Sustainability in Employment Ecology models of the Modern Firm

A Critical Management Studies Comparative Assessment Based on Japanese Industrial Relations Research

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Sustainability in employment ecology models of the modern firm: A critical management studies comparative assessment based on Japanese industrial relations research

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Abstract

At the core of the present global crisis lies an ideological oversight that indicates standard business models are subject to fail due to moral hazard: managerial prerogative, particularly the U.S. variant, is not self-regulating in respect to either corporate risk or the stewardship of stakeholder trust. We know there is variance in national political economies, but less is known about legal factors informing firm-specific variance, especially as these regards trust and transparency. This paper reports research seeking to bridge this 'gap' by the introduction of comparative legal ecology employment models of the enterprise. The construct is derived from reflection upon industrial relations research into the existence and nature of Japan's 'lifetime employment system'. Construct parameters include employment security, labor unions and the degree of employee participation permitted (if any); model schematics are offered for the United States of America, Germany, Japan, Denmark, and the People's Republic of China. The comparative models help to account for variance in the legal extent and nature of managerial prerogative, job security, and the degree of information, power, and resource transparency of any enterprise. These offer, in consequence, clear and clearly comparative benchmarks of industrial democracy.

The field of critical management studies has been characterized as having three distinct features: de-naturalization, anti-performativity, and reflexivity (Grey, C., and Willmott, H. (2005), citing Fournier and Grey 2000). The first concerns an effort to look beyond the otherwise presumed. In the case of Japanese employment relations, this paper reports an effort to deconstruct commonly held notions that 'lifetime employment' is either, a.) non-existent (Koike, 1987, 1988), or b.) a "traditional" or a merely "reasonable" human resource management outcome employment practice (Aoki, 1987, 1988;).

The second feature notably rejects simple presumptions that business-related research is useful only if it contributes to the "bottom-line"; CMS recognizes that such calculations are themselves culturally bound and organizationally embedded ideals, ideas, financial calculations, means of control, and artifacts of persuasion. This paper documents the labor law distinctions in Japanese employment practice that contribute to their comparatively lower profit outcomes – at least compared to U.S. firms – and compel a socially different definition of the very social nature and function of the modern enterprise.

The third point admits the notion that the researcher quite literally embraces the object of study – her or his own intellect, insight, and reflection are an inevitable, even valuable, part of the research process. And further, that the research process itself – in workshop, conference, and publication, exhibits some degree of reflective awareness of process and broader implications of research outcomes – for societal and other ends.

This paper, as a contribution to the Critical Management Studies Division of the 2009 Academy of Management (AOM) conference, is an effort to articulate the implications of field work in Japanese industrial relations that began in 1991 and continue. That field work unearthed the fact that the lifetime employment system is a 'real' institutionalized practice in Japan, at least

since it was first recognized as the nation's standard industrial relations practice in a 1961 legal case decision (Tackney, 1995, Kettler & Tackney, 1997). Here, the author builds on that published knowledge base and specifies an analytic and comparative employment ecology model of the modern enterprise in order to shed light on the behavior and potential of different enterprise models for society, globalization, and innovation processes, and sustainability.

In this effort, the "Green management" Call for Papers of this year's Conference has been kept in mind, although the subsequent series of financial and economic crises that grip the world suggest "Green management" first implies fulfillment of managerial need to be ecologically sound and sustainable in terms of the transparency, and employee participation viz. internal enterprise prerogative and function, and this as a necessary, if not sufficient *precondition* to ensure correct, equitable, and sustainable proprietary functions in respect to the natural environment.

The motivation for offering an industrial relations-inspired work to the Critical Management Division (CMS) derives from the author's sense that both research streams share a healthy suspicion about the dangers of an unreflective ideological faith in economics. The insights gained from field work in Japan, since they shed light upon labor law as a tool to mitigate unrestrained managerial prerogative, appear well suited to a "Green management" CMS conference venue.

2.0: Method:

In light of the introduction, the research methodology and method of proceeding in this paper can now be specified. In the third section of the paper, the CMS literature on trust, the

observed difficulties involving its sustainability in the modern enterprise sustainability and the tenuous relation between trust and the firm-intrinsic management theories will be reviewed.

The initial comparative industrial relations research and derivation of the comparative employment ecology models are explained in the fourth section. The research method was a field work effort to specify the existence (or not) of Japan's 'lifetime employment system'. Should it be found to exist, then its nature as an employment practice would be specified. Subsequent derivation of Japan's employment ecology model, and further comparative elaboration of the other models, developed over the years. These comparative ecology employment models are introduced, along with a summary of the field research that informed their derivation and development. The fifth and concluding section, the Discussion, will offer some observations on the relationship of these comparative models to sustain innovation under globalization. Further research possibilities will also be specified, focusing particularly on the enabling relationship between participatory employment ecology models and corporate social responsibility. For quantitative economists, hypotheses are offered regarding the relationship between employee participation and the nature of profit, on the one hand, and executive compensation levels, on the other.

3.0: The Sustainability of Enterprise Trust in the Critical Management Studies Literature

Heckscher and Adler (2007) take up the modern tension between sustain community and societal needs for trust and its apparent systemic erosion by the expansion of markets in capitalist societies. More particularly, they note the similar tension that runs through modern capitalist institutions, "What is less known is that the corporate sphere has faced the same essential problem and has engaged in considerable practical innovation in dealing with it." (2007, p. 1).

Free-market ideological assertions notwithstanding, “the old corporate communities based on a culture of loyalty, which have been the basis for commitment for a century now, have been taken apart by three decades of economic turbulence, downsizing, and restructuring” (Ibid.).

In their volume, Rubinstein explores the notions of collaborative communities and employee representation, focusing on the U.S. case in general and the GM/Saturn model in particular. Despite the historically adversarial relationship between U.S. management and labor, he offers an interesting report on “the much smaller number of organizations in which management and labor have committed to partnership in the pursuit of their common goals” (p. 334). Despite notable successes (the study that was Rubinstein’s source examined some 50 projects), the author does not appear to see these as being sustained over time. Management fails to share power, or seeks to influence human resource outcomes directly, circumventing union representation. He writes, “Analysis of the reasons for the limited life-spans of these partnerships implicates some of the enduring features of the capitalist economy. The prospects for democratization of business organizations remain uncertain.” (p. 334). He notes that an absence of supporting legislation results in management reversion to self-interest. Too, economic crises can undermine merely bi-lateral relational understandings and undertakings. A third factor impeding progress – in this U.S. case examination – related to partnership-threatening “decisions made higher in the corporate hierarchy” (p. 346). Rubenstein noted a tendency at GM to undermine the Saturn effort through decisions taken, and decision-making authority being taken, centrally – with negative consequences within the Saturn project.

More broadly, trust is a matter of interest in cross-cultural studies involving comparative economic performance (Fukuyama, 1995). In the CMS literature, Adler (2005) identified trust as “the key coordinating mechanism in the community form” (p. 176). And, working backwards

through his presentation, the community is the constituting outcome of informal organization. He notes three sources of trust: familiarity, interests (and their calculation), and values/norms. Trust is generated via any of three mechanisms: direct interpersonal contact, reputation, or "by our understanding of the way institutions shape the other actor's values and behavior" (pp. 176-177).

It is this last mechanism that is of particular interest for the current study. A vast literature clearly identifies Japanese culture, management, and modes of production as being profoundly based on trust. While a comprehensive review is beyond the scope of this paper, we can note that trust is a key explanatory variable for Japanese success in the comparative political sphere (Fukuyama), Japanese management (Aoiki, 1987, 1988, Koike, 1987, 1988, and Ouchi 1980), and Japanese modes of production studies, either domestic Japanese (Morgan, J.M. & Liker, J.K., 2006) or in "Japanese management" transfer research (Liker, J.K., Fruin, W. M., & P.S. Adler, 1999).

What is of interest is how Japanese legal scholars freely adapted *foreign, and decidedly Western,* legal constructs to advance this "Asian culture" value. We seek to explicate in the next section the puzzle of how trust, which the literature clearly attributes to the Japan case (and not, in contrast, to the U.S. or, at a minimum, not in remotely the same way), could have emerged from a post-World War II circumstance of Japanese labor-management conflict that features both nations with essentially the same labor legislation. This account, which derives in part from field work into the existence and nature of the 'lifetime employment system', is taken up in the next section.

4.0: Comparative Employment Ecology Models of the Modern Enterprise – a study inspired by Suehiro Jurisprudence

In terms of research method, industrial relations as a field of study seeks to understand, explain and compare the "web of rules governing employment relations" as its object of interest. In terms of research method, this makes the "web of rules" the dependent variable to be explained (Dunlop, J. 1958, 1993, Kaufman, B. E. 2004). These rules vary by nation, yielding national industrial relations systems. Essentially, the web of rules comes into existence once the three primary actors in any industrial relations system find mutual assent to fundamental norms, allowing industrial chaos to yield to civil order. This is a first, basic, and essential step in what has elsewhere been described as the "civilizing process" (Kristensen, P. H. 2005). "Working rules" can also be analyzed at any number of other levels: industrial sector, region, even the shop floor or classroom.

The three primary actors are employers (and their representatives), employees (and their representatives), and government (in its variety of representative functions). As a field, industrial relations arose from dissatisfaction with economics as a reliable and valid method. Thus, the field of industrial relations was, from the outset, interdisciplinary in scope. It draws upon an informed critique of economics, which was considered theoretically insufficient to adequately account for observed market functions and performance, as well as history, politics, sociology, studies of political economy, also law (the regulation of consent and power in society). Historically, industrial relations research method has tended to favor 'mid-level' studies: field work involving cases, sectors, and organized labor issues. Too, there is a fundamental assumption that the elaboration of these working rules follows the expansion of markets.

Study of international business makes abundantly clear that product and labor markets have now expanded to a global, international scale. Despite obvious processes of internationalization and globalization, political economists find renewed significance in the study of distinctions in political economies at the national level (Morgan, G., Whitely, R., & Moen, E. 2006). Whitley wrote that nation-states vary by type and this variance is associated with business systems and firm characteristics (Whitely, R. 2005b). He identified four 'ideal' state types; possible national examples of each are given in parentheses:

- Arm's length (U.S.A.)
- Dominant developmental (Singapore)
- Business Corporatist (Japan)
- Inclusive Corporatist (Germany)

Within each ideal type, Whitley also offered characterizations of employment relations along the parameters evident in Table 1:

Table 1 about here.

Whitley notes that the nations approximating each of these ideal types may change over time. The Republic of Korea, for example, appears to have shifted from a dominant developmental model to something approaching a business corporatist state. In contrast,

Germany and France may be shifting from inclusive corporatism to the more business corporatist type. However, contemporary events suggest such even fundamental presumptions about profit and wealth remain a much contested domain. French President Nicolas Sarkozy proposed a radical change corporate profit distributions in France. He said, "A system in which a third of the profits of a company would be for shareholders, a third for employees and a third for investment is a system ...that would have a certain coherence and logic" (French President proposes, January 1, 2008).

Theorizing in respect to ideal types at the level of comparative political economies is an essential task in our contemporary world. It is also a task that leaves industrial relations specialists ever so slightly uneasy: 'ideal types' are never concrete instances – they succeed in eluding capture and measurement by social science methodology. More important, perhaps, is the lack of explanatory power according to state type for the comparative attributions made to firm specific differences: authority sharing and long-term employer/employee commitment. What causes these different relationships to come about? Are the long term employment commitments due to managerial altruism? Are they firm intrinsic or are there compelling externalities?

Thus, even with distinctive national systems of political economy, we remain outside the "black box" of that which constitutes the modern enterprise. While trans-national corporations have emerged and may yet be identified as being an "American" or "German" firm, there is scant basis to explain what such distinctions mean, aside from historical attribution or the firm's headquarters office address. Corporations are legal entities, endowed with the same rights that would be attributed to persons. Unlike individuals, corporations appear to have no specific,

predictable demise. Instead, the modern enterprise persists insofar as the key stakeholders see merit in continuance.

Nevertheless, given stable and enduring assent from each of the three partners in a national industrial relations system, a certain degree of stasis can be expected. Dunlop's 1958 systemization of the field, Industrial Relations Systems, reflected the time period. It was still a time when scholars debated the convergence theory – that all nations would, in the end, converge upon the U.S. model of industrial relations.

Yet, by the 1980s, a transformation in American industrial relations changed the postwar status quo, resulting in an expansion of managerial prerogative (Kochan, T. A., Katz, H. C., & McKersie, R. B. 1984, Kochan, T. A., Katz, H. C., & McKersie, R. B. 1986). The emphasis on "strategic choice" recast the nature of the American enterprise both domestically and in reference to U.S. enterprise strategies abroad. Ironically, one of the factors cited that prompted this change in U.S. managerial prerogative, leading management to work "outside" the postwar norms of the American system's accepted web of rules, was the strong impact of Japanese management success in value added exports, resulting in a subsequent "hollowing out" of U.S. manufacturing infrastructure. Due to these developments, the interplay of power and information within the legal entity of a given American firm invites an ecological analysis.[1] And, as the specified parameters reside in labor law, this model is no mere "ideal type"; it is the normative expectation for enterprise behavior. Corporations (referred to as 'enterprises' in this paper) are recognized in law as legal entities; they are persons without physical being in the biological sense. Yet, like any nominal entity, they take in resources, transform matter, produce goods and waste, and seek

[1] To be clear, it was the Japan case that first prompted the legal ecology schematization. Yet, the 'strategic choice' literature was known to the author. Along with the analysis of the Japanese 'web of rules' at the firm level, the dynamic changes in the U.S. system was suggestive of the need for a schematic depiction of comparative managerial prerogative and its institutional constraints.

to endure over time. Firms occupy a niche; the study of the birth, persistence, and failure of firms within a specific niche is an academic field that is known as organizational ecology (Hannan, M. T. & Freeman, J. H. 1989).

The term "legal ecology" appears in the title of a 2005 research paper dedicated to the study of ecosystem functions and the law (Rohlf, Daniel J., Dobkin, David S. October 2005). Our current interest in the phrase – the legal ecology of the modern enterprise – concerns the internal dynamics – or 'balancing' - of the employer <> employee relationship within an individual firm as these are conditioned by external legal norms and/or external legal norms that permit development of internal structures for management-employee dialogue. The internal dynamics can be specified in respect to employment rules governing authority/power, information, and control of resources. As we shall see, the U.S. model is relatively simple and straightforward.

4.1: The American Enterprise Employment Ecology Model

The U.S. legal employment ecology model is offered first for two reasons; it is the easiest to understand and the Japanese later made adaptive appropriations to very similar legislation. Since the New Deal labor legislation of the Roosevelt administration and – significantly – the legal interpretations of the National Labor Relations Commission, American workers may unionize.[2] Unions may negotiate over wages and working conditions. The nature of the U.S. employment contract is "at will": employer and employee are presumed equal parties to contract.

[2] In contrast, the Japanese functional equivalent of the NLRB took a completely different path in 1946, forever changing the nature of the Japanese enterprise. That is why the text is underlined.

Functionally, employment 'at will' permits the U.S. employer to dismiss for a good reason, a bad reason, or no reason at all.

Having noted this managerial prerogative, it is important to note that U.S. federal law prohibits discriminatory employment practices in respect to religion, race, political party affiliation, sex, and, most recently, age. In addition, state legislation may further restrict 'at will' managerial prerogative. Collective bargaining agreements further constrain U.S. managerial prerogative; these are negotiated between legally recognized employee representatives and employer representatives and reflect negotiated determinations about wages and working conditions.

Figure 1 here.

The legal employment ecology of the U.S. enterprise is given in Figure 1. The solid black lines between management and employees depict the adversarial nature of the underlying relationship between employer and (organized) employees. Apart from issues of wages and working conditions, there are no formal, institutionalized mechanisms to negotiate or discuss matters regarding authority, power, fiscal transparency, or detailed information and/or policy regarding the enterprise. Insofar as employees are granted additional rights or discretionary powers - stock options or other forms of "employee empowerment" - these are strictly at the discretion of the employer: hence, the downward arrow to the right.[3]

The schematic does not intend to negate the prevalence or role of work teams in U.S. employment settings. As we shall see, these simply lack the institutionalized stature recognized in employee representative groups in other national settings. In the U.S. context, work groups

[3] Readers familiar with the U.S. model may experience frustration at 'pointing out the obvious'. It will become apparent in the next sections how the legal ecology of a firm in different national settings can profoundly transform the internal dynamics of modern enterprise.

and/or teams are established by employer prerogative and, thus, lack extrinsic institutional support. They do not, for example, possess any or any adequate grounds to address issues such as executive compensation or inordinate risk-taking propensities on the part of American management.[4]

4.2: The German Enterprise Employment Ecology Model: Just Cause, Legislated Co-determination and Works Councils

The employment ecology of the German enterprise follows the U.S. model in respect to labor union negotiation rights about wages and working conditions, including the presumption of fundamental conflict in respect to the aims of both employer and (organized) employees. In one domain of contrast, employment contracts in Germany can only be abrogated given just cause. It is not legal for an employer to dismiss an employee for no reason or a bad reason. In another contrast, as Figure 2 makes clear, the German model (and, we note, the European Union works council model since 1994) obliges, by legislation, works councils in firms beyond a certain size. Works councils can be defined as, "institutionalized bodies for representative communication between a single employer (management) and the employees (workforce) of a single plant or enterprise" (Rogers, J. & Streeck, W. 1995). In addition, at the top level of an enterprise governing board, proportional representation by elected representatives of employees is also obligatory by legislation. Taken together, Works Council and Board membership participation in the life of a German enterprise are referred to as "Co-determination" (die Mitbestimmung). The German Co-determination schematic of Figure 2 depicts a degree of transparency and participation in authority, information and resource control by the dotted lines that separate

[4] See Rubenstein, who was referred to above, on the propensity of external factors to undermine partnership efforts in the U.S.

management and the Works Council, in contrast to the solid lines separating the union and management functions.

Figure 2 here.

Co-determination in Germany has a history that has been traced to the 1848 Frankfurt National Assembly (Jackson, G. 2001). As we shall soon see, the Japanese postwar legal employment ecology is influenced by the German case. This is the reason for taking it up after the U.S., but prior to the Japanese employment ecology model.

Before we look in more detail at the works council feature of co-determination, we should note that the European Union has adopted participation as an integral policy. In 2005, the European Trade Union Confederation (ETUC) reported the following on its website:

> The claim that co-determination is an alien concept in Europe does not stand up to scrutiny…. Even though the German arrangements regarding worker participation are more extensive than in other European countries, Hoffmann points out that this is far from equivalent to saying that other European countries have widespread co-determination-free areas. In fact 18 of the 25 EU Member States have binding rules governing co-determination, and in many cases their arrangements provide for an extensive workforce presence on companies' supervisory boards. In the new Member States company bodies are taking their lead from German law, and in Slovenia - by law - companies employing more than 1,000 staff have to guarantee the workforce 50% participation (ETUC 8 A.D.).[5]

This development both recalls, and strengthens, a 1995 observation by Wolfgang Streeck. He wrote of the "largely forgotten" process of "the almost universal establishment of works councils after 1945 in otherwise very different national contexts, as a integral part of a worldwide recasting of the political economy of capitalism" (Streeck, W., p. 313). It will be

[5] "Hoffmann" is Deputy General Secretary Reiner Hoffmann, speaking at an IG Metall conference on worker participation held in Dortmund on 17 November 2004.

useful to elaborate on the possible range and role of works councils, precisely because of their varied manifestations in different national settings. Works councils, briefly:

> - represent all the workers at a given workplace, irrespective of their status as union members,
> - represent the workforce of a specific plant or enterprise, not an industrial sector or a territorial area,
> - are not 'company unions',
> - differ from management policies encouraging individual workers to express their views and ideas, as well as new forms of work organization introduced to increase the "involvement" of workers,
> - (enable) representative communication between employers and their workforces, (which) may be of all possible kinds and may originate from either side,
> - may (the usual case) or may not have legal status,
> - structures vary widely across and within countries, and
> - are not the same as worker representation on company boards of directors
> (Rogers, J., Streeck, W. 1995, pp. 6-9).

Rogers and Streeck specified three "ideal types" of works councils. First, paternalistic councils are those formed by employers or government. These permit worker representation only to the extent that the independent expression of worker interest is constrained, by prior intent. In this respect, there is a political dimension to their establishment. Second, consultative councils are primarily for economic purposes, unlike the politically constrained end envisioned with the paternalist type. Consultative councils are mainly for communications between management and workers to enhance firm competitiveness and, possibly, implement rewards systems. These councils supplement the firm's functional organization. And, third, representative councils "are typically established through collective agreements or legislation giving the entire workforce of a plant or enterprise (again, unionized or not) some form of institutionalized voice in relation to management" (p. 10). In contrast to consultative councils, representative councils are "part of a firm's political system" (p. 11).

Given the background on the U.S. enterprise legal employment ecology, and informed of the nature and function of co-determination and works councils in the German enterprise, we are

now ready to turn our attention to the Japan case. It was in Japan, shortly after the end of World War II, that works councils were adapted from their German origins to resolve a political crisis within a devastated Asian nation.

4.3: The Japanese Enterprise Employment Ecology: Suehiro Jurisprudence – "Just Cause" through Case Law and Management Councils in Collective Bargaining Agreements

The initial design notion for the comparative legal employment ecologies of Japanese, U.S., and German firms was due to study of the institutionalized practice of lifetime employment in Japan (Tackney, C. T. 1995). Suehiro Izutaro, a legal and labor law specialist, was instrumental in the establishment of three postwar industrial relations practices. The first was study and systemization of the role of case law as a pattern and norm generating legal resource – beginning long before World War II. The second was post-World War II 'just cause' case law restrictions on managerial dismissal prerogative – initially appearing, ironically, in dismissal efforts by Occupation forces against redundant Japanese employees. The third was the localization of employee participation prerogative (modeled on German works councils) within the postwar Japanese collective bargaining agreement.[6]

Suehiro's various contributions to Japanese legal studies are recognized by a small number of legal scholars; his name is widely known in Japan, his specific contributions far less. In the field, his approach is known as "Suehiro jurisprudence" (末弘法学). While a notable phrase in Japanese, the precise content of the term remains rather amorphous and difficult to signify. For present purposes, it is only necessary to keep in mind that Suehiro's contributions to

[6] If Grey and Willmott (2005) can include five scholars as individuals whose work anticipated the emergence of critical management studies, I would nominate Suehiro for similar post-hoc recognition as one of Japan's critical management studies precursors.

Japanese labor law, reviewed above, stand upon distinct, and distinctively Continental European, interpretations of labor law legislation. Again, it is with considerable irony that the Japanese postwar labor legislation, upon which such distinctive features were crafted through Suehiro jurisprudence, are essentially identical to the New Deal legislation of the United States of America.

Following legal interpretations extant in continental Europe, Suehiro jurisprudence presumes that the labor contract is inherently unequal; the hired worker is comparatively disadvantaged in comparison to the hiring employer. Accordingly, corrective measures should be taken by the courts, with appropriate norms becoming 'codified' through case law outcomes. As a means to overcome extremely antagonistic confrontations between Japanese employers and unionized workers in the aftermath of World War II, Suehiro was also instrumental in the crafting of a July 1946 Central Labor Relations Commission guideline that advocated creation of "Management Councils" (経営協議会, Keiei kyogikai). These were explicitly modeled on German works councils, but uniquely based in firm-specific collective bargaining agreements.

Due to case law decisions enforcing just cause as restriction upon managerial dismissal prerogative and the single document issued in July, 1946 by the newly formed Central Labor Relations Commission, the Japanese firm's legal employment ecology is radically different from that of its U.S. counterpart. The differences in degree of the legal interpretations given in respect to essentially similar U.S. legislation – by the Japanese courts and the Central Labor Relations Commission – resulted in a difference in kind concerning the emergent post-war legal employment ecology of the Japanese firm.[7]

[7] For a thorough examination of Suehiro's adaptive appropriation of Weimar era German jurisprudence, see Kettler & Tackney, 1997).

The Japanese employment ecology of the firm is given in Figure 3. Note the similarity to the U.S. and German models in regard to the presence of labor unions, their right to negotiate over wages and working conditions, and the solid line depicting a fundamental conflict of interest between union and management.[8] As Japan's management councils arise from collective bargaining agreements, there is an obvious transparency of form and function between the labor union and the management council; this is depicted by the dotted line between them. In turn, the relationship between the management council and the management staff is also variable – and varied; again, this is depicted by a dotted line.

Figure 3 here.

While German law and European Union directives tend to specify a minimum number of employees in a firm before works council representative functions are mandated, the Japanese have no such restriction. Data from a 1999 survey indicate that 41.1% of all Japanese firms surveyed have some form of management council, while 58.2% do not. Yet, 84.8% of unionized firms report management councils; and 77.9% of firms having 5,000 or more employees report the presence of such councils (Ministry of Labor Policy Secretariat Survey Section, 1999). Data from the subsequent survey, show the rate of participation for firms with 5,000 or more employees to have increased: 80.8%. There was a decline in the national rate to 37.3%. (MHLW, 2004).

4.4: Danish and Chinese Enterprise Employment Ecologies

[8] For the most part, Japanese labor unions are organized on an enterprise basis. Neither craft nor industrial unions predominate in Japan. Thus, Toyota (automobiles) and Okuma (machine tools) – two firms located in Aichi Prefecture - have distinct, separate labor unions. In practice, as the legal ecology model we are describing makes clear, firm-specific information flows concerning wages and working conditions between and among Japanese labor unions in respect to type, regional affiliation, and national federation, are extremely high. The long-term employment arrangements ensure that proprietary information remains within a specific firm.

We can now look at two other national cases in our study of comparative legal ecologies of the modern enterprise: Denmark and the People's Republic of China. Both nations, for very different reasons, show recent transformation in the formal arrangements of the legal employment ecologies in each nation's enterprises. For Denmark, it will be valuable to see how this nation's historical enterprise employment ecology – in respect to the parameters of employment security, managerial prerogative, and employee participation – is undergoing change due to EU membership. The PRC enterprise model, in turn, will be of interest due to the emerging norms of this nation – especially in light of its communist legacy.

First, we consider Denmark. As in the Japan and German cases, Danish employment that continues beyond a specified time, or after completion of a specified task, presumes – by implication – that the contract is for an indefinite period of time (Hasselbalch, O. 2005). The dismissal decision prerogative, on the grounds of right to manage, resides with the Danish employer. However, this right "has been limited to no small degree during the last decades by statues and not least by collective agreements which prescribe that a dismissal should be for a fair reason" (Ibid., p. 162).

Denmark has a history of cooperative committees between employer and organized employees dating from 1936 (Ibid.). The most recently revised agreement was concluded in 1986, between peak employer and employee representative organizations – and the form of the cooperative committees that exist are similar for both public and private sectors.

While Danish labor law does not have a works councils system, EU membership obliges Danish participation in EU directives, including the 22 May 1996 implementation of the EC Directive on European Works Councils. The Directive addresses "Community-scale" undertakings, which require that the undertaking: "employs at least 1,000 employees in EU

member states and EEA countries (excluding the United Kingdom); and has establishments in at least two of the countries referred to in (1); and employs at least 150 employees in each of at (l)east two of the countries referred to in (1)" (Ibid., p. 225).

Thus, on the one hand, the European Works Councils Directive, "marks a break in the UK and Denmark, from the national traditions of modelling the relations between employers and employee representatives solely on the basis of agreements concluded with trade unions (Knudsen and Bruun 1998:135)" (from Stoop, S., 2004, p. 41). On the other hand, the EU norms do not apply "where a collective agreement or other agreements contains obligations and rights which at least match the provisions of Directive 94/45" (Ibid. p. 224). Thus, the Danish enterprise legal employment ecology can be depicted as shown in Figure 4. In the Danish case, a change to EU works councils would mean – in practice – that committees formerly composed of both management and employee representatives would have to be reconstituted as strictly employee representative bodies; this is a shift from a less formal, agreement-based policy approach to that of formal law. By 1998, there were six multinationals that had established European Works Councils in Denmark (Pedersini, R. 1998). Data from the European Trade Union Institute for Research, Health, and Education and Safety Research Department indicates that as of January 15, 2008, Denmark has 63 companies headquartered in Denmark and covered by the EWC Directive. Of these, 26 have already established an EU works councils, while 37 have not. The compliance rate then, is 41%.[9]

Figure 4 here.

[9] The author would like to thank Romuald Jogodzinki of the ETUI-REHS for very timely provision of this data. See the website: www.teui-rehs.org/research for additional information.

The People's Republic of China offers yet another interesting case for study of a firm-specific legal employment ecology that derives from a changing national political economy. In the instance, Chinese firms exist in an increasingly profit-driven market, while laden with a Chinese Communist centralized production legacy in a political environment where the Chinese Communist Party retains effective hegemony.

After decades of communist rule and directed reforms of state-owned enterprises, which resulted in massive job loss, there have recently been substantial reforms in Chinese corporate governance and labor laws. The China Company Law was revised in 1993, and again in October 2005. This last reform came into effect on January 1, 2006. A new labor law came into force recently - January 1, 2008.

In general, there is sufficient evidence to identify the parameters of the legal ecology of the Chinese enterprise – insofar as these laws indicate suggested norms. Tam, in 1999, wrote that China's Company Law offered provisions to ensure employee participation in the corporate governance of state owned enterprises. The locale of this participation is on the enterprise supervisory board and reflects a national policy commitment to employee participation in corporate governance (Tam, O. K., 1999). The 2006 reform continued the role of supervisory boards just for state-owned enterprises, with the board needing one-third employee representation. More recent evidence indicates that the new Chinese labor law obliges a proper cause for termination of contract. Thus, the PRC has taken a path on dismissals similar to that of

Europe.[10] Given this background, the legal employment ecology of the PRC firm is provisionally given in Figure 5.

Figure 5 here.

To conclude this section, it is fascinating to note that both Denmark and the People's Republic of China appear to be undergoing change due to exogenous, or quasi-exogenous, influences. Denmark is facing the need to modify national practice due to EU membership: China due to formal membership in international institutions.

5.0: Discussion

The comparative models of the legal employment ecology of the modern enterprise were initially developed to depict, in a simple schematic, the important differences in labor law that substantially condition the character of Japanese, U.S., and German enterprises. This step was taken to account for the development of the lifetime employment system in Japan – and to do so in a manner that facilitates comparison and contrast according to standard social science method (Tackney, C. T. 2000, Tackney, C. T. 2001).

The current analysis reflects an attempt to apply this research to the critical management studies domain, while offering the CMS literature an example of what may obtain from a comparative analysis that takes a non-Western nation as the point of departure. As Grey and Willmott wrote, "Post 9/11 and post Enron there is an emergent awareness of the relativity and contingent viability of dominant, Western values and forms of knowledge" (2005, p. 11).

[10] That is, a bad reason or no reason would not constitute a reasonable cause for contract termination. See the blogsite: http://www.chinalawblog.com/2007/11/chinas_new_labor_law_its_a_hug.html . This site contains links to the text of the new labor law.

This analysis serves the 'de-naturalization' approach within the critical management studies literature by explicating the presumed 'traditional' nature of Japan's lifetime employment system. It further challenges any naïve assertion that managerial prerogative of the American variant is essential or necessary to ensure either business success or – and this is perhaps far more compelling – a stable and equitable national political economy. Nothing could be further from the truth of Germany and Japan's postwar economic recovery and continued – despite setbacks and challenges – productive performance.

Indeed, the comparative models suggest, in a rather straightforward manner, that hypotheses can be readily derived to test, and strengthen, the 'anti-performativity' presumption of critical management studies. First, comparative studies of firm profitability now must be re-examined, as the obvious legal ecology differences as depicted suggest 'profit' is itself hardly a univocal variable. In the vast majority of cases, German, Danish, and Japanese firms must determine profit levels in consultation with employee-participation management councils or cooperative committees. Thus, 'profit' would be expected to vary in according to the national and comparative legal employment ecology models depicted; higher U.S. corporate profit levels would no longer represent a simplistic proxy for comparative success or national industrial prowess.

The same derivation of a readily testable hypothesis should hold for executive compensation levels. These would be expected to be much higher in enterprises lacking employee participation at the management level. Current executive compensation levels in the U.S. are, thus, no longer falsely explicable as the simple outcome of market forces or the failure of U.S. corporate boards and/or shareholders to restrict this self-serving exercise of managerial prerogative. U.S corporate executive compensation levels are due, instead, to the inevitable

outcome of American exceptionalism; the U.S. does not yet recognize works councils or a functional equivalent for these in its industrial relations system.

Finally, it is reflexively essential to note that trust in the Japan case has never been merely the outcome of clever managerial prerogatives, nor was it the culturally unique outcome of Confucian sensibility. The overriding attainment and continued deployment of the necessity for trust in postwar Japanese employment relations was conditioned and controlled by the legal employment structures described in these pages. These were structures deliberately introduced in Japan the aftermath of World War II. Labor legislation gave Japan both standard 'American-style' labor unions and collective bargaining practices. But it took the genius of Suehiro Izutaro, and others of his generation, to introduce adaptive appropriations of German jurisprudence that compelled and encouraged trust between management and employees in the postwar Japanese enterprise.

It was upon these various legal strictures that Japanese courts later came to recognize what we now describe as 'lifetime employment.' Yet, the distinctive rules that produced the trust necessary for later development of the many "Japanese management practices" were Eastern merely by dint of the locale of adaptation; their notional source was due to the knowing application of Western European industrial relations practices to a devastated Asian nation.

The role of trust as an enterprise value, a value necessary for a knowledge-based society, or a value under increasing threat, is a recurring theme in critical management studies (Adler, 2001). The legal employment ecology model of the Japanese enterprise makes clear that trust in the postwar Japan case was the deliberately nurtured outcome of legal encouragements and constraints. Ironically, these legal measures were all Western in source – there was nothing

particularly Asian about them.[11] The legal expectation of participation and consultation – over a broad range of issues – provided a compelling hierarchy within the postwar Japanese firms that, in turn, resulted in flexible adaptations to changing market demands.

As an instructional tool, these employment ecology models appear to be a useful means to introduce students to the very different dynamics that exist in firms that arise from the legal frameworks that exist in their nation of origin. This insight suggests it is possible, and possibly essential, to reclaim the nature of the modern business enterprise for legal studies; the firm should no longer be only, or merely, an observable outcome of economic theories: the suppression of price mechanism or observable market failures, to mention but two approaches (Coase, R. 1937, Williamson, O. 1971).[12] The models offer an interesting way to explore enterprise differences, based on national origins, and then examine their differing behavioral propensities when a firm expands to other national settings as well as into the international business environment.

There are a number of caveats to note in connection with the models proposed. First, these models have analytic merit on a general national level; firms that do not follow these norms may be found. Put simply, it remains possible for a U.S. firm to function in a manner resembling its Japanese and/or German counterparts: avoidance of dismissals, coupled with solicitation and reward for high levels of employee participation. Yet, even given such exceptional cases, the significance of these models is clear - 'just cause' or an employee participation approach to employment relations within a given U.S. firm must arise from strong dispositions for these

[11] It a matter for further research to inquire how "Asian" a culture or political economy may be when all the structures of its functional jurisprudence are sourced in the West. Of course, the clever adaptive appropriation of these steps by the specific Asian nation returns the construct of "Asian-ness" back one more causal step – but infinite regress is not a fruitful social science insight. To be sure, there are unique aspects to Japanese jurisprudence – Suehiro's legacy, production control and its legal treatment, and provisional dispositions in case law.

[12] For further analysis of 'coodinated capitalism' at the level of comparative political economy, see (Streeck, W. & Yamamura, K. 2001;Yamamura, K. & Streeck, W. 2003).

practices within the specific management team and these must be sustained over a long period of time to be perceived as an enterprise norm. The legal ecology conditions offer functionally equivalent benchmarks for the successful adaptation of Japanese management practices to the U.S. (or potentially other) national settings.

Second, these are analytical models; they do not attempt to capture unethical or illegal behavioral propensities of managers (or employees) in any of the nations or firms studied. Nor do they address areas in the Japan case when just cause was ignored or an absence of employee participation oversight failed to restrain managerial risk propensities. Nevertheless, the values of trust and reciprocal transparency in information, power, and finances that are embedded in the Japanese, German, and Danish models would appear to reduce the propensity of managers to act in an illegal manner. In a word, Enron and the other recent executive scandals took place in the United States, not elsewhere; risky mortgage re-packing and marketing flowed from managerial prerogative unfettered by employee participatory oversight; the automobile executives who were publicly shamed to drive from Detroit to Washington, D.C. in their second attempt to seek public funds from the U.S. taxpayer were U.S. automobile executives, not Japanese auto executives, nor their fiscally sound (in contrast) U.S. transplant executives.

Third, the German enterprise ecology limits the upward potential of employee participation by carefully defined legislation. In contrast, the Japan case, by basing participation issues within negotiable collective bargaining agreements, shares no similar theoretical restriction on the potential for employee participation in the life of the enterprise.

Perhaps the most important observation to be made concerns the singularity of the U.S. legal ecology model. There was a period in the first Clinton administration when experimentation with Works Councils was formally discussed, even encouraged, by the then

chair of the National Labor Relations Board (NLRB) and, subsequently, in Presidential Commission known as The Dunlop Commission on the Future of Worker-Management Relations (Dunlop Commission 1994, Gould, 1984, 1993).[13] The Bush administration put an abrupt end to any momentum for even small scale experimentation in employee participation with NLRB oversight. This flexible approach is something Japan's then fledgling Central Labor Relations Commission quickly and completely sanctioned in 1946, some five decades earlier. Despite Rubenstein's 2006 despair, referred to earlier, a change in U.S. policy would appear to take nothing more than a determination to permit such experimentation by the National Labor Relations Board.

As explicit and comparative indicators of industrial democracy in the workplace, the legal employment ecology models document that the U.S. variant lags far behind both German (and now EU, thus also the U.K.) and Japanese counterparts. The proxy measures for industrial democracy, to be clear, are 'just cause' dismissal constraint on managerial prerogative and employee participation opportunities, whether legislated works councils and board co-determination (in the German case), the outcome of cooperative agreements between peak employer-employee associations (in Denmark), or the outcome of collective bargaining agreements (Japan). If equity in profit distribution is also a measure of industrial democracy, then it would seem obvious that the extreme levels of executive compensation in U.S. firms, compared to executives in the E.U. or Japan (for example), <u>are the causal outcome of the absence of employee participation</u> in the information, power, and resource distributions in the contemporary U.S. enterprise. A testable hypothesis is simple and any economist could gainfully explore this possibility.

[13] For a critique of the Dunlop Commission Final Report, see (Troy, L. 1995), who nevertheless noted the employee participation recommendations constituted the only "forward looking" items in the Report.

Supporting the notion of American exceptionalism, recent research suggests that long-term multinational enterprise success in the international business environment may increasingly due to the creation and sustenance of "idiosyncratic firm-specific capabilities that result from managers and skilled workers contributing to organizational problem-solving and growth over a considerable period of time" (Whitely, R. 2005a). In terms of international competitiveness, the remarkable postwar success of both German and Japanese employee participatory models, along with their continued competitive strength – particularly in value added manufacturing - makes it difficult to sustain claims that future economic and competitive success in the U.S. case necessarily depends upon the exceptional degree of managerial prerogative that has persisted to this day.

Indeed, any assertion that this exceptional level of American managerial prerogative is necessary to ensure U.S. competitive prowess in global markets must, instead, now justify such claims against the profound weight of the international economic and domestic auto industry crisis. As one example, we may consider Japan's postwar success in the automobile manufacturing sector – Toyota in particular - in contrast to the decades-long decline in General Motors, Ford, and Chrysler. Each of the major Japanese automobile manufacturers has active – sometimes quite contentious - management councils participation arrangements that have long operated within the national legal framework of 'just cause' employee security.

As the legal employment ecology modeling effort began in the context of field work in Japanese industrial relations, a few specialized comments may be appropriate before closing. The model is a way to characterize the Japanese firm – and Japanese management practices – in a manner empirically grounded in the historical principles of Suehiro jurisprudence. As Japanese unions are enterprise-based unions (企業別組合, kigyobetsu kumiai), and as just-cause norms,

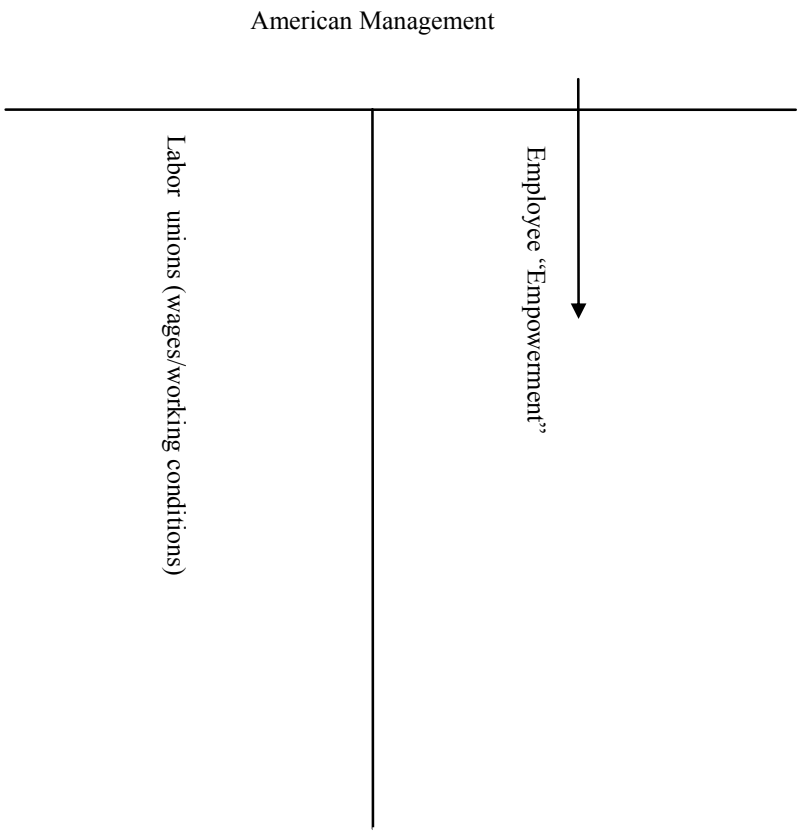
along with employee participation, are focused upon the success of a specific enterprise, the legal ecology analysis of such an enterprise appears to form an appropriate unit for social science research.

Furthermore, Japan's industrial relations literature suffers from two enduring English / Japanese translation difficulties. First, the phrase, "industrial relations" is understood in the English language to comprise three actors that constitute a system: employers, employees, and the government. In Japanese, industrial relations is translated as 労使関係 (rōshi kankei). The first Chinese character represents 'labor'. The second character stands for use of capital. The last two characters are 'relations'. The function of government, more specifically the role of law, is conspicuously absent from the term. All too often, it also appears to have been completely overlooked in the research literature. Second, the object of industrial relations studies, the "web of rules governing employment relations," simply does not translate well from English to Japanese. In contrast, the legal ecology of the Japanese enterprise offers parameters of analysis that are properly comparative and well-suited to social science research.

Kristensen observed, "capitalism may be seen as a truly formidable social innovation." (2005, p. 392). Yet, this innovation "was institutionalized in highly different ways in different countries, each with its particular composition of former status groups and relations and balances…" (p. 393). The Japan case demonstrates a successful effort at adaptive appropriation of foreign norms that facilitated national reconstruction and the elaboration of Japanese cultural propensities unto a new realm: that of the modern workplace.[14] As the 'civilizing process' continues, perhaps the role and function of employee job security and managerial participation will become notable benchmarks in the ecological analysis of the American modern enterprise.

[14] For a detailed study of the historical legal issues involved in Suehiro jurisprudence compared to Weimar era labor law scholar Hugo Sinzheimer (upon whom Suehiro relied), see Kettler, & Tackney, 1997.

Figure 1: The Legal Employment Ecology of the U.S. Enterprise



	Good, bad, or no reason: "at will", with federal, state and union restrictions.
Dismissal / Participation:	No (not since New Deal)

Figure 2: The Legal Employment Ecology of the German Enterprise

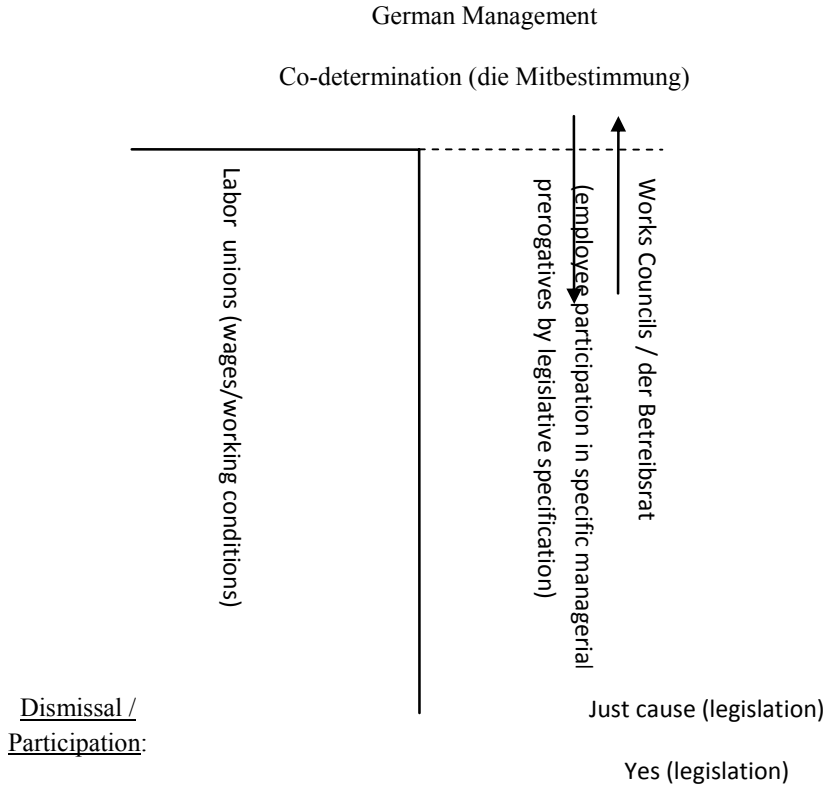
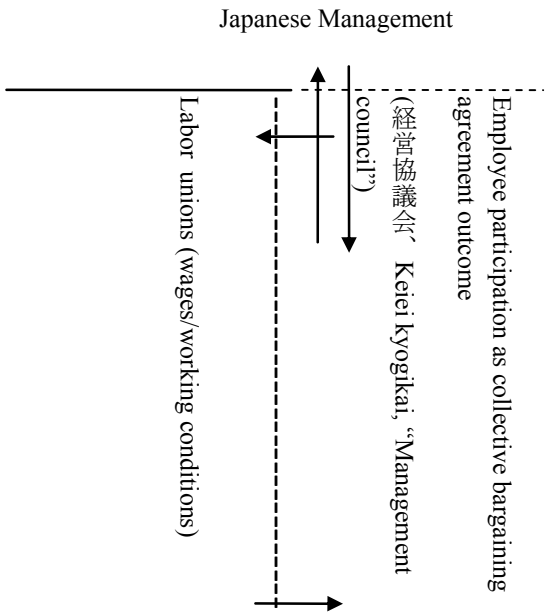
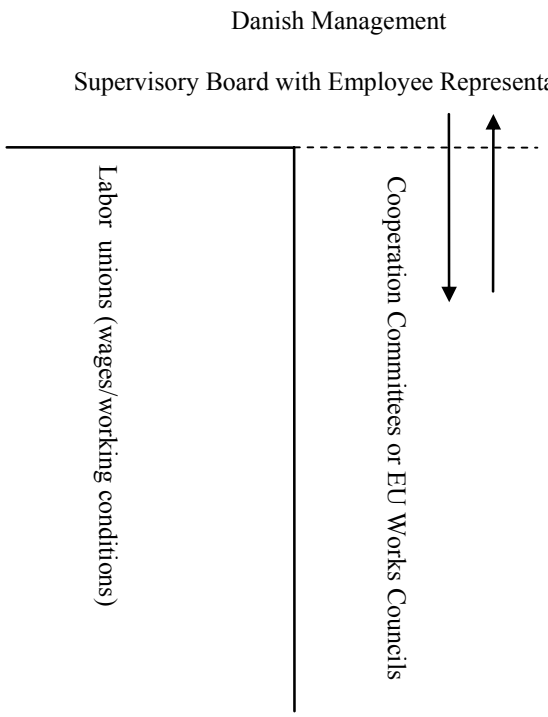


Figure 3: The Legal Employment Ecology of the Japanese Enterprise



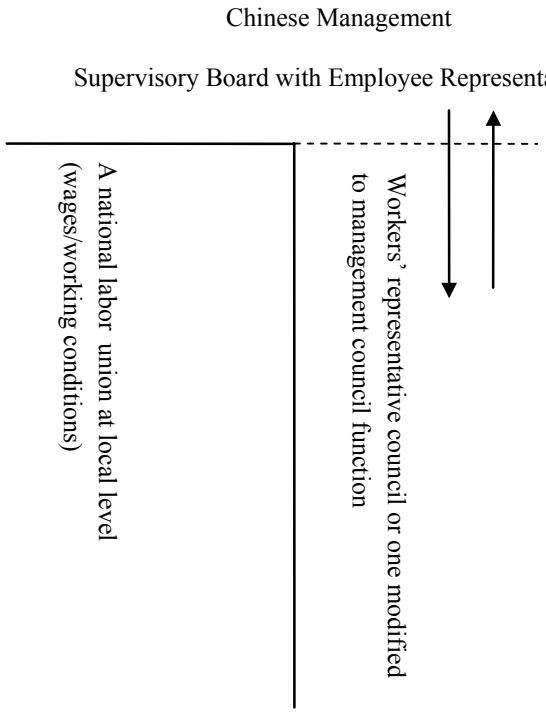
Dismissal / Participation:	Just cause (case law) Yes (firm-specific collective bargaining outcomes): "Management Councils"

Figure 4: The Legal Employment Ecology of the Danish Enterprise



Dismissal / Participation:	Just cause (statute and collective bargaining)
	Yes (cooperation committees or EU Works Councils)

Figure 5: The Legal Employment Ecology of the Chinese Enterprise (a provisional assessment)



Just cause (according to 2008 labor law)

Dismissal / Participation:

Yes (Supervisory Board for SOEs, otherwise functionally indeterminate to date)

Table 1: Employment Relation Characterizations by Type of Political Economy

Associated business system and firm characteristics / Employment relations	Arm's length	Dominant developmental	Business corporatist	Inclusive corporatist
Authority sharing with skilled staff	Varies between sectors and firm types	Generally limited	Some in larger firms	Considerable in most firms
Long-term employer/employee commitments	Low	Some for managerial staff, limited otherwise	Considerable in larger firms, limited elsewhere	Considerable in most firms

Whitely (2006), p. 205.

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