Japan*, Table 6)

contexts, many cooperative, multi-agent contractual relations may function in a coherent manner, without conforming to a market/hierarchy/state trichotomy.¹⁷ Table 2 illustrates some of the issues in multi-owner organizations, though forms masquerading as linguistic equivalents in the

Table 2. Capitalist Enterprise Forms in the First Half of the Twentieth Century.

UK	public company	private company	limited partner- ship	ordinary partner- ship	special associations*	sole proprietor
US	corporation		limited partnership	general partnership	*	sole proprietor
Japan	kabushiki kaisha	yugen kaisha†	goshi kaisha	gomei kaisha	special kumiai	kojin jigyō sha
Germany	AG	GmbH	KG (Kommandit)	OHG	*	Allein- inhaber
France	SA	SARL	SC (commandite)	SNC	*	propriétaire unique

*In addition to *kaisha*, there were many *kumiai* (cooperatives or associations) in Japan besides those set up under special legislation from 1900 (the “special” *kumiai* in col 5. Many similar entities existed in western countries, sometimes set up as cooperatives, sometimes as corporations, but also with a wide variety of names, liability regimes, profit distribution rules and legal status (savings banks, credit unions, mutuals, *Vereine*, *Raffeißen*, etc).

† from 1940. The *godo kaisha*, introduced in 2006 to succeed the *yugen kaisha*, is irrelevant for this historical discussion.

¹⁷ See her Nobel lecture, opening quotation above.

organizational menus of this table conceal considerable variations (anyone who has ordered *spaghetti bolognese* in Bologna, Los Angeles and Tokyo will understand the problem of menus).¹⁸

Corporations - the first two columns - encompass two types (though their *legal* separation in many countries only came in the second half of the twentieth century): public companies, which could be (but were not necessarily) quoted; and private companies, not offering stock to the public. Some countries exempted private companies from requirements to publish accounts and restricted their shareholder numbers (for example, Japan and the UK, but not Germany, imposed maximum numbers of fifty). By this period stockholders normally (but not invariably) had limited liability, while partners in ordinary partnerships (col 4) did not. Limited partnerships (col. 3) occasionally had fully limited liability but usually (as in Japan) followed the old European model of the *commandite*: managing partners retained full liability and only outside investors had limited liability. This table includes only capitalist enterprises: state and municipal businesses (unless they were organised under the general law for capitalist enterprises) are excluded, as are some older legal forms once common in Europe but approaching extinction¹⁹ and minor variants that contemporaries treated together with the cases shown.²⁰ The order of the six forms shown in the table can be thought of as a ranking: it is *broadly* true that progressing from public companies to sole proprietors entails a movement toward smaller enterprises, usually with fewer owners and greater personal liability. Yet

¹⁸ We do not show Switzerland separately since French and German terminology was used there and (though its laws substantially differed) no new legal principles are illustrated by the Swiss case.

¹⁹ The *bergrechtliche Gewerkschaft* in Germany or the similar “cost-book” mining company in the UK were species of cooperative with distinctly capitalist characteristics and in many cases quoted on stock exchanges, so closer to the corporate form than most cooperatives. Japan did not have similar forms.

²⁰ For example, the *kabushiki goshi kaisha* was a limited partnership with shares, a cross between a KK (it issued shares) and a *goshi kaisha* (managing partners had unlimited liability).

giant enterprises have at times existed in all categories and it is possible for a corporation (*de jure* or *de facto*)²¹ to be owned by one person, uniting the extremes.

Cooperatives and mutuals are generally excluded, since, though they made and distributed profits, control rights were generally not proportional to the capital subscribed or dividends paid (by then the capitalist norm); instead each member normally had one vote. However, in Japan some kinds of *kumiai* – variously translated as cooperatives, associations or partnerships – were close counterparts to certain collective business firms in the west.²² *Kumiai* was the term used in the civil code to describe partnerships which had neither separate legal personality nor limited liability.²³ Many were very similar to western (unlimited) business partnerships, and they had similarly wide freedom to contract and modify contracts when circumstances changed, but responsibility for debts was not (as in the west) joint and several, but proportional to participations in the enterprise (or, if creditors had not been apprised of that, equal liability per partner).²⁴ Other

²¹ Some jurisdictions recognised “corporations sole,” but multi-ownership was usually a necessary condition for incorporation, though such rules were often (and with varying degrees of legal risk) evaded by the appointment of dummy shareholders.

²² Since no statistics are available for any country, we do not consider *tokumei kumiai* (literally “anonymous associations”), the Japanese equivalent of Germany’s *stille Gesellschaften* or France’s *associations en participation*. These were loans made by “sleeping” investors on the basis of participating in the borrower’s profits, usually incurring no liability for this participation in civil law jurisdictions (or in the UK from 1865), but with a (significant but declining) risk of judicial attribution of partnership liability in the US.

²³ It was also used to describe labour unions (*rōdō kumiai*) and some social, cultural and professional associations as well as some commercial cooperatives and partnerships.

²⁴ This was under the earlier Japanese civil code (not, as with *kaisha*, the Commercial Code), see de Becker, *Annotated Civil Code*, pp.240-50. They also differed in sometimes being conducted by a default rule of majority voting of partners and in permitting one partner to be expelled by unanimity of the other partners. On related Chinese traditional views on partnership, see p. 00, below.

kumiai (in the fifth column of table 2) set up under special legislation in Japan from 1900 (partly modelled, like its corporate law, on German precedent) did have separate legal status; some had limited and some unlimited liability.²⁵ Some undertook functions (trade associations, cartels, joint purchasing or credit for farmers or homeowners) which might in the west have been constituted under special legislation, but were sometimes organised as corporations or cooperatives.²⁶

In Japan's distinctive terminology, "kaisha" describes all the first four columns in table 2 (under the Commercial Code) but none of the remainder (under special legislation or the Civil Code). This was not the case for similar words for generic types in western languages. The corporate form was usually confined to the first two columns (public and private companies) in the Anglosphere, while *Gesellschaft*, *société*, *aktiebolag* etc in continental European languages (and "company" in Victorian British English and modern American English) cover the first four columns but additionally include further types. "Firm" (or even "company") in English can sometimes include sole proprietors, as do non-legal terms like *kigyō*, "enterprise" or "business" in most languages. *Kaisha* is usually translated as "company" (in its more restricted modern sense) or "corporation," but is that correct? Not to twentieth century Anglo-American lawyers. Common law partnerships did not then have

²⁵ For *sangyo kumiai* under the Industrial Association Law of 1900 see n.41, below. On this enterprise form, see Fisher, "Cooperative Movement," Churchill, "Cooperatives." There were also *dogyo kumiai* (trade associations mainly for assuring quality under another 1900 law), *suisan kumiai* (fishery associations under a 1901 law) and *shinrin kumiai* (forestry associations under a 1907 law). In 1925 further laws created associations to cartelise exports (*kogyo kumiai* for manufacturers and *yushutshu kumiai* for merchants), with stronger controls over non-members than *dogyo kumiai*. Limited liability in the 1930s was discouraged as insufficiently prudent, with cooperatives increasingly adopting "guaranteed" capital, increasing (but still limiting) the liabilities of *sangyo kumiai* and their members (for the shift see e.g. Fisher, "Cooperative Movement," p. 483 and the statistics in *Financial and Economic Annual of Japan, 1930-38.*)

²⁶ e.g. Raffeisen cooperatives in Germany, corporate savings banks in the US, building societies in the UK.

separate legal personality in the US and England,²⁷ but in Japan some types - partnerships (ordinary or limited) under the commercial code (both *kaisha*) and some (but not all) *kumiai* - did and even in civil law Scotland, France and Germany partnerships had some characteristics of separate legal entity.²⁸

Guinnane et al (2007) describe the GmbH as a “hybrid” and there was initial contemporary uncertainty about how to describe it. Some – noting the GmbH’s corporate form and fully limited liability – translated it as private limited company (close corporation); others – noting that its ownership stakes were named *Anleihen* (quotas) rather than *Aktien* (stocks) and that, as with partnership stakes, they were not tradable on stock exchanges – translated it as limited partnership. The first usage predominated, but the latter has recently been revived in American English, where, from the 1970s, newly legally-defined “limited liability companies” (private companies) - though sharing most legal characteristics of corporations - are technically considered partnerships. The historically pervasive Anglo-American use of that same term as a synonym of corporation is accordingly falling into disuse by the minority of English speakers in the US.²⁹ Confusingly, “limited

²⁷ though in practice common law courts struggled to maintain this view (Crane, *Handbook*, 8-16). In the US the revised Uniform Partnership Act of 1997 finally conferred separate legal personality on all partnerships, but implementation by states differed. In England and Wales from 2000 limited liability partnerships (but not general or limited partnerships) had separate legal personality, like companies, though continued to be taxed as partnerships. The world is thus now nearer the Japanese usage than it was historically and the distinctive meaning of corporation in English has become fuzzier.

²⁸ There were, for example, different rules about whether creditors suing to recover debts had to exhaust all partnership assets *before* proceeding against one or more partner’s individual assets.

²⁹ Although there were numerous close (private) companies organised under general corporation laws in earlier decades, the formal US legal equivalents of the British private company – “limited liability companies” - were only introduced by Wyoming as late as 1977 and were numerous nationwide in the US only from the

liability companies” in *British* English (in this context more widely spoken worldwide)³⁰ are definitely *not* partnerships, but corporations proper.

Economists might wish to define the boundaries between enterprises differently from lawyers and the legal categories in Table 2 – even if not coinciding exactly with their needs - will sometimes provide serviceable approximations. For example, to measure enterprises that were corporate (in the Anglosphere’s sense) and in which everyone, including the top managers, had limited liability, one combines the types in the first two columns, making small adjustments.³¹ To include registered enterprises in which outside investors – but not designated principals or managing partners - had limited liability one needs to add limited partnerships and some cases from col. 5. To include all capitalist multi-owner entities one further adds unlimited partnerships and more cases from col. 5, again correcting for odd exceptions.³² Practicalities are more difficult than principles. Ordinary partnership data are full for Japan (at least for Commercial Code *kaisha*, though not for Civil Code *kumiai*) but often only partial or non-existent for other countries. Such gaps in the statistical record leave some inevitable lacunae in comparative measures.

Japan has fuller data for its *kaisha* (the first four columns) than the equivalents in most countries, facilitating examination of some variations resulting from alternative definitions. In Table

1990s. Many American books published before this recent divergence of legal definition from common usage still treated “(limited liability) company” and “corporation” as synonyms, as in modern British English.

³⁰ English-speakers in Australasia, India, Singapore, Hong Kong etc, as in the UK, still generally treat private limited liability companies as corporations proper, like other joint stock companies.

³¹ In many jurisdictions by 1900 limited liability was a necessary feature of incorporation, but that was not true before 1850 (when limited liability was less commonly specified in corporate charters). There were still exceptions: some UK registered companies had unlimited liability and all California corporations until 1933 had only proportional liability. The table omits western cooperatives and mutuals and some of these (and some Japanese *kumiai* in the table) had limited liability.

³² As we have noted, a few of these had *de jure* single owners and more *de facto* single owners.

1, following a common convention, we counted as corporations only the first two columns. For Japan - before 1940 - this includes only the first column, the *KK*, though one might view this with equanimity. Japan as yet had no formal private company form, but many *KKs* - as with the basic corporation in other countries - were *de facto* private,³³ in the sense that they had few shareholders and their shares were not traded publicly, so companies in some respects resembling the German GmbH are actually included. Moreover, the differentiation is logically uniform: both limited and unlimited partnerships are also excluded from all countries' totals. Thus, as a measure of *fully* limited *kaisha* entities, the totals in Table 1 serve reasonably well for international comparisons.³⁴

Yet there are indications that Japanese limited or ordinary partnerships (in addition to being distinctively described as *kaisha* or "corporate" in Japan's idiosyncratic legal terminology) and also some *kumiai*, were prone to fulfil functions sometimes undertaken by corporations proper in other countries, despite many of them having (partially or fully) unlimited liability. Table 3 puts some

Table 3. Main Japanese Multi-Owner Enterprise Forms in 1910.

	<u>Numbers (by liability status)</u>				<u>Paid-up capital</u>	
	Limited	Partly Limited	Unlimited	Total	¥ million	% of known
Public company (KK)	5,026	0	0	26	1,244.5	84
Limited partnership (goshi kaisha)	0	4,783	0	24	96.2	6
Ordinary partnership (gomei kaisha)	0	0	2,499	13	140.7	9
Special <i>kumiai</i> *	<u>4,204</u>	<u>166</u>	<u>2,889</u>	<u>37</u>	<u>5.2†</u>	<u>0</u>
Total (of known)	<u>9,230</u>	<u>4,949</u>	<u>5,388</u>	<u>100</u>	<u>1,486.6</u>	<u>100</u>

³³ The terms *kabushiki hikōkai kaisha* and *kabushiki kōbo kaisha* exist in Japanese only as translations of foreign terms (public and private/close companies/corporations in the Anglosphere)

³⁴ The exceptions in note 36 apart, with the additions of some older forms such as *bergrechtliche Gewerkschaften* (see note 19).

Source: Department of Finance, *Twelfth Financial and Economic Annual of Japan 1912*, pp. 83, 86.

* *Sangyo kumiai* under the 1900 Industrial Association Law (see *Sangyo kumiai yoran*), which had a choice of liability status: limited (*yugen kumiai*) and unlimited (*mugen kumiai*) are self-explanatory; the “partly limited” in the table (*hosho sekinin*) had chosen something in between e.g. double liability). In addition to the 7,259 shown in the table there were 49 whose liability was not classified. Many of these *kumiai* were closer to western rural coops than to companies, but *shigaichi shinyo kumiai* (city credit associations, which took deposits from non-members and were able to discount bills) and *shigaichi kobai kumiai* (city consumer cooperatives) were 3,421 fishermen’s associations (*suisan kumiai*) in 1910, but their numbers then rapidly declined also formed under this law. Other *kumiai* seem to have been less numerous: for example, there were; and 916 *juyo bussan dogyo kumiai* (trade associations) in 1912 (the earliest year), numbers that had slightly declined by 1930.

† Paid-up capital data refer to 3,527 *kumiai*: less than half the total numbers.

numbers on the issue for 1910. It is clear that counting *KKs* alone only just captures most entities with *fully* limited liability in 1910, and captures less than half of those with *any* limitation of liability or with separate legal personhood. It is the cooperatives (mainly special agricultural *kumiai*) which make up most of the numerical deficit in 1910 and that would increase if we had statistics on other *kumiai*. Moreover, even omitting *kumiai* (as other countries’ statistics omit cooperatives, which they appear to have used less intensively than Japan),³⁵ *kaisha* partnerships (combining *goshi* and *gomei*, i.e. those with and without some limited partners) also outnumber *KKs*. However, corporations (*KKs*) are on average much larger, so they account for 85% of paid-up *kaisha* capital in 1910. Neither would their dominance be much diminished if we added the paid-up capital of special *kumiai*, whose numbers grew more slowly and were smaller than *kaisha* and many of which lost their limited liability status in the 1930s.³⁶ *Goshi kaisha* proliferated at twice the rate of *KKs* in the quarter century

³⁵ If Woytinsky’s (*Welt*, p. 161) estimate of 130-140,000 cooperatives worldwide around 1920 is correct, though it is clear there are some lacunae in his figures (*idem*, pp. 156-171).

³⁶ The *Financial and Economic Annual of Japan* began publishing statistics on their capital only in 1928, reporting statistics back to 1917, suggesting similar small sizes to those indicated by the partial data in Japanese sources for 1910. The special *kumiai* numbers had increased to 15,028 by 1935, though the average capital of the 92% reporting had grown to ¥18,753 and by 1939 only 726 had fully limited status, many having

after 1910 (their numbers peaked in 1936), with *gomei kaisha* numbers also growing faster than Ks, but both kinds of partnership *kaisha* remained mainly smaller firms,³⁷ while the average paid-up capital of Ks more than doubled. Thus the K share in all *kaisha* paid-up capital remained at 85% in 1935, as in 1910.³⁸

This numerical expansion and stable capital share of partnerships differs from continental European experience in this period, where the *commandite* was in relative decline in both numbers and paid-up capital, particularly - as in the cases Guinnane et al emphasize - in countries which adopted the GmbH/SARL (private company) form.³⁹ Shimizu argues that limited partnerships (*goshi kaisha*) and private companies (*yugen kaisha*) were more similar in Japan than their European equivalents.⁴⁰ *Goshi kaisha* had separate legal personality, like a corporation, and might more readily survive the departure of a partner. However even in Japan dissatisfied partners in a *gomei kaisha* could still compel premature dissolution through withdrawal (at the end of a business year and with six months' notice), though limited partners (or their heirs) in a *goshi kaisha*

been pressured to increase their capital and guarantors (*Financial and Economic Annual of Japan 1940*, pp. 114-5).

³⁷ though there were notable exceptions. The peak Mitsubishi and Sumitomo holding companies remained *goshi kaisha* until 1937 and Mitsui family control was exercised by a peak *gomei kaisha* until 1940, though many of their subsidiary and associated companies were Ks (Japanese judges did not share the US distaste for hybrids, such as partnerships owning corporations). The changes were motivated by new double taxation of family partnership holdings, which K holding companies avoided.

³⁸ *Financial and Economic Annual of Japan 1940*, p. 217.

³⁹ By 1925, Germany, Austria, the UK, Poland, France (and some countries in their empires) had adopted the private company form.

⁴⁰ Shimizu, "Management," pp. 11-13.

could only withdraw if all general partners agreed,⁴¹ while withdrawal (as opposed to share sale) was forbidden in *yugen kaisha*, providing fuller entity shielding. *Goshi kaisha* also differed from *KKs* or *yugen kaisha* in that at least one partner had to have *unlimited* liability (and, in respect of debts incurred while he was a partner, that liability subsisted for two years after withdrawal), but in practice, until a change in the law in 1938 which made it easier to enforce judgments on unlimited partners, the procedure for outside creditors to attach assets for partnership debts was onerous. *Goshi kaisha* had other advantages for small, family enterprises. They were cheaper to register than *KKs*,⁴² did not have to appoint auditors or publish accounts (secrecy was prized by family companies, as well as by group holding companies⁴³), required only two rather than seven members and had no minimum capital requirement.⁴⁴ Partnership agreements could also entrench family control, protect minorities (through withdrawal rights of unlimited partners for reasonable cause) and allocate rights and duties more flexibly than shareholders (who in *KKs* had to have equal votes per share, with only a 50% majority required for major changes).

⁴¹ Vogt and Heath, *Commercial Code*, pp. 22-7, 36-8. Partnerships were automatically dissolved if all general or all limited partners withdrew, but it was easy to convert to *gomei* status if the latter occurred, and from 1911 it was possible also to convert from *gomei* to *goshi*, attracting limited partners to replace unlimited partner withdrawals.

⁴² In 1912 0.4% of capital for *gomei* or *goshi kaisha* against 0.5% for *KKs* (Tanaka, *Genko*, p. 37); though by 1936 the standard fee was 0.5% for all *kaisha* with a minimum of ¥20 (Mizoguchi, *Toki*, pp. 378, 400, 407).

⁴³ See *Kaisha Tōkeihyo*. In 1927 500 *kaisha* were holding companies, most of them *gomei* (214) or *goshi* (157) *kaisha*, not *KKs*, and the partnership holdings had larger capitals than *KK* holdings. In other countries, large holding companies were usually corporations, not partnerships (which in some jurisdictions were not allowed to control corporations).

⁴⁴ though even in *KKs* the minimum capital requirement (¥140 authorized or ¥87.5 paid-up), as in Switzerland, but unlike Germany, was trivial.

Goshi kaisha were the smallest of registered *kaisha* in Japan, with less than a tenth the average capital of Ks in 1910 (less than a twentieth by 1935) and only around one-third the average capital of ordinary partnerships at both dates. They thus occupied a position in the size hierarchy different from the ostensibly similar *commandite* limited partnerships in the west, which recruited limited partners to amass *greater* resources than unlimited partnerships. We do not have comparable capital measures for all German enterprises (only for AGs and GmbHs) but, in employment terms, German KGs (limited partnerships) were about eight times the size of OHGs (unlimited partnerships) and somewhat larger than GmbHs (private companies).⁴⁵ In the US, also, limited partnerships were of intermediate size.⁴⁶ Japanese Ks, like AGs in Germany or corporations in the US, occupied the top of the firm size hierarchy, but unlimited partnerships (*gomei kaisha*) - oppositely to the norm in western countries⁴⁷ - were larger than limited ones (*goshi kaisha*). It was the latter - with outside investors' liability limited and freedom from accounts publication - that fulfilled a role similar to GmbHs in Germany. That explains both why *goshi kaisha* substantially

⁴⁵ In the 1907 German census, AG establishments on average had 179 employees (underestimating relative AG size since AGs were most likely to have multiple establishments), KGs 79, GmbHs 49 and OHGs (ordinary partnerships) only 7.

⁴⁶ In the US manufacturing census of 1909, corporations employed an average of 76 blue-collar workers and all partnerships an average of 12. Sizes for the two kinds of partnerships are not separately reported but for earlier evidence that, as in Germany, they were larger than ordinary partnerships see Hilt and O'Banion, "Limited Partnership." There were 43 times as many manufacturing establishments in US corporations and ordinary partnerships combined than in limited partnerships in 1909; the comparable figure for German manufacturing in 1907 was 59 times. Yet, for all industries in Japan in 1907 the comparable multiple was less than 1.7 times. Thus limited partnerships were already - in relative terms - massively more important in Japan before 1914 (and became more so by the 1930s).

⁴⁷ perhaps because many unlimited partnerships in Japan were organised not as *gomei kaisha* under the commercial code, but under the civil code as *kumiai*, so reported numbers are biased to large holding partnerships and omit some small partnerships, similar to those counted in the US and German statistics.

declined (in numbers and share of *kaisha* capital)⁴⁸ with the introduction of the *yugen kaisha* (formally the GmbH equivalent)⁴⁹ in 1940 and also why Shimizu reports that the advantages of the GmbH identified by Guinnane et al were not a primary reason for the subsequent rising popularity of the *yugen kaisha* in Japan.⁵⁰ In the 1920s the Tokyo Chamber of Commerce and Industry lobbied for a GmbH for small companies, but were successful only when a tightening up of newspaper publicity requirements and other rules for Kks seemed unreasonably onerous for small firms. *Yugen kaisha* were introduced in 1940 and were initially nearer in size to Kks than *goshi kaisha*,⁵¹ but smaller firms later predominated and, just as Guinnane et al show for Germany and France, the use of limited partnerships declined.⁵² One advantage of the *yugen kaisha* was extending limited liability to the top

⁴⁸ By March 1949 both forms of partnership *kaisha* were down to 24,451 (17% of corporations proper) and by 2009 there were only 6,056 left (only 0.5% of the number of corporations).

⁴⁹ It is oversimplifying to describe the *yugen kaisha* as a copy of the German GmbH. There was no restriction on the numbers of holders in a German GmbH (and a few had more than a thousand owners), but the *yugen kaisha* (following the British 1907 legislation) was limited to a maximum of 50 shareholders. On the other hand, the British private company had no minimum capital size, while the *yugen kaisha* had a minimum of ¥10,000 capital (\$2,344 at 1940 controlled exchange rates, higher than most US limits but a lower minimum than Germany's M20,000 (\$7,994), though arguably about the same in terms of financial affordability to the local bourgeoisie). This minimum was raised to ¥100,000 in 1951 (though, post-inflation, that represented a substantial reduction in real terms) and to ¥3 million in 1990 (when a minimum capital requirement was also first introduced for Kks at ¥10 million, see Nicholas, "Organization").

⁵⁰ Shimizu, "Organizations" and "Management."

⁵¹ In 1940 the average capital of 2,091 *yugen kaisha* was ¥31,781 and of 35,497 Kks ¥69,123 (and 6,981 Kks with capital less than ¥50,000 had an average of ¥20,290).

⁵² See n. 5, above. The requirement of *yugen kaisha* for a supermajority of 75% with at least 50% of voting rights represented for changes on important matters (compared with only a 50% majority for Kks) and the possibility of shares with multiple votes (banned in Kks) also created a wider range of choices in such private

owner-managers, at least one of whom had to accept liability in a *goshi kaisha*.⁵³ However, other advantages of the GmbH - notably the freedom from compulsory accounts publication and flexibility in governance arrangements - were already widely adopted by Japanese SME entrepreneurs in the *goshi kaisha*. It is nonetheless possible that partnerships in Japan were less effective than Kks. Nicholas shows that their returns on equity were lower than Kks in 1922-38,⁵⁴ an observation compatible with a dual economy interpretation of enterprise forms. SMEs - often using the partnership forms - perhaps occupied the less profitable niches in a developing economy with many backward sectors, though all *kaisha* forms were present in most industries.⁵⁵

Thus the limited partnership (*goshi kaisha*) was more popular in its heyday in 1930s Japan than its German equivalent (the KG), despite Nazi policy favoring the conversion of AGs and

companies for minority protection or qualified majority dominance, but this choice was more constrained than in Germany or the UK.

⁵³ The government specified a minimum capital of ¥10,000, fearing individuals would use the *yugen kaisha* to obtain limited liability (in a *goshi kaisha* at least one partner had unlimited liability and there was no minimum capital requirement). For Shimizu ("Management") the dominant motivation was the fuller management integration needs of mergers of multiple sole proprietors required by government wartime concentration policy, while retaining shareholder participation. He also mentions safe within-family ownership dispersion, and national and local government and business association endorsement of the form, as factors encouraging diffusion of the *yugen kaisha*.

⁵⁴ Nicholas, "Organization." His finding is particularly surprising because, in countries like the US and UK, partnerships (and sole proprietors) have higher measured rates of return on capital than corporations, an observation usually explained by partnership profits including some returns to managerial labour, whereas corporate profits largely exclude such returns.

⁵⁵ Even in manufacturing, partnerships outnumbered Kks, though partnerships were rare among public utilities, insurance and transport *kaisha*. *Goshi kaisha* were prominent in mining, where they were the same average size as Kks (though less numerous) and were particularly numerous in domestic trade.

GmbHs to KGs.⁵⁶ To find proportions of extant registrations in the limited partnership form as high as in 1930s Japan in Germany (or other civil law countries), one has to go back to the early nineteenth century, that is to before general registration laws made individual authorization of corporations unnecessary,⁵⁷ or to countries like Russia, where the Tsar's authorization was still required at the time of the 1917 revolution.⁵⁸ There was, however, nothing uniquely Japanese in flexible responses to the absence of the specific GmbH corporate form which Guinnane et al praise. Although *commandite* partnerships were not used in twentieth century Europe as widely as the Japanese *goshi kaisha*,⁵⁹ KK-equivalents (the AG in Switzerland, the NV in the Netherlands, the AS or AB in Scandinavia) were more commonly used to achieve what was offered by GmbHs in Germany and *goshi kaisha* in Japan. This was possible because their laws for this corporate option were less stringent - on matters like publicity of accounts and governance rules - than Germany's for AGs. The Netherlands most closely resembled Japan, though - significantly - only after its NV law was tightened up in 1928, without permitting the *besloten vennootschap* (BV, equivalent to a GmbH) until 1971. In the intervening decades there was, though less markedly than in Japan, extensive recourse to the *commandite* form. This was unnecessary in Switzerland and many other small European countries, because their basic corporate form continued to have less stringent requirements, so that form could still be widely used by SMEs and family firms. Similar recourse to the KK form was known in Japan (in fact most KKS were small family firms)⁶⁰ but was less favored

⁵⁶ Fränkel, *GmbH*, p. 36; Statistisches Reichsamt, *GmbH*, p. 4.

⁵⁷ Hannah, "Corporations."

⁵⁸ Owen, *Corporation*, 11n; Bokhanov, *Krupnaia*, 95 n 13; Papp (*Development*, p. 403).

⁵⁹ Anon, "Statistique;" Viandier et al, *Société*, 66-8, 85-8, 307-27.

⁶⁰ In 1927, 85% of KKS had less than ¥1m (\$0.5m) capital and 23% had less than ¥50,000 (*Historical Statistics of Japan*, vol. 4, 1988, 172-3), though some very small KKS continued to be traded on the TSE. By 1957 95% of *kaisha* (which were then overwhelmingly corporations in the sense of table 1, not partnerships) had less than ¥5m (by then less than \$13,889) capital (*Historical Statistics of Japan*, 2006, vol 2, p. 52).

there. This was because Japan's fuller disclosure requirements, the wider scope of decisions that required ratification at a general meeting and shareholder fears of calls on unpaid capital by directors at an inconvenient time (which had largely died out in Europe in the nineteenth century) discouraged some SMEs from registering as Kks.⁶¹ However, the numbers of corporations (Kks) in Japan overtook the number of AGs in Germany in 1912 and then expanded even more rapidly. Even after the *yugen kaisha* was introduced in 1940, Kks remained massively more numerous than German AGs. The KK was perceived to have more prestige than the *yugen kaisha* and the provisions for protecting shareholder interests in Kks long remained less stringent than those in German AGs. The KK also allowed some choices, such as restrictions on share transfers by family owners, which were not possible in a German AG, but were allowed in GmbHs.⁶²

STOCK EXCHANGES

As the KK form was widely used by family SMEs, we cannot assume that most KK capital was publicly traded on stock exchanges, as was the case for AGs in Germany.⁶³ In Japan - as in the US, UK and Switzerland⁶⁴ - *de facto* close corporations (with shares rarely (if at all) traded and held by relatively few people) dominated the corporate population numerically throughout the twentieth century.⁶⁵ Japan did not regulate Kks as stringently as Germany's 1884 code regulated AGs, nor did it emulate the tough additional German stock exchange regulation of 1896/7 which affected quoted

⁶¹ Baum and Takahashi, "Commercial and Corporate Law," 376; Nanjo and Kasuya, "Unpaid Capital."

⁶² von Mehren ed., *Law*, 539.

⁶³ Around a third of Prussian AGs (mainly the largest ones) were quoted on a formal exchange (*Statistisches Jahrbuch 1911*, pp. 228,231).

⁶⁴ Before 1938, when the Swiss introduced the GmbH.

⁶⁵ Rajan and Zingales count 389 Japanese companies quoted on Tokyo, Osaka and some other exchanges in 1913, less than 6% of the 6,562 extant Kks.

AGs.⁶⁶ Such laws reinforced the gatekeeper position of German banks and required AG accounts, prospectuses and other investor aids facilitating the divorce of ownership from control.⁶⁷ With fewer such legal protections for investors, one might expect Japanese stock exchange development to lag Germany's, at least until post-war Americanisation promoted investor protection. This increased Japan's score on the "anti-director" rights index (which some modern analysts consider the major driver of stock exchange development) from 1 to 5 (out of a possible score of 6).

Table 4. Stock Markets: Germany and Japan 1913-1999.

Date	Ratio of Equity Capitalisation to GDP (%)		Listed Companies per Million Population	
	Japan	Germany	Japan	Germany
1913	49	44	8	28
1929	120	35	17	20
1938	181	18	19	11
1950*	5	15	9	13
1970	23	16	15	9
1999	95	67	20	13

Source: Rajan and Zingales, "Great Reversals," pp. 15, 17.

* Japan's stock exchanges were closed from 1945 to 1949 and recovery was slower than in Germany.

⁶⁶ though KJs did, for example, have to publish accounts, respond to investor concerns in annual general meetings, and give shares equal votes.

⁶⁷ Burhop and Lehmann-Hasemeyer, "Geography"; Fohlin, *Finance Capitalism*; Burhop, Chambers and Cheffins, "Law"

Yet, as Table 4 reports, Japanese equity markets were *not* behind Germany's before World War One, by Rajan and Zingales's⁶⁸ widely-used metric of the ratio of quoted equity capitalisation to GDP, and they forged ahead of Germany's in the interwar years in quoted company numbers also. One of the reasons may have been competition both among exchanges and from off-exchange trading, whereas Berlin (and Frankfurt) gradually dominated Germany's provincial exchanges and off-exchange securities trading was illegal. Unlike major exchanges abroad Japanese exchanges encouraged trading by not charging listing fees. Japan's 46 exchanges of 1898 fell to 13 by 1911⁶⁹ and to 11 by 1943, when they were compulsorily amalgamated into the Japan Exchange (with a main exchange in Tokyo and 10 branch exchanges, of which two soon closed). Outside these exchanges, over-the-counter (OTC) unregulated trading of both listed and unlisted stock long remained strong (but is excluded from the table), so the precise size of the market is difficult to define, but when nine exchanges reopened in 1949, they abolished forward trading in return for a ban on this OTC trading of listed stocks.⁷⁰ (Low) listing fees were introduced and by 1950 much of the post-war reorganization of stock corporations was complete. Paradoxically Japan's quoted

⁶⁸ "Great reversals." Their data include all (Germany) or several (Japan) stock exchanges, not just the major metropolitan exchange. Although some of Rajan and Zingales's statistics have (correctly) been criticised, those for Japan and Germany appear broadly correct. Burhop and Lehmann suggest only a slight downward adjustment to Rajan and Zingales's 1913 figure, apparently adopting a stricter definition of domestic firms than RZ. Hamao et al (pp.53, 62) show a very similar pattern (though, of course, somewhat lower levels) for the Tokyo Stock Exchange alone in 1885-2000 and their estimate of the number of Tokyo- and Osaka--listed companies (available only to 1937, pp.60, 65) are compatible with Rajan and Zingales's figures. The Japanese lead will be understated because, while off-exchange trading was prohibited in Germany, there was a significant OTC market in addition to the formal exchanges in Japan, in the first half of the century.

⁶⁹ Tamaki, *Japanese banking*, p.108.

⁷⁰ Before 1949, only forward trades had to be on exchanges in Japan: spot trades could be conducted anywhere and so the exchanges' share of this market was low. US-style margin trading was introduced in 1951 to stimulate demand.

capital/GDP ratio reached a nadir at this time when post-war Americanization *increased* statutory investor protection, though within a few decades Japan restored its lead over Germany and now has one of the most widely dispersed stockholdings in the world.⁷¹ As elsewhere, Japanese corporate size distributions were highly skewed and it seems likely that *most* Japanese KK capital at an early stage was in the small minority of companies that were quoted on exchanges,⁷² as was the norm in Europe, rather than (as in the US before 1914 or the global norm today) most corporate capital being in close (unquoted) corporations.⁷³

Apart from a tightening of the Commercial Code in 1911, which strengthened directors' liabilities for negligence,⁷⁴ it is difficult to see any early German-style positive impact of corporate law in protecting shareholders in Japan. It has been argued that both law and Nazi politics shifted Germany from its strong initial (pre-1914) shareholder value culture to one which stunted stock exchange growth (as shown in this table).⁷⁵ Why did Japan – with an apparently similar Commercial

⁷¹ Faccio and Lang, "Ultimate."

⁷² In 1900 authorized capital listed on Tokyo was about a third of all KK capital (Hamao et al, "Listing Policy," p. 61, with precise data and definitions underlying the graph kindly provided by Tetsuji Okazaki, and *Financial and Economic Annual of Japan 1902*) and most firms were listed and traded elsewhere than Tokyo. Similar data for 1915-37 suggests that the TSE's share of all KK capital remained around a third during World War One, peaked at 60% in 1922 and, after a sharp dip in 1923, remained above 50% from 1924 to the war. By 1949-50 – an untypical year - the corporate capital listed on all Japan's stock exchanges (by then all but a few percent quoted on Tokyo) again accounted for around one-third of the authorized capital in kaisha (compare the figures in the TSE Annual Statistical Report (*Shoken tokei nenpo*) with those in Bank of Japan, *100-Year Statistics*, p. 330).

⁷³ Compare Hannah, "Global census," 16-17.

⁷⁴ Hamao et al ("Listing Policy") note the positive impact of the 1911 change on listings on the Tokyo Stock Exchange.

⁷⁵ Burhop et al, "Law."

Code – develop so differently? Historians noting the widespread development of stock exchanges before legal protections for investors were seriously implemented, have speculated that there were alternative mechanisms protecting shareholders, such as information signalling and monitoring by investment bankers, high dividend distribution disciplining boards, private order regulation by stock exchanges of corporate charters (such as anti-director rights or transparent accounts), which promoted shareholder confidence.⁷⁶ As far as we are aware, there is no study of whether interwar Japanese corporate charters voluntarily adopted good governance rules. Okazaki et al acknowledge that shareholders held ultimate control of corporate activities through the appointment and dismissal of directors at shareholder meetings, but argue that one of the reasons for the remarkable post-1918 growth of the Tokyo Stock Exchange, far from a strengthening of investor protection, was a relaxation of the rules, enabling the exchange to trade securities already traded on the outside spot market which had not applied for listing, thus improving market liquidity.⁷⁷

Another possible candidate for explaining Japan's remarkable early growth in the quoted capital/GDP ratio is the voluntary emergence of gatekeepers and information signallers trusted by investors. Signalling by influential Meiji reformers such as Eiichi Shibusawa may have been an important supplement to legal regulation in Japan and the *zaibatsu* may later have been an institutional substitute for weak legal investor protections.⁷⁸ We thus provisionally view the strong

⁷⁶ Miwa and Ramseyer ("Corporate Governance" and "Value") show before 1914 that Japanese quoted companies adopted good governance practices: they drained firms of excess cash by paying high dividends, tied managerial pay to firm profits, relied on reputational sanctions in the managerial labor market, restricted managerial discretion by charter and statute, and actively recruited prominent industrialists to the board. For similar cases in the UK see Foreman-Peck and Hannah, "UK Corporate Law."

⁷⁷ Okazaki, "Corporate Governance;" Hamao et al, "Listing Policy."

⁷⁸ Franks et al, "Ownership," citing Okazaki's finding ("Role") that zaibatsu enterprises had higher rates of return in 1922-36. Okazaki interprets this as the result of family owners being more willing to employ professional managers than firms with dispersed shareholdings, a striking reversal of the Chandlerian

development of Japanese stock exchanges in the interwar years as a result of intense monitoring of professional managers by large investors (in some cases zaibatsu families), rather than wide dispersion of holdings driven by strong investor protections. It was post-war Americanization that placed stronger investor protections on the statute book, but the occupying authorities also dissolved the zaibatsu and expropriated large shareholders. If this caused a loss of valuable signalling and/or monitoring, it provides a neatly compatible explanation of the lower post-war penetration of Japanese stock exchanges. The later recovery may have been caused as much by alternative institutional innovations by main banks and *keiretsu* as by formal investor protections.⁷⁹

AN ASIAN MODEL?

Was Japanese corporate law - and the flexibility with which Japanese businesspersons used it - in some sense part of a different Asian or Asia-Pacific model of corporate development⁸⁰ than its plainly European origins suggest? Not on the dimensions we have so far discussed. Japan was precocious in using corporations (and developing stock exchanges) compared with most Asians, but was by no means the only case. Singapore and Hong Kong (which adopted western corporate laws decades before Japan) consistently⁸¹ had (and still have) more corporations per capita than Japan and Hong Kong had the highest ratio of quoted capital to GDP in the world as early as 1910.⁸² India also adopted English corporate law decades before Japan adopted the German

orthodoxy, but in line with Morikawa and others on the zaibatsu. Fruin's view (*Enterprise*, pp. 94-5) that Japan's stock exchanges were "small, underdeveloped in terms of the range and sophistication of financial instruments, and highly speculative" is difficult to sustain.

⁷⁹ Franks et al, "Ownership." Morck and Nakamura ("Frog") tell a similar story of strong Japanese institutions compensating for its weak securities laws.

⁸⁰ As suggested notably in World Bank, *East Asian Miracle* and Aoki, "Towards."

⁸¹ except briefly when Japanese military occupiers closed their Companies Registries in 1942-44.

⁸² Hannah, "Global Census."

model in 1899, yet still at the latter date had fewer corporations (though initially more corporate capital) than Japan, even though Japanese corporations until that time required individual government authorization or lacked legal clarity. India's corporate numbers per capita grew steadily but slowly under British rule and, after independence in 1947, actually *declined* for several decades. Despite China's adoption in 1904 of a commercial code very similar to Japan's,⁸³ China had fewer corporations even than India and, after Mao's triumph in 1949, corporations were more comprehensively suppressed than under India's disastrous "license Raj." Korea and Taiwan were well behind India in the early decades of the century but when the Japanese authorities extended free incorporation (on their own 1899 model) to their colonies (in 1920 and 1923 respectively) there was catch-up.⁸⁴ On their unexpected independence in 1945, they followed the Singapore and Hong Kong rather than Indian trajectory, continuing to develop the relatively liberal corporate regime inherited from their colonial masters.

The main differentiator of the future tigers of Asia-Pacific from other underdeveloped regions in the early twentieth century was the exceptionally small size of their

⁸³ Williams, *Recent*.

⁸⁴ The first estimate for Taiwan in the Japanese language sources shows 402 corporations (KKs) with ¥287.937m capital, 78.4% of it in Japanese hands, an average size of ¥716,261 in 1929 (Takahashi, *Gendai*, 435-6). There were also 357 limited partnerships and 59 ordinary partnerships – a smaller relative number than in Japan - making a total capital of ¥312,447,000. The equivalent Korean figures for KKs only in 1929 are ¥582.246m (an average of ¥724,187 for 804 KKs), compared with ¥11,762.7m (an average of ¥619,252 for 18,995 KKs) for Japan proper. The ratio of these capital figures to GNE is 71.9% for Japan, 32.5% for Korea and 37.2% for Taiwan, suggesting that the colonies resembled each other more than the mother country. The numbers of corporations (KKs) in 1929 per million people - 88 in Taiwan, 40 for Korea and 300 for Japan - compares with figures of 4 per million people for Korea (with an average capital of ¥140,415) and 101 per million for Japan (with an average capital of ¥247,612) in 1910 (Hannah, "Global Census," Table 3). The figure for India in 1910 was 12.

corporations, compared with the underdeveloped economies of eastern Europe, Latin America or Africa.⁸⁵ The average size of Japanese KOs in 1910 was only ¥247,612 (\$125,819), in Korea \$152,431, and their equivalents in the Netherlands East Indies (modern Indonesia) \$128,260 and in the Straits Settlements (modern Singapore and parts of Malaysia) \$138,678. If such countries had any advantage over other underdeveloped economies (where average corporate sizes of \$1m+ were not uncommon), it seems to be the absence of crony capitalism. This limited incorporations and access to finance to favored groups in Latin America and elsewhere and depended more on states “picking winners.”⁸⁶ A multiplicity of small corporations perhaps encouraged Schumpeterian creative destruction – multiple foundations and multiple bankruptcies – and a more successful, risk-taking growth model than crony capitalism. However, the largest Asian populations suffered similarly to unsuccessful non-Asian models: the average size of Chinese corporations in 1910 was as high as \$1,314,851 and in India \$410,339. That structure left less room for creative destruction there.

Similar relativities are observable for companies quoted on stock exchanges. The average size of 389 Japanese companies quoted on Tokyo, Osaka and some other exchanges in 1913 was, in dollar terms,⁸⁷ only \$3.2m, compared with \$34.9m for the 298 listed on the NYSE about the same time, \$4.8m for the 910 listed on the Berlin Bourse and \$14.1m for the 1,198 listed on the LSE. Japanese quoted KOs were also smaller than the \$16.4m for the 117 listed Argentine companies, \$9.6m for the 75 listed Egyptian companies, or \$7.1m for the 113 listed South African companies.⁸⁸

⁸⁵ Hannah, “Global Census,” p.565.

⁸⁶ Versions of crony capitalism intensified in some of these societies after independence.

⁸⁷ At that time \$1=¥2.

⁸⁸ Hannah, “Global Census,” p.565 and online appendix. Firm size distributions are highly skewed, tending toward the lognormal, so the reported sizes are sensitive to the cut-off points implied by different numbers of listed firms averaged. It is also important to make international comparisons at market rather than par because Japanese (and many other) shares generally traded well above par, while US shares before 1914 traded below par. The alternative view of Franks et al (“Ownership,” p.2592) on “the relatively large average

This was partly because of Japan's low minimum listing size: paid-up capital of only ¥75,000 (\$37,500) had been required since 1894 and, even when this was raised for new listings for forward trades, many small companies continued to be traded on the spot market. Also, after railway nationalization in 1905, Japan (like Germany and South Africa) lacked this large, formerly quoted, sector, which still dominated many other stock exchanges.

The average corporate size in Japan will, to some extent, be understated because neither the overall KK statistics nor the stock exchange statistics group corporate subsidiaries into zaibatsu holding company groups, the major ones until the war typically controlled by (unquoted) family partnerships, not Kks.⁸⁹ Seven major zaibatsu accounted for 17.5% of the paid-up capital of all Kks in 1928,⁹⁰ nine zaibatsu controlled several hundred Kks with 15.1% of paid-up capital in 1937,⁹¹ and their dominance was then accentuated under wartime controls.⁹² Yet some 98% of Kks with 85% of KK capital were *not* in major zaibatsu in 1937 and these included most of Japan's fifty largest

size of companies listed on the Japanese stock markets" is based on Japan having fewer listed companies but a higher ratio of capital to GDP than other countries in 1913/15, without noting that Japan's GDP was relatively small.

⁸⁹ See note 48 above.

⁹⁰ Morikawa, *Zaibatsu*, p. xix. Comparison with the Ministry of Commerce data suggests Morikawa used all *kaisha* capital as the denominator, though by this time the zaibatsu had organised most subsidiaries as Kks. We have adjusted his reported 16.5% percentage (actually 16.6%) upwards, as all KK capital is a more suitable denominator for comparisons with Hadley's 1937 and overseas data.

⁹¹ Hadley, *Antitrust*, 54-5. Her data are from the post-war Holding Company Dissolution Committee, using Takahashi and Aoyama's 1937 definition of zaibatsu, which is wider than modern scholars favor. Morck and Nakamura say the big 8 had 449 subsidiaries in 1937 (and the big 10 1,200 in 1945).

⁹² Hadley (*Antitrust*, p. 49) gives a figure of 35.2% of KK capital for ten zaibatsu in 1945, but both wartime distortions and larger disagreements among ministries on the size of the denominator make this less reliable than earlier indicators. On the wartime disruptions of capital and management see Okazaki, "Japanese Firm."

enterprises, many listed on stock exchanges, with shares more widely dispersed than closely-held zaibatsu subsidiaries.

Moreover, Japan was not unique on these dimensions. All countries' corporate size distributions are highly skewed (with several giants and numerous small companies) and many enumerated in other countries were also subsidiaries of interlocking enterprise groups and corporate pyramids.⁹³ Gardiner Means, mainly now celebrated for his work with Adolph Berle on the *decline* of American insider ownership, actually concluded that four interlocking business groups dominated by the Rockefeller, Du Pont and Mellon families and Morgan financial interests in 1935 controlled over 23% of US corporate assets.⁹⁴ They thus dominated the US economy more than the leading family zaibatsu in Japan and, in absolute terms, were much larger. There were also smaller interlocking groups in both countries. The American New Deal bureaucrats occupying Japan in 1945 faced few constraints and forcibly dismantled its enterprise groups, while in the US they had to make do with anti-holding company laws, taxes on inter-corporate shareholdings and antitrust measures against similar pyramided groups. The US groups shared features with, but were not identical to, the zaibatsu,⁹⁵ though the Mellon interests perhaps came closest in terms of degree of diversification and nature of interlocking controls. In Germany also similar holding company groups (*Konzerne*) with

⁹³ Morck and Nakamura also cite family pyramids in modern France, Italy, Korea, Canada and Sweden.

⁹⁴ Authors' calculation from National Resources Committee, *Structure*, 308ff. The four groups' ownership share was higher in railroads and utilities (each 38% of all corporate assets) than in banks and industrials (each 16%). The definitions used in the US and Japanese statistics differ: the US stringently includes only seven Rockefeller and four Du Pont corporations, while excluding some in which they had substantial holdings but over which they exercised looser control. The unincorporated business sector was also larger in Japan, biasing the result in favor of finding a higher Japanese share of all business for groups.

⁹⁵ Scholars disagree about the nature, role and significance of American, Japanese and other corporate groups, see Hilt, "History;" Morck, "Riddle;" TNEC, *Bureaucracy*; Bank and Cheffins, "Corporate Pyramid Fable;" Kandel et al, "Business Groups;" Colpan et al, *Oxford Handbook*.

subsidiary and associate companies increased the average size of grouped companies above that shown in the unadjusted corporation or stock exchange statistics.⁹⁶

One aspect of Anglo-American commercial law which initially struck many Asians as odd (in addition to fully limited liability joint stock corporations) was joint and several liability in partnerships, by which all partners - or any one of them - were liable for all partnership debts to the full extent of their assets inside and outside the partnership. In much traditional Asian law it seemed more equitable when a partnership failed for the active partners to share liability for its debts in proportion to their shares in capital or profits, though in China creditors might bargain to adjust the normal settlement according to the relative wealth of the partners and in the Japanese civil code equal (but not several) liability was accepted where partners had not disclosed their respective shares. A conflict with traditional notions of equity may be one reason why the take-up of western-style partnerships in China's 1904 Commercial Code was so low. Even in Hong Kong, where Chinese entrepreneurs more enthusiastically espoused western laws, the British authorities proved more flexible than Manchu legislators on the mainland, adding to the enterprise menu in 1911 a partnership form for Hong Kong Chinese that conformed more closely to native preconceptions.⁹⁷ Although there was no similar modification of the Japanese Commercial Code, this was arguably because the contractual options for liability and governance in *goshi kaisha* and in Civil Code *kumiai* partnerships already left considerable scope for traditionally-minded Japanese to mold their enterprises to a culturally congenial form and, for a time, ignore new-fangled western models that the Meiji elite were keen to promote (and that eventually predominated).

⁹⁶ Liefmann (*Kartelle*, 314) suggested that 18% of AGs with 62-3% of AG common stock were part of *Konzerne*. This clearly included hundreds of groups, many more than the US and Japanese figures, though the IG Farben and Vereinigte Stahlwerke groups alone accounted for 10% of AG capital.

⁹⁷ Hong Kong Ordinance 53 of 1911 offered a Chinese-style proportional liability option for partners, see Jamieson, *Chinese Family*, 121, 127-9.

CONCLUSION

Our international comparisons suggest that civil law countries like Japan or Switzerland can – as they develop – incorporate businesses as abundantly as common law countries and that the critical element in organizational menus facilitating this is liberal flexibility, not any specific legal form like the GmbH. Our thesis is not that corporate laws and their political underpinnings have no consequences, but that the existing literature exaggerates both the negative effect of civil law legal families and the positive effect of GmbH-type forms in determining national levels of corporatization. There is not one (or another alternative) ideal legal pathway: many different menus of business forms have facilitated entrepreneurs creatively molding superficially incomplete menus to their tastes, especially if they included relatively unconstrained and cheap access to some form of liability limitation with entity shielding; reasonable choices among the different governance rules appropriate for both SMEs and large quoted companies; and the right cultural or regulatory impetus toward sensible choices among them. To that extent, differences in corporate laws in mainstream capitalist countries constitute only minor variations on a standard story of evolving patterns of organisational development on corporate lines, promoting both larger scale and competitive diversity.⁹⁸

Did high levels of corporatization propel countries to achieve high GDP per head?

Evidence on the developmental role of companies is less clear than that on the causes of high corporatization. Views extend from skeptics like Ronald Coase (once *any* clear property rights are established free market exchange will sort everything out), Joan Robinson (joint-stock companies are secondary details: by and large “where enterprise leads, finance follows”) and Robert Lucas (professional economists overplay the role of institutions supporting capital accumulation) to the

⁹⁸ As was arguably even true of earlier evolutionary stages before statutory provision for general incorporation by simple registration, i.e in Japan before 1899 or in England before 1844; on the latter see Bubb, “Choosing.”

large opposing literature claiming a beneficent causal connection running from the development of efficient financial and corporate institutions to modern economic growth.⁹⁹ At a most basic level, there can be no serious doubt that corporate laws are important for the successful development of capitalist economies.¹⁰⁰ Douglass North and his collaborators emphasise that “open access” political and economic orders (especially democratic regimes allowing free incorporation) are conducive to sustained economic growth.¹⁰¹ Although some “proofs” of that proposition verge on the tautological, they become less so if we look at regimes suppressing corporations: as in Soviet Russia for six decades after 1917 or Communist China for three decades after 1949 (three decades did less damage than six). Sometimes, even in less overtly communist societies, unfriendly governments can suppress corporate numbers growth for decades: as did Germany for two decades before 1945 or India’s “licence Raj” for several decades after 1947. Both eventually (and productively) abandoned their illiberal experiments as clearly as communist dictatorships.

Showa Japan had its share of authoritarian governments, but they generally remained as favorable as Meiji autocracy or Taisho democracy to developmental capitalism.¹⁰² Thus Japan *never* suffered declines in corporate numbers over many decades, though the numbers of *kaisha* (all kinds) did decline briefly in 1903-4, 1921-2, 1936-7 and 1944-5 (as well as for several years of the post-1989 stagnation). One of the requirements of a passage to “modernity” - to which its elites more clearly committed Japan than did most developing countries – is a liberal process of incorporation by

⁹⁹ Atack and Neal, *Origins*, pp. 4-5, arguing the positive view is dominant, cite Robinson - but not Coase or Lucas - for the negative view; Zingales, “Does finance benefit society?” notes post-GFC challenges to the positive view.

¹⁰⁰ Rosenberg and Birdzell, *How*, pp. 189-241 provide a classic account of corporate advantages; Foreman-Peck and Hannah, “Diffusion” provide some econometric evidence on the relation between high levels of corporatization and GDP growth.

¹⁰¹ North et al, *Violence*.

¹⁰² See Okazaki (“Japanese Firm”) for Takahashi’s 1930 book and anti-shareholder sentiment.

simple registration. That was what an international meeting of corporate lawyers in Paris in 1889 advised for all modern societies¹⁰³ and that was what Japan introduced in its 1899 Commercial Code.

On the other hand the criticality of more specific corporate laws hypothesized by La Porta et al and Guinnane et al may be doubted. The case for a basic form of limited liability is clear, but the Japanese experience confirms doubts about whether it matters whether countries adopted common or civil law systems, relied on English, French or German stems, or formally allowed particular statutory forms such as the GmbH. As long as there was some variety of organisational choice, easy and cheap registration, reasonable tolerance of private contracting for governance and liability rules and/or a generally liberal government approach to private multi-owner organisations, capitalists - and particularly SMEs - appear to be able to fashion organisational forms to their needs. They tend to avoid unnecessary expense or complication and spend few sleepless nights worrying about the arcane issues that animate corporate lawyers. Japanese businessmen were especially slow to hire lawyers (fewer in number than in western societies), preferring ad hoc face-to-face re-negotiation (based on common sense and continuing mutual interests) to courtroom tussles, when business circumstances required contractual or governance modifications.

The importance of contractual flexibility and liberal political stances over notionally “perfect” law-making can be seen in Russia today: its exemplary formal corporate laws (adopted in the 1990s) were no proof against crony capitalism and corruption.¹⁰⁴ Equally eloquent is the fate of those menu innovations introduced by well-meaning legal reformers, convinced of their logical superiority, but underestimating the ingenuity of businesses already using viable work-arounds. The drafters of the new Japanese Commercial Code introduced the German KGaA (limited partnership with shares) in 1899 (while not considering the GmbH necessary), but Japanese entrepreneurs hardly used it, preferring to achieve similar objects within the KK framework. Bankers who wanted

¹⁰³ Ministère, *Compte-rendu*.

¹⁰⁴ Pistor et al, “Evolution.”

directors of corporations to accept liability for loans simply required them to guarantee the loans, rather than adopting the KGaA form.

The overwhelming majority of Japan's (and indeed the world's) businesses in the early twentieth century - with self-employment the norm in economies dominated numerically by farmers, craftsmen and shopkeepers - were not *kaisha* of any kind, but sole proprietors. Some individuals operated collectively through family arrangements, unregistered *kumiai* partnerships or other informal multi-owner forms, perhaps governed by trust, convention and interest as much as formal law. In 1920 the first detailed Japanese employment census showed employers (including the self-employed) still numbered 8,958,000, as much as one-third of the civilian labor force. The 29,917 *kaisha* of all kinds¹⁰⁵ thus constituted less than 0.3% of all Japanese enterprises, and the unknown (but more numerous) total for all *kumiai* is unlikely to have increased the multi-owned proportion to more than a percentage point or two. On the other hand, in a developed economy like Germany multi-owner or incorporated enterprises already constituted above 9% of private sector businesses;¹⁰⁶ and in richer societies like the US, UK or Australia the proportion was even higher.¹⁰⁷ In the UK – then the most industrialised economy – corporations alone already accounted for most

¹⁰⁵ Bank of Japan, *100-year Statistics*, p. 326, though compare p. 330 for higher figures. The Ministry of Commerce data show only 28,676 *kaisha* in the same year (*Financial and Economic Annual of Japan 1922*, p. 85). From 1893 sole proprietors in Japan were forbidden to call themselves companies (Takata, "From Merchant House," 101).

¹⁰⁶ Calculated from the 1907 census of *Gewerbe*, with all private sector establishments except those classified sole proprietors or *Alleinbetrieben* (establishments with no employees and using no power) counted as multi-owner or corporate enterprises. Sole proprietors and the self-employed still then accounted for most of the private sector workforce.

¹⁰⁷ Nicholas ("Organization," pp. 4, 10) suggests that Japan used the corporate form more than the US; this derives from his Japanese business count excluding sole proprietors while his US count includes them.

business employment and for three-quarters of all profits on capital.¹⁰⁸ Japan's twentieth century history is essentially the history of the growth of *kaisha* to become a similarly dominant enterprise form. The rise of the Tokyo Stock Exchange to rival western equivalents in absolute size is a similarly normal trajectory for a successful industrializer, though for most of the century on this dimension Japan was ahead of many civil law countries including Germany.

In both the industrialized and developing worlds, private (unquoted) companies now constitute around two-thirds of the corporate sector by value or output and include many SMEs.¹⁰⁹ This sector is arguably critical for promoting the competitive diversity on which innovation and productivity improvements thrive. Here too, the main contours of Japanese corporate development are a slight variant on a common story in advanced economies of flexible organizational menus. It did not matter that the framers of Japan's Commercial Code omitted the *yugen kaisha* until 1940; Japanese SMEs simply modified their use of what was available - Kks, *goshi kaisha* and *kumiai* - to achieve much the same effect. Societies that allowed human capital, infrastructure and basic property rights (modified by some form of limited liability) to work creatively toward wealth creation could relax about the finer details of their legal menus for organizational and financial contracting. The Japanese were very ordinary capitalists, doing ordinary capitalist things, like many others in Europe, Asia, and America who lacked the GmbH.

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¹⁰⁸ Feinstein, *National Income*, 157; Stamp, *British Incomes*, 303-5.

¹⁰⁹ Mayer, p.14; see also Brav, "Access," p. 264.

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