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Family, Partnerships and Companies

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CHAPTER TEN

FAMILY, PARTNERSHIPS AND COMPANIES

This chapter summarizes the business organizations discussed in each of our nine pre-industrial societies.[1] The vast majority of businesses before the Industrial Revolution were operated by family or household members without any formal legal organization. Section I. The most common legal business organization before the Industrial Revolution was the basic partnership. Section II. A few societies developed open partnerships and more complex business organizations. Section III. The chapter ends with the conclusion that economic demand for capital and risk sharing was the primary driver of business organizations. Section IV.

I. FAMILY OR HOUSEHOLD

The family or household was the fundamental and in a sense the default unit for economic activity in pre-industrial societies. There were significant economic advantages in keeping a business within the family or household.[2] Kin met agency concerns, provided trust and reduced costs. These economic benefits were often supplemented by a cultural preference (sometimes expressing biological imperatives) to keep business within the family. There also are disadvantages to family businesses, such as harm to efficiency arising from nepotism. Family relations can make agency problems more difficult to resolve because of the troubles engendered by paternal altruism. And family

[1] Sources and authorities have been largely omitted here to avoid duplication of footnotes.
[2] See Hirth, The Organization of Ancient Economies: A Gtobal Perspective 18-24 and 42 (2020).

businesses rarely survive beyond the third generation ---- the so-called Buddenbrook effect that can be found in many societies.

The capital and risk sharing needs of shopkeepers and artisans were met without any legal business organization in pre-industrial societies. Even economic activities like long distance trading that require more capital and risk sharing often could be met within the family. Moreover, if the state --- or an extremely wealthy individual or family --- had sufficient capital and risk tolerance, there was no need for even simple business organizations like basic partnerships. Pharaonic Egypt might be an example.

The importance of kin can also be seen in family networks. Early second millennium Assur and its Anatolian trading colonies provide the earliest recorded example of merchant houses --- the Old Assyrian *bitum*. There also were family networks in the early Islamic world where Muslim and Jewish merchants used sons, grandsons and other relatives in running and investing in businesses. Similar kinship networks can be found in China. Family networks in India, Europe and China often engaged in long distance trade.

The Romans so strongly emphasized the family that they developed a legal institution unique in the pre-industrial world --- the *peculium*. Designated business assets of the head of a Roman *familia* --- the *paterfamilias* --- were entrusted in a *peculium* to a slave or son who managed the business. Wealthy Romans conducted much of their business activities through a *peculium*. For some larger businesses, the *peculium* form was used collectively by several families to combine assets and share risks. This shows that although the *peculium* rested on the strong Roman emphasis on the family, it was also used as a building block to engage in business with non-family members when

considered necessary and prudent to combine assets and share risk for a project.

The *peculium* provided many benefits. It partially screened the *paterfamilias*'s business activities from peers and the public, provided a mechanism to ensure continuity of business, facilitated use of talented slaves and incentivized them to perform well by the possibility of purchasing their freedom, and partitioned assets.

The *peculium* enjoyed several advantages over the contractual *societas* or Roman partnership. The *peculium* permitted the *paterfamilias* to benefit from de facto limitation of liability, a limited measure of location-based entity shielding, direct agency, and mechanisms to guarantee the continuity of business activities. If the *paterfamilias* remained at arms' length from the operation of the *peculium* business, he generally was liable to third parties only up to the amount of the *peculium*. A pyramid structure with tiers of slaves between the *paterfamilias* and the business provided further protection from liability to third parties. With at least one exception, the *peculium* did not enjoy full entity shielding. However, the *peculium* did enjoy de facto entity shielding under some circumstances: limited liability in one *peculium* business prevented the creditors of that business from levying upon assets committed to another *peculium* of the same *paterfamilias*. The single owner nature of the *peculium*/*paterfamilias* meant that entity shielding was not required to monitor numerous potential credit holders. There was no practical need for entity shielding and the pragmatic Romans did not require it.

Despite all the advantages of the *peculium* --- as well as the strong preference to keep business within the family --- Romans did not limit their business activities to family *peculia*. Like their counterparts in earlier and later

societies, Romans also used their wealth and surplus incomes to invest in potentially profitable ventures like long distance trading with parties outside the *familia*.

There is considerable debate about the role of the family in economic life and even economic growth, including effects on business organizations. That debate is often framed around opposing concepts like nuclear versus extended family, family versus individual and individual versus community. But this may be placing too much emphasis on the family. Our survey of pre-industrial societies suggests considerable caution before embracing a global progression from fettered family to unfettered individual investors and entrepreneurs. Individuals --- not families --- remained the legal parties in simple partnerships and more complex business organizations. To further blur the distinction between family and non-family members, family relationships remained important in medieval Italy even when non-family individuals were included in the business. For example, Italian merchants included non-family members when capital needs and risk sharing required access to resources outside the family. The *commenda* partnership was used primarily between non-family members, although the *compagnia* frequently was marked by a predominance of family members. Moreover, nuclear families can be found well before the European commercial revolution in 1000 and the Italian *commenda* --- let alone the later joint Dutch and English joint stock companies. Indeed, nuclear families can be found among hunter gatherers, as well as earlier societies like Rome. And wealthy extended families continued well into the modern period after 1600.

Stock exchanges and secondary trading were far more important than family composition (nuclear or extended) for modern business organizations.

Stock exchanges and secondary trading provided an opportunity for individuals --- in either nuclear or extended families --- to employ their assets in investments in a wider range of businesses, notably businesses with passive investors. In sum, family continued to be important in business. What has changed in the last few centuries is the scale of capital requirements of many businesses that in turn has generated the need for investors and parties beyond even the wealthiest of families and circles of personal acquaintances. Thus, the shift was rom personal to impersonal relations.

II. BASIC PARTNERSHIPS

The most common legal business organization before the Industrial Revolution was the basic partnership. It can be found in all our societies going back at least four thousand years, with the possible exceptions of hunter gatherers and ancient Egypt. The basic partnership often was developed to pool capital and share risks in connection with single projects, such as caravan trips and sea voyages.

An (often passive) partner contributed capital and an (often active) active partner managed operations. Profits (or losses) were shared under an agreed formula. Partnership interests were not tradable. Basic partnerships usually ended at completion of the project and were easy to terminate earlier by a partner. Basic partnerships lacked legal personality, entity shielding and limited liability (the last with the exception of the medieval *commenda*. In sum, the basic partnership had several limitations as a business organization: it was <u>confined</u> to designated activities like a single long distance voyage; it was <u>fragile</u> in the sense that it was easily terminable and ended with withdrawal or death

of a partner; and it was closed in the sense that partnership interests could not be traded. Let us look at basic partnerships --- and their variations --- in our nine societies. Let us start with hunter gatherers.

A. Hunter Gatherers

Contrary to what many might expect, it is not unreasonable to believe that hunter gatherers developed business partnerships. After all, humans have demonstrated over many millennia an ability to adapt to changing environments. This adaptability carried over to trade. Generally speaking, when local food sources were abundant, surpluses and specialization followed, the volume of available goods increased, and hunter gatherers began to trade within the local group or with outsiders. They did more than share, gift and engage in ceremonial exchanges.

Hunter gatherers developed rules and institutions to support trading. They also developed rules and institutions to protect against risks to themselves and their property when engaged in trade --- such as bans on theft and fictional kin relationships. They developed substantive rules akin to what today might be called contract or commercial law. They created institutions to resolve disputes. Local elders and village notables mediated, arbitrated and resolved disputes involving exchanges in local markets. Hunter gatherers whose environment generated significant trade developed more elaborate systems of dispute resolution. For example, some hunter gatherers developed special fora and procedures to resolve disputes involving outsiders.

The simpler exchange world of hunter gatherers compared with later societies might suggest that no business organization was demanded to raise capital or share risk. Moreover, the absence of writing would have made

agreements more difficult to design and operate --- as well as making them more difficult to document. And yet. Exchanges outside a group might have required more capital and risk sharing than could be comfortably provided by an individual or family. Given the adaptability and ingenuity of hunter gatherers, it would not be a complete surprise to find that they developed customary rules about agreements that we would call partnerships --- such as the distribution of profits, risk of loss and scope of activities. At the same time, it is highly fanciful to believe that hunter gatherers included concepts like legal personality, limited liability and entity shielding in any agreement or organization.

The most likely place to look for partnerships is complex hunter gatherer societies. For example, the North Pacific societies reveal considerable capital needs and risk sharing ---- the two most important drivers of partnerships. Trade was initiated by wealthy individuals who were able to free themselves during the summer months because of large numbers of junior kin and slaves. Perhaps a more focused culling of anthropological and ethnographical literature will reveal some trace of hunter gatherer partnerships.

B. Mesopotamia and the Near East

In contrast to hunter gatherers, business partnerships are clearly evidenced in Mesopotamia as early as the late third millennium BCE. Several centuries later, two partnerships --- the *ellutum* and the *tapputum* --- were developed in Assur to engage in long distance caravan trade. These were basic partnerships: they were confined to certain economic activities like a single long distance voyage; they were fragile in the sense that they were easily terminable

and ended with withdrawal or death of a partner; and they were closed in the sense that a partnership interest could not be traded.

The *ellutum* was a short-term partnership comprised of a group of investors who appointed an active partner to direct the business and presumably bear much of the risk, with proportional division of costs and profits. One *ellutum* consisted of fifteen merchants from Assur who contributed various amounts of silver for the purpose of buying copper, converting it to wool and selling the wool for silver.

The *tapputum* was a single project partnership with a maximum of four parties who shared facilities and assets and who represented each other in transactions. For example, the *tapputum* was used by landowners to obtain an additional source of income beyond agricultural investment. The *tapputum* terminated with the death of its manager. There was neither limited liability nor entity shielding. This was also probably true of the *ellutum*.

In the later second millennium, we find similar partnerships. And a thousand years after Assur, Neo-Babylonians developed the *harrānu* (literally, "contract of the caravan"). There was a senior financing partner and a junior active partner. The generally high profits were divided as agreed. Partnership interests could be inherited and some *harrānu* lasted over forty years from one generation to the next. The *harrānu* partnerships were not limited to long distance trade like a maritime voyage. A *harrānu* commonly involved local activities like textile production or brewing. Moreover, partnerships like the *harrānu* were used as elements in larger business groups or networks.

C. Ancient Egypt

There is little surviving evidence of partnerships in ancient Egypt --- in striking contrast to the business accounts and correspondence recorded on the

clay tablets in Mesopotamia and the Near East. This would not be surprising to earlier Egyptologists who described a Pharaonic state that dominated economic life and left little room for private trade that needed business organizations. This traditional view has been increasingly challenged, however, by Egyptologists and economic historians who emphasize both the political and economic diversity of ancient Egypt.

The question is whether private trade was sufficient to generate demand for institutions and rules to obtain capital and share risk, that is, business organizations like partnerships. Private individuals and officials (acting in an unofficial capacity) participated both in foreign trade and domestic distribution of imported goods in Egypt. Indeed, trade with foreign territories was far from being an exclusively royal prerogative or depended exclusively on royal commands and expeditions. Foreign traders and merchants also were involved --- both as suppliers of imported goods and buyers of exported goods.

This raises the possibility that there were partnerships in ancient Egypt but their evidence has not survived. If there were partnerships, they would be most likely found in connection with trade along the Nile and foreign trade. The extensive and well documented trade on the Nile suggests a greater demand for capital and risk sharing that might reasonably have generated at least basic partnerships. Partnership agreements between Egyptian and foreign parties probably would have invoked Egyptian law. Foreign merchants --- at least among themselves --- probably would have used partnerships and other business organizations under their own laws. Agreements or arrangements between Egyptian and foreign parties, however, might have invoked Egyptian law. In sum, the archives of Levantine, Near Eastern, Aegean and Anatolian

merchants and traders might reveal evidence about Egyptian business partnerships.

D. Athens

Athenians formed *koinonia* or basic partnerships for both non-commercial and commercial purposes. For example, *koinonia* were used in maritime trade to raise capital to cover the costs of acquiring cargo in a foreign port, transport to Athens and sale in the *emporion*. Our knowledge of the legal attributes of the *koinonia* is less than our knowledge of partnerships in other societies like Rome, the Islamic world and Europe. Athenians have not left us detailed business records and historians generally have been focused more on the political and cultural achievements of the Athenians than their legal business organizations. It is reasonable to generalize that the *koinonia* --- like most pre-industrial partnerships --- lacked limited liability and entity shielding, as well as legal personality.

***Koinonia* were used in the important Athenian maritime trade. However, even here in the case of long-distance trade where partnerships are commonly found throughout history, Athenian citizens appear to have participated through maritime or bottomry loans rather than through partnerships --- although this is impossible to quantify. Athenians commonly engaged in sea trade by loaning money to active traders --- at least in the fourth century. There usually were three persons involved in a trading voyage: the lender(s) who often was a wealthy Athenian citizen or *metic*, the borrower (s) who was an active merchant and the shipowner. The Greek maritime loan continued to be used well into the Roman Principate, as seen in the Muziris papyrus of the second century CE. The Muziris contract largely followed the terms of the 4th century Athenian maritime loan described in Demosthenes' *Against Lacritus*.**

E. Rome

We find a rich evidentiary trove about Roman partnerships and their legal attributes, notably the *societas*. Essentially, the *societas* was a contractual partnership (albeit not entirely within the modern legal definition of the term) among family and outsiders to raise capital and share risk for a specific activity. Each party in a *societas* contributed capital or labor. Unless otherwise agreed, profits were shared equally. Many *societates* consisted of two or three partners often linked by family or clientele.

Over the centuries of the Republic and Principate, different forms of the *societas* were developed for specified activities.[3] Ultimately, the *societas* was used for a wide variety of purposes, including provision of financial services, cattle breeding, cultivation of land, construction and sale of tombs, rental of apartment buildings, trading in oil and wine, and last but certainly not least, long distance maritime trade. Many wealthy Roman landowners, however, preferred debt investments like maritime loans over equity investments (like participation in a *societas)*.

In most cases, the *societas* was a vehicle for short-term ventures in contrast to the longer-term *peculium*. The *societas* was fragile and easy to terminate. It was terminated by withdrawal or death of a partner or by legal action between partners or between a partner and the *societas*. There was no mutual agency --- each contracting party had to endorse a contract to be bound by it. There was no joint and several liability among parties and there was no

[3] The Romans developed a *societas* devoted exclusively to bidding on public services like tax collection --- the *societas publicanorum*. The *societas publicanorum* was not a basic partnership but had more partners, tradable shares and other legal attributes that distinguish it from the normal *societas*. It is discussed later in the chapter.

distinction between the obligations and assets of the *societas* and the parties. Thus, the *societas* lacked limited liability and entity shielding --- all typical for basic partnerships in other societies. The *societas* created rights only between the *socii* (contracting parties) and ---- in modern parlance --- enjoyed no legal personality.

F. Islamic Partnerships

The Islamic world developed several forms of partnership, principally the *mudaraba* (or *qiridi*), the *inan* and the *mufawada*. These basic partnerships perhaps hold the world record for the length of their application and their geographic reach. For over one thousand years lasting into the 20th century, the classic Islamic basic partnerships were in use in the Islamic world, a world that at various points in time stretched from Spain and Morocco in the west to the Indonesian islands in the east. The *mudaraba*, *inan*, *mufawada* and other classic Islamic partnerships continued to be used up to modern times. Examples have been found in 16th century Ankara and other Ottoman court records or *qadi* registers through to the 18th century.

Like basic partnerships in other societies, the classic Islamic partnerships had several limiting characteristics. They often were confined, fragile and closed. The Islamic partnerships also lacked legal personality, limited liability and entity shielding.

***Mudaraba*. The most important Islamic partnership --- at least for caravan and long distance trading --- was the *mudaraba* or *qirid* that was also used for local businesses like retail shops. The *mudaraba* combined elements of a modern partnership and an agency contract. Often compared with the later Italian *commenda*, the *mudaraba* was a contractual arrangement in which one (or more) investors (*rabb al-mal*) transferred capital or goods to one (or more)**

agents (*mudarib*). The *rabb al-mal* was a passive investor and did not directly participate in the activities of the *mudarib*. In general, the parties had a large degree of flexibility in setting the profit (and loss) terms.

The duration of the *mudaraba* was indefinite, often ending with a single voyage; however, it often was the practice to withdraw only the profits after a voyage and transfer the original capital with the same *mudarib* in a new *mudaraba*, thus enabling longer-term investments. The *mudaraba* ended if a party withdrew, died or became incapacitated, and heirs did not automatically replace deceased partners. This reduced its utility as an instrument for longer-term ventures, let alone multigenerational businesses.

There generally was no limited liability with respect to third parties and no entity shielding. The modern focus on solvency and creditor rights that underlies the concepts of entity shielding and owner shielding (limited liability) appears less important in the Islamic world given, among other things, the smaller scale of business operations.

As we see in other societies, the *mudaraba* was used as an element in broader organizational structures that considerably enlarged the capacity for pooling of capital and risk sharing. For example, the capital of one *mudaraba* could be transferred to another *mudaraba* or could be used to form a partnership with a third party.

***Inan*. The second Islamic partnership was the *inan* or *sharika al-aqd,* often used for small-scale businesses like local shops. Unlike the *mudaraba*, there were no personal qualifications for partners with a few exceptions (one barred apostates from joining as partners). Partner(s) in the *inan* contributed capital or services in the same or different amounts. The geographic and**

product scope of activities of the *inan* were defined in the contract. Like other Islamic cooperation agreements, the *inan* lacked legal personality. Again, there was no limited liability or entity shielding. According to some commentators, the *inan* was dissolved if a partner withdrew, died or became incapacitated.

***Mufawada*. The third Islamic business partnership was the *mufawada* that required contribution of all the trade activities and assets of the partners. In a sense, it was a merger of the entire business or non-household assets of the partners. The conditions concerning duration, status of partners, liability and profit distribution were generally the same as those of the *inan*. The *mufwada* was probably most often used for small-scale businesses like local shops.**

G. India

There are references to merchant partnerships in many periods of India, including several *jataka* stories from the first millennium BCE. And long distance trade in the later medieval Chola kingdom was conducted under "partnership" agreements between a *nagaram* (state administrative unit) and groups of itinerant merchants who traded high-order goods for locally produced commodities. It is not clear, however, whether these arrangements were partnerships as distinguished from merchant associations ("*sreni*") in which members traded on their own accounts.

Compared with many other societies like Meospotamia and Rome, there is little surviving evidence of the details about actual partnerships in India before 1800. But unlike ancient Egypt, there can be no doubt about the importance and intensity of private trade in India and the existence of partnerships is well documented in literary works. There is a rich Hindu jurisprudential tradition --- the *Dharmasastra* --- that provides some general

information. Partnerships were legal entities created by mutual agreement (*samvid)*. The parties contributed capital, human or other assets. Profits and losses generally were allocated according to the contribution --- with detailed rules on allocation. There were procedures to deal with cheating by partners. Acting without the other partners' consent was prohibited and partners were compensated for any harm. Partners proportionally bore the risk of loss from acts of God or the king (*daivarajakrta*).

The *Dharmasastra* principles were applied as early as the first millennium BCE. One partnership form --- the *pani* --- had two or more partners who would appoint a leader. The *pani* apparently could own assets separately from the partners. There were also fairly detailed rules developed over the years for the apportionment of assets and liabilities. There also appear to have been obligations that mirrored the modern fiduciary duties of care and loyalty. A partner's interest could be bequeathed to his children.

Despite the capital needs and risks of the extensive maritime and land long distance trade in India, business organizations beyond basic partnerships were not developed. The *sreni*, an institution that went back at least to the first millennium BCE, was more like a European guild or general merchant association of independent businesses than business organizations like the Dutch joint stock company or the Old Assyrian *naruqqum*.

H. China

There were many legal forms of partnerships with different names over the course of the more than two millennia since the Qin unification of China in the third century BCE. These included, among others, the Tang and Song *chiu-ho huo-pan* (associations of partners), *lien-ts' ai ho-pen (*joint capital

partnerships) and the Song *dou-niu*. In the first two partnerships, there was usually one active partner and only one or two passive partners. The *dou-niu* accommodated a larger number of investors, notably a class of merchants known as the "*ching-shang*" or "agent merchants" who enjoyed great prominence late in the first millennium CE. A later partnership was the Yuan "*ortoy*" --- an arrangement between the Chinese state and foreign merchants. There also was the joint investment practice of *tou-niu* or "collecting tying, " used mostly for ten year investments in tax-exempt monastery pawnshops.

Another highly interesting partnership was the *heben* or *hegu* (合股). Investors and active parties pooled their capital, shared risks and divided profits in proportion to their interests. The *heben* was often used for high risk ventures like overseas trading voyages or capital intensive ventures like the salt and tea trades. What distinguishes the *heben* from other Chinese partnerships is the tradability of shares. In that respect, the *heben* resembled the Old Assyrian *naruqqum* and the Roman *societas publicanorum*. No Chinese stock market developed: share trading rested largely on personal relationships and contacts.

A caveat. Not all business arrangements in pre-industrial China that are labelled "partnerships" in the literature would be treated as "partnerships" under modern laws. Some may be more like modern more agencies or loans. One example is the *xing qian* or 行钱 ("entrusted money) transferred money to a "dependent agent."

A reasonable summary of the legal attributes of the numerous Chinese partnership forms might read as follows. There often was a capital (passive) partner and a labor (active) partner who shared profits frequently pursuant to a 50-50 to 70-30 split. The partnership might or might not survive the death of

a partner. The active partner often had broad discretion to make decisions and bore the risk of loss. The capital-labor arrangement is similar to the Islamic *mudaraba* and the *commenda* in that the partners could invest freely in forms of labor and capital. Also, like the *mudaraba* and *commenda*, many Chinese partnerships were formed for short-term ventures. Chinese partnerships probably lacked entity shielding and limited liability.

I. Europe

The European commercial and legal revolution that began around 1000 CE generated a number of partnerships, including among many others the *commenda*, the *compagnia* and the *accomandita*.

***Commenda*. The *commenda* was originally developed first in Italy for single purpose ventures like long distance sea voyages. The *commenda* was not limited to professional traders and merchants. People with capital to invest like tavern keepers invested in *commenda*.**

A passive investor (*commendatore*) provided capital to a traveling partner (*tractator*) who contributed skill, labor and sometimes capital. At the conclusion of a voyage, the *tractator* returned home or remitted the proceeds without returning in person. Profits were distributed as agreed in the contract. The risk of loss during the contract was borne by the *commendatore*, unless otherwise agreed. Unlike other basic partnerships, the *commenda* provided limited liability for the passive partner who was liable only up to her investment and in this respect resembled a modern limited partner. There also was entity shielding which protected the *commenda*'s assets from creditor claims of the passive investor.

Ultimately, the *commenda* declined in importance, although its predominance in the Mediterranean lasted several centuries. There were

several reasons for this decline. The *commenda* was not an effective organization for more permanent operations. Commission agents were a common alternative for continuous business. And as short single port-to-port voyages declined with the establishment of colonies and local agents, use of the *commenda* fell. And of course, the *commenda* was of little use for the global maritime trade initiated by Vasco da Gama's trip around Africa to India and the Far East.

***Compagnia*. The Italians also developed the *compagnia* ---- from which the English term "company" is derived. The *compagnia* was a more durable multipurpose partnership than the *commenda*. Indeed, in some respects, the *compagnia* looks more like a joint stock company or corporation than a basic partnership (although it lacked limited liability). The *compagnia* was formed by a registered contract which contained detailed articles of association much like modern articles of incorporation with governance rules, etc. The *compagnia* did not terminate on the death of a partner, was often renewed and many well-known *compagnie* lasted decades. The *compagnia* had weak entity shielding (*compagnia* creditors had priority over partner creditors).**

But there were important differences between the *compagnia* and the joint stock company and modern corporation: interests in a *compagnia* were not transferable and there was less separation of management and ownership in the *compagnia*. Last, partners enjoyed no limited liability.

For several centuries, the *compagnia* was a highly important business organization in medieval Italy --- more important than the *commenda* for larger and diversified enterprises. The *compagnia*, like the *naruqqum* of Assur and the Chinese lineage trust, was used as one element in larger organizational networks with "holding" companies, tiered entities and widely

diversified activities. So-called "super-companies" appeared in the 13th century that were composed of a single *compagnia*, centrally managed with wholly owned branches in different locations, many partners and hundreds of employees. In the mid-14th century, super-companies were fatally weakened by the domino effect of bankruptcies and lack of limited liability. They were replaced with smaller *compagnie* embedded in a different management structure of a decentralized hub-and-spoke system. Separate *compagnie* were used to protect secondary investors interested only in specific activities or locations.

***Accomandita*. The Florentine commune in 1408 sanctioned the *accomandita* which did provide limited liability to passive investors. The *accomandita* was a closed partnership that was generally limited to a few partners --- unlike the *compagnia*. The *accomandita* was less frequently used than the compagnia. The Medici used the *accomandita* when creating new branches of their Bank. The Bank protected itself from the conduct of inexperienced local managers by creating an *accomandita* in which the Bank enjoyed limited liability as a passive investor. If the local manager was successful after two years, the Bank would convert the local business into a normal *compagnia* in which the Bank had unlimited liability.**

III. OPEN PARTNERSIPS, LINEAGE TRUSTS AND JOINT STOCK COMPANIES

Four of our nine societies developed business organizations that were more durable, broader in scope and more open than the basic partnership. These were the Old Assyrian *naruqqum*, the Roman *societas publicanorum*, the

Chinese lineage trust and the European joint stock company. These business organizations facilitated larger capital accumulation and risk sharing than the basic partnership. Generally speaking, they were broader in scope, more robust, lasted longer and were open to a larger number of parties.

A. Old Assyrian *Naruqqum*

In the early second millennium, the merchants of Assur developed the *naruqqum* ("sack" or "money bag") to pool capital and share risks, primarily in connection with caravan trade. The *naruqqum* appeared in Assur at a time of extensive trade that required a scale of operations beyond the means of an individual, family or a few investors. Unlike the Old Assyrian basic partnerships like the *tapputum,* the *naruqqum* was not confined to one venture, was more robust and was open with tradeable interests. Indeed, the *naruqqum* appears to be the earliest recorded example of an open partnership with tradable shares or interests.

The *naruqqum* was formed by a written contract drawn up under the supervision of the authorities. *Ummeanum* or passive investors normally contributed a considerable sum of gold or other assets. Each interest or share in the *naruqqum* was held by individuals or other *naruqqum*. The active investor or manager of the *naruqqum* was required to segregate its funds from other funds or assets that he held. Many merchants had shares in several *naruqqum*.

The *naruqqum* contract provided for distribution of profits which generally were forfeited on withdrawal. The *naruqqum* frequently terminated after death of an influential head of family, but many Old Assyrian businesses survived for several generations. Surviving sons started anew as independent traders or in cooperation with other traders. Each son could create his own new

***naruqqum* or inherit all or part of his father's share of an existing *naruqqum*. Although each interest in a *naruqqum* was treated separately, many *naruqqum* were run like a family firm where the individual shareholders were members of the same family.**

Importantly, participants could transfer or sell their interests, although we know little to nothing about the extent of trading. Whether investors in the *naruqqum* had limited liability is not entirely clear. Many commentators seem to presume the absence of limited liability with little discussion. But limited liability may have been available through contract if the parties agreed. There is no evidence in the Kanesh archives that the Old Assyrian *naruqqum* had entity shielding. The number of partners ranged as high as ten to twenty. Most of these probably were well known or related to each other. The *naruqqum* remained largely family firms based principally on trust and friendship. This suggests that entity shielding may not have been critical. Certainly, its absence did not raise an insuperable barrier to risk sharing and the pooling of large amounts of capital by Old Assyrian merchants.

B. Roman *Societas Publicanorum*

Almost two millennia after the Old Assyrian merchants, the Romans developed the *societas publicanorum,* a *societas* devoted exclusively to bidding on public services like tax collection and infrastructure projects --- much like a modern public bidding consortium or project venture. Contracts (typically with a five-year term) were awarded by a *censor* to bidders (the *publicani*) via auctions.

The *societas publicanorum* provided capital and senior management for a specific project --- usually for a five year term. Partners did not retain a large

permanent staff and employees. The *societas publicanorum* had a wider separation of ownership and management than the normal *societas*. The owners were the *socii* (shareholder partners) who met occasionally but generally had no direct executive powers. The *societas publicanorum* was akin to the modern limited partnership: strong entity shielding for the limited partners (the *socii*) and weak entity shielding for the general or managing partners. The *societas publicanorum* also provided limited liability.

The *societas publicanorum* and the *publicani* were politically and popularly controversial throughout their history with claims of corruption and concerns about their power. Over the centuries, the scope of activities entrusted to *societates publicanorum* was narrowed. Ultimately, public administration of tax collection, large infrastructure projects and military provisioning replaced outsourcing to private firms. The use and importance of the *societas publicanorum* declined, but it did not disappear entirely. Political and popular opposition was directed primarily against the large *societates publicanorum*, notably the tax collectors. The populace hated the *publicani* for their abuses and the Roman state felt threatened by political influence of the larger groups. The decline of the *societas publicanorum* came about from this political and popular opposition and not from any defect in its legal organization. The notion that the Romans might have considered expanding the *societas publicanorum* into a general purpose corporation is far-fetched in light of that opposition. This is the historical context in which to answer the question why the Roman "failed" to extend the *societas publicanorum* to a general purpose corporation. The Romans did not do so for the political and popular opposition mentioned above --- not for a lack of legal creativity, disdain of commerce or a social preference for the family.

Legal analysis of an historical business organization like the *societas publicanoru*) certainly must rest on historical facts even if it compares that organization with a modern organization like the corporation. This is roughly similar to the situation where economic "models" are used to explore historical institutions. The validity of the analysis and modelling ultimately rests on facts. At the same time, a mere comparison of the legal attributes of an historical organization and a modern organization is not necessarily "teleological" unless it implies that the historical organization is a step (or "failure" to take a step) toward the modern organization.

It is true that shares (*partes*) in the *societas publicanorum* were transferable and were in fact traded. But the surviving evidence does not establish that there was extensive trading of the shares in the *societas publicanorum,* let alone secondary trading on the scale of the 17th century Dutch and English joint stock companies or the even larger numbers of shareholders in modern publicly held corporations trading in highly organized stock exchanges.

Far from being a business organization like the modern corporation or joint stock company, the *societas publicanorum* is better viewed as a public bidding consortium or project joint venture largely in partnership form. It was an exceptional *societas* that permitted multiple parties to jointly bid (and provide the services if successful) on specific public projects for a fixed term of normally five years. In sum, the Romans created a special *societas* that provided the robustness and openness that the normal *societas* lacked. The *societas publicanorum* was used until political and popular opposition killed its use (at least for larger projects).

C. Chinese Lineage Trust

The Chinese lineage trust is a wonderful example of adaptation of a non-commercial organization --- an ancestral trust --- into a business organization with a larger capacity to obtain capital for a longer time than available under existing organizations like basic partnerships. Although lineage associations can be found outside China like the medieval Tuscans *consorteria* of coheirs, the Chinese lineage trust appears unique in that it developed into a legal business organization that engaged in profit-making activities. The roots of the lineage trust go back at least as early as the Song in the 10th century. A portion of estate assets was placed in an ancestral trust with the income to be used for burial, sacrifice and other rituals. The ancestral trust gradually evolved into the lineage trust which engaged in profit-making activities. Lineage trusts served a wide variety of objectives: pool capital, share risk, distribute income among family members, marginalize non-productive family members, partition assets, and enable gentry and mandarins to screen their participation in trade. Individual households via their lineage trust could themselves become members of larger groups extending over many generations. Thus, the lineage trust was used to facilitate multigenerational businesses by permitting continuation of a business, despite unhelpful inheritance rules like dissolution of the *jia* or household on the death of the father/household head.

Lineage trusts could contract in their own name, sue and be sued. There was separation of management and ownership, with rules to monitor managers and prevent undue influence from lineage members. Governance rules were registered with local magistrates, included in genealogical records and invoked

in litigation. The majority of lineage trusts had from six to twenty partners, but some had as few as two partners and some as many as several dozen investors, including not only individuals but partnerships and other lineage trusts.

In principle, lineage trusts were limited to lineage members, but the lineage could be a fiction. For example, members under a long-deceased ancestor were placed under a lineage trust; unrelated clans were combined into a single lineage trust; adjustments to the lineage were made by contract, notably, marriage and adoption contracts. Official bans on sales of linear genealogies suggest that there may even have been a market for interests --- at least in larger lineage trusts. But there appears to be little to no evidence of wide tradability. Interests in lineage trusts were not part of an open financial or secondary market.

Lineage trusts differed from the European joint stock companies in significant ways. Lineages trusts did not raise capital or equity investments from outsiders on impersonal stock markets. Lineage trusts almost certainly had no entity shielding. Trust among related kin and investors may help explain the lack of entity shielding, as well as the smaller number of members or shareholders. Lineage trusts also probably lacked limited liability which became a more serious concern with industrialization and more capital-intensive industries in the 19th century.

D. Joint Stock Companies

A business organization far more suited to accommodate numerous investors and parties in order to increase capital and risk sharing than even partnerships with tradable interests was the joint stock company. Joint stock company can be found before the well known joint stock companies developed around 1600. Examples of earlier joint stock companies are the Casa di San

Giorgio and *maona* in Genoa, the Honor del Bazacle in Toulouse and a few English companies. The *maona* granted monopoly trading rights to private merchants who in turn performed government civil and military functions in the Mediterranean. The republic of Genoa created the Casa di San Giorgio to assume Genoa's outstanding debt. The Casa, in turn, issued shares (*luoghi*), which could be traded in a secondary market. The Honor del Bazacle operated grain mills along the Garonne in Toulouse. It had legal personality, separation of ownership and management, transferable shares (*uchaux)* and limited liability. The Honor del Bazacle lasted almost six hundred years. Beginning in the 16th century, English joint stock companies were formed to raise capital to engage in mining and long distance maritime trade with Russia and the Near East (via the Mediterranean). Other examples may lie hidden in public and private archives.

Then in the early 17th century, the Dutch and English created joint stock companies to meet the higher capital and risk sharing needed for the new global sea trade that began in the 15th century with the Portuguese voyages around the Cape of Good Hope to India. A new era had begun in which the capital needed for, among other, deep water ships, permanent trading posts, maritime conditions and a long turn-around time for voyages exceeded (at least in absolute terms) the capital requirements of prior long distance trading ventures such as the Old Assyrian caravan trade or Roman sea trade with India.

The Dutch Vereenigde Oosr-Indisch Compagnie (VOC) created in 1602 was historically unique in one critically important respect: wide tradability of shares involving more than a thousand shareholders who created secondary markets in stock exchanges. Wide tradability of shares (not simply transferability of shares) was necessary to generate the larger number of

investors needed to contribute the capital required. In the initial subscription to the VOC, 1,143 investors signed up in Amsterdam alone and secondary trading began almost immediately, facilitated by detailed rules on registration and transfer of shares. Over the next decades, a full-fledged financial market developed with a high level of market activity and a growing share of speculative transactions with short-term investment horizons. Probably for the first time in history, thousands of investors participated in a business.

Other legal attributes followed wide tradability. For example, wide tradability of shares required entity shielding. Investors would not put their assets into a business whose assets were exposed to the claims of creditors of each of the numerous shareholders, many if not most of whom were strangers. In contrast, entity shielding was not required in earlier business organizations that had comparatively few parties or shareholders --- most of whom were not strangers.

Another example. Wide tradability meant impersonal relations among investors that in turn engendered a credible commitment by managers that they would not act contrary to the interests of the shareholders. Governance rules and procedures provided shareholders with a mix of participation in decision-making, exit through the selling of shares, access to information and a share in the profits.

By the mid-17th century, Dutch and English joint stock companies enjoyed many attributes of the modern corporations: permanent capital, legal personality, separation of ownership and management, limited liability for shareholders and directors, entity shielding and transferable shares. These attributes did not result, however, from a coherent plan to create a modern corporation. Rather they emerged from piecemeal legal and financial engineering. In the case of the VOC, they came as a response to the growing

financial strains of the VOC's Asian operations. As is generally the case, details and legal attributes of business organizations were developed as solutions to specific business problems.

Political conditions in the United Provinces and England were favorable. There were credible commitments by the authorities not to expropriate the newly pooled, tangible capital. The Dutch and English governments supported the companies by providing what today is called a rule of law to govern relations among shareholders and the managers, including enforcement of rules protecting investors.

It is fair to conclude that the Dutch and English joint stock companies merit their exalted place in the legal pantheon of business organizations. What about their place in history more generally? For example, was the joint stock company --- as a legal business organization --- a significant factor in the ultimate predominance of the Dutch and English in maritime trade between Europe and Asia?[4] After all, Spain and Portugal were first movers in the discovery of the Americas, and Portugal was the first mover with respect to maritime trade between Europe and Asia.

The joint stock company certainly enabled the English and Dutch to deploy more capital and ships and organize more voyages than their Portuguese and Spanish rivals. It does not necessarily follow, however, that the joint stock company form was more important than technological or military factors in creating and maintaining English and Dutch predominance in the Asian trade for several centuries. Broader political and economic factors also played a significant role, such as the turn of attention of Mughal,

[4] Another question asks why Asians --- notably, Arab, Indian and Chinese merchants and investors --- failed to follow the Dutch and English examples until the 19th century. See Chapters Six, Seven and Nine.

Ottoman, and Ming rulers from the Indian Ocean to the Eurasian landmass. Dutch superiority rested on, among other factors, the efficiency of its shipping industry and vertical integration into source markets. In a word, a reasonable and simple answer to a complex question is that the joint stock company played an important but supporting role in the ultimate success of the English and Dutch in the Asian trade.

IV. DEMAND FOR CAPITAL AND RISK SHARING

A. Economic Demand for Capital and Risk Sharing

Economic demand for capital and risk sharing was the primary driver of business organizations in the pre-industrial period. The vast majority of businesses in pre-industrial societies were not sufficiently capital intensive to require pooling of capital from numerous asset holders and in turn there simply was no demand for business organization forms that accommodated numerous investors/shareholders. When capital and risk sharing needs did require participation of numerous investors, business organization like the *naruqqum* and the *societas publicanorum* were developed. When capital and risk sharing demands went even higher, the joint stock company was created to assemble the needed resources from an even larger pool of investors. In other words, the scale of business operations drove the need for capital and risk sharing which in turn drove the development of supporting business organizations.

Economic demand was the primary driver of business organization development in the sense that it was a necessary condition. Without a demand or need for a new business organization, knowledge of foreign or historical

organizations was largely irrelevant. They became relevant with demand. Comparisons of legal attributes --- like limited liability and legal personality --- must be placed in their historical contexts. Comparisons enable us to better understand the attributes and not to prove (or disprove) connections between business organizations of different periods --- either to show historical antecedents or a linear progression.

The similarity of institutions like business organizations can be explained by both common conditions and by temporal or spatial migration of ideas. As to the former, we need more facts and empirical analysis to better assess the significance of capital and risk sharing demands in the development of business organizations,. Further research should focus on comparisons of the absolute and relative capital requirements of several long distance trade routes: 1) the Old Assyrian caravan trade served by the *naruqqum,* 2) the Roman maritime trade within the Mediterranean, 3) the Roman maritime trade with India served by partnerships and merchant network, 4) the Islamic/Asian maritime trade before 1450 served by partnerships and merchant networks, 5) the post-da Gama European-Asian trade served by the joint stock companies and 6) Chinese domestic and foreign trade (land and sea) served by lineage trusts, partnerships and merchant networks. In addition, the absolute and relative capital requirements of Roman infrastructure and other projects served by the *societas publicanorum* should be added to the mix.

B. Absence of Tax and Other Regulatory Factors

Modern tax, liability and regulatory issues were largely absent in the pre-industrial world and did not affect the decision to form a business organization.

This is unlike the situation today when those issues drive shopkeepers, artisans and entrepreneurs to form a legal business organization selected from a long list that includes close corporations, public corporations, limited liability companies, limited liability partnerships and on and on.[5] In contrast, a pre-industrial shopkeeper or long distance trader was driven to form a legal business organization (usually a basic partnership) only when she decided it was necessary to obtain capital and risk sharing from other family members or outsiders. Moreover, financing often provided an alternative that avoided formation of a formal business organization ---- as seen in the preference of many Athenian and Roman landowners to invest in long distance trade via maritime loans rather than partnerships.

C. Political and Social Factors

[5] See generally Epilogue. The tax and regulatory burdens of the corporate form have generated an array of new business organizations that offer the important legal attributes of limited liability and entity shielding without the government-imposed burdens of the corporation. These new entities include the limited liability company (LLC) which began with a Wyoming statute for oil and gas firms that ultimately led to LLC statutes in almost all states who competed for business and investments. See Ribstein, The Rise of the Unincoporation 3, 6-7, 10-12, 37 77-81 and 119-23 (2010). Many European countries like Belgium, France and Germany long have had popular private limited liability company alternatives to incorporation (including the Belgian and French SARL and the German GMBH) that offer limited liability and flexible rules regarding dissolution. Id. at 93. Although partnership law has been relatively uniform over the years in part because of partnership's status as the "default" business association, state statutes concerning partnerships have also changed in the last few decades, particularly with respect to the creation of limited liability partnerships or LLPs, initially the creative invention of Texas tax lawyers. The popularity of the LLC (and to a lesser extent the LLP) has lessened the role of the traditional limited partnership which has become a bridge to the LLC, which resembles a limited partnership except for the extension of limited liability to the managing members. See generally Martin Gelter's discussion in the Epilogue.

Political and social factors also played a role in the development of business organization.[6] Innovation in business organizations is more likely where there is an entrepreneurial or mercantile spirit. Perhaps the earliest example is the merchant oligarchy of the early second millennium city of Assur --- the nursery for the *naruqqum*. Later examples are the medieval European cities --- filled with politically influential and socially accepted merchants --- that developed business organizations like the *moana*, *compagnia* and the VOC. As a mid-17th century Englishman complained: "It is no wonder that these Dutchmen should thrive before us. Their statesmen are all merchants."[7] At the same time, Dutch and English political institutions were essential to the success of the joint stock company. Strong state support was critical.

Social and political factors also can block or delay development of business organizations that appear to be needed for economic reasons, notably scale of operations requiring more capital and risk sharing like long distance trading. One example is the Roman political and popular mistrust of large groups that limited the use of the *societas publicanorum* and would have blocked any effort to develop a general purpose business organization like a modern corporation. Another example is found in the Islamic world where a host of factors constrained the development of business organizations beyond basic partnerships. These included an Islamic reluctance to legally recognize non-human entities, an inheritance system that disfavored larger firms, and the

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[6] There is mutual influence between legal business organizations forms and culture. For example, see Alesina and Giuliano, Culture and Institutions, 53 J. Econ. Lit 898 (2015).

[7] Quoted in Jardine, Going Dutch: How England Plundered Holland's Glory 336 (2009).

absence of supporting institutions like double entry bookkeeping and stock exchanges.

On a more general level, our survey suggests caution before placing too much weight on social disdain or disapproval of business as a factor in the development of business organizations. Social values do not prevent all individuals from engaging in trade. If social objections are very strong, however, they might reduce the number of potential operators and investors to such a great extent that they effectively emasculate a demand for business organizations beyond the basic partnership. Whether this has actually happened is questionable. For example, a Greek disdain of commerce may have reduced the number of Athenian citizens who engaged in trade, leaving business to non-citizens like *metics* and foreigners. Nonetheless, there seems to have been a sufficiently large pool of business operators and investors who engaged in considerable trade, notably maritime trade --- under either Greek law or foreign law. The absence of Athenian business organizations beyond the basic partnership is likely to have resulted more from a lack of economic demand for pooling capital and sharing risk than from an Olympian disdain for commerce. The same reasoning can be applied to wealthy landowning Romans.

A final note. Legal commentators often lament (or disappointedly conclude) that certain societies --- such as Rome and the Islamic world --- "failed" to develop the corporation. Classic historians respond that historical business organizations should not be examined in a parochially small world of abstract legal analysis untethered to the historical facts.[8] A few observations. First, legal analysis of an historical business organization (like the *societas publicanorum*) certainly must rest on historical facts even if it compares that organization with

[8] See Chapter Five.

a modern organization (like the corporation). This is roughly similar to the situation where economic "models" are used to explore historical institutions. Second, there is nothing inappropriate or "teleological" about making the comparisons, unless there is an implication that the historical organization is a step (or "failure" to take a step) toward the modern organization. Of course, such an implication may not always be clearly evident. For example, a legal scholar might exaggerate the importance of the abstract analysis and underestimate or oversimplify the importance of historical facts --- at least from the point of view of a professional historian of the period. Hopefully this survey of business organizations in their economic, political and social contexts will be useful to historians and legal scholars in their quests to understand and explain the past.