

NOTE

TAMING THE BEAST: CONFUCIANISM AS THE KEY TO REFORMING KOREA'S CHAEBOL SYSTEM FOR THE COMMON GOOD

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ABSTRACT

Since South Korea began its path toward industrialization after the Korean War, chaebol firms—conglomerates led by a single-family head, characterized by numerous affiliates and subsidiaries spanning several industries—have driven Korean economic development. Bolstered by support from the Korean government, these firms operated unchecked until the Asian Financial Crisis drew international attention on the inefficiencies and abuses of power that surrounded chaebol firms. Since the Crisis, the Korean government has endeavored to reform Korean corporate law and place greater checks on the chaebol leaders’ abuses of power. These attempts have been largely unsuccessful, however, because the Korean business and political elite use the rigid and ever-present influences of Confucianism to perpetuate unbalanced societal power structures and entrench their positions in Korean society. To achieve substantive change, rather than pushing back against Confucian ideals, policymakers must utilize traditional values to promote stricter corporate governance standards and urge managerial officers in companies to internalize these changes and encourage a similar shift in thought throughout their staff.

I. INTRODUCTION

South Korea today stands as a country at the forefront of technological innovation¹ and economic strength²—yet this status was not easily achieved and remains inhibited by the many inefficiencies that plague the Korean economic system. Under this

1. See, e.g., John McKenna, *South Korea and Sweden are the Most Innovative Countries in the World*, WORLD ECONOMIC FORUM (Feb. 6, 2018), <https://www.weforum.org/agenda/2018/02/south-korea-and-sweden-are-the-most-innovative-countries-in-the-world/> [https://perma.cc/QQ7A-6XV5] (noting that South Korean companies filed the most patents in 2017).

2. *Best Countries for Business 2018: South Korea*, FORBES (Dec. 2018), forbes.com/places/south-korea/ [https://perma.cc/DZ3H-KHK8] (identifying South Korea as the sixteenth best country for business in 2018).

veneer of success lies the chaebol system, a conglomerate-based corporate structure which serves as the foundation of Korea's economy.³ Despite having lost strength over the decades since the Asian Financial Crisis,⁴ it remains at the heart of the Korean economic system and serves to uplift certain families and social circles at the expense of the economic health of the nation as a whole.⁵ This Note explores how the chaebol system came into existence, how it has persisted despite reform efforts, and how it may be modified to limit its abuses and produce positive effects for Korean society. It argues that Korean customs must support any attempted statutory reform to create meaningful improvements in Korea's corporate governance system.

Part II introduces the history of South Korea's economic development, driven in large part by Japanese colonization and subsequent American influence. Part III describes the effect that traditional Korean culture has had on Korea's economic growth and in the development of Korean corporate law. While this culture can positively impact society, the chaebol families have historically exploited such culture to aggrandize and entrench themselves among Korea's political and economic elite. Korean culture should instead encourage concepts of sound corporate governance that conforms with the traditional Korean conception of the role of business and government. Part IV discusses the various factors that have contributed to or inhibited the reform of Korean corporate governance. Part V identifies some reform measures that policymakers have successfully implemented into Korean law—often only formally, while rarely implemented in practice. Part VI details the current status of the chaebol firms after the passage of these reform measures. Part VII recommends further

3. For further details, *see infra* Section II.B.

4. *See, e.g.*, Ellen J. Shin, *The International Monetary Fund: Is It the Right or Wrong Prescription for Korea?*, 22 *HASTINGS INT'L & COMP. L. REV.* 597 (1999) (discussing IMF-mandated reforms to Korean corporate governance that limit the power of the chaebol families); Craig Ehrlich & Dae-Seob Kang, *U.S. Style Corporate Governance in Korea's Largest Companies*, 18 *UCLA PAC. BASIN L.J.* 1 (2000) [hereinafter Ehrlich & Kang, *U.S. Style Corporate Governance*] (discussing measures that give Korean boards greater influence and independence from the chaebol families).

5. *See generally* Christopher Hale, *Addressing the Incentive for Expropriation Within Business Groups: The Case of the Korean Chaebol*, 30 *FORDHAM INT'L L.J.* 1 (2006) (discussing how chaebol firms can expropriate resources to the detriment of the conglomerate).

action that could streamline reform efforts, and potentially allow it to be more effective in practice.

II. HISTORY

A. *The Beginning of a Miracle*

In 1910, Japanese imperialism ended the centuries-old reign of the Choson Dynasty⁶ on the Korean peninsula.⁷ Japan's colonization eventually ended in 1945 with its surrender in World War II. However, the former colony's recovery could not begin until the end of the Korean War in 1953 after the conflict between the United States and Russia divided the nation into two opposing states.⁸ This left both North and South Korea destitute and scarred from decades of war. As an agrarian society in the pre-colonial period,⁹ and with most of the peninsula's natural resources locked away in North Korea,¹⁰ the newly-formed Republic of Korea lacked the commerce, infrastructure, and resources to begin industrialization.¹¹

With the aid of the United States and under the military dictatorship of Park Chung Hee, Korea began efforts toward modernization in the 1960s.¹² From its inception, Park's government was actively involved in the economic vitalization of

6. See Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEX. INT'L L.J. 1, 15 (2016) [hereinafter Ma & Marquis, *Business Culture*].

7. See Robert J. Rhee, *The Political Economy of Corporate Law and Governance: American and Korean Rules under Different Endogenous Conditions and Forms of Capitalism*, 55 WAKE FOREST L. REV. 649, 659 (2020).

8. See *id.*

9. See Mel Marquis & Jingyuan Ma, *Confucian Bureaucracy and the Administrative Enforcement of Competition Law in East Asia*, 43 N.C.J. INT'L L. 1, 30 (2018).

10. The majority of mineral deposits on the Korean peninsula—including iron ore and coal, upon which many newly industrializing countries rely for energy production—are located in North Korea and completely inaccessible to South Korea. Bae-ho Hahn, *North Korea*, ENCYC. BRITANNICA: GEOGRAPHY & TRAVEL, <https://www.britannica.com/place/North-Korea/Resources-and-power> [<https://perma.cc/K7DU-BHEX>] (last visited Dec. 14, 2020). South Korea, in contrast, is relatively poor in such resources, and in modern day is forced to import 99.3 percent of its metals. *New Solution to South Korea's Natural Resources Scarcity*, CURTIN UNIV. (Sept. 13, 2017), <https://news.curtin.edu.au/stories/new-solution-south-koreas-natural-resources-scarcity/> [<https://perma.cc/QQV7-EER6>].

11. See Rhee, *supra* note 7, at 659.

12. See *id.*

the country. With an eye toward “export-oriented growth”¹³ in “heavy and chemical industries,”¹⁴ the government selectively supported certain entrepreneurs through preferential loans and government-controlled bank financing.¹⁵ This strategy marked the birth of what is now often referred to as the “Miracle on the Han River”—a period of rapid economic growth spanning from the 1960s until the late 1990s.¹⁶ This period heralded South Korea’s transformation from an impoverished, war-torn nation into what is today the twelfth-largest economy in the world.¹⁷ Because of this incredible growth, the public grew accustomed to accepting the government’s economic strategies. The success of this model also allowed policymakers to maintain their authority and legitimacy among the Korean people well into the late 1990s and the twenty-first century.¹⁸

B. The Rise of the Chaebol

The Korean government’s economic plan during this period centered on close involvement with family-owned firms. This “entrepreneurial bureaucracy,” a system of quid pro quo cooperation between companies and politicians, facilitated Korea’s economic surge from the 1960s through the 1980s.¹⁹ As particular family-run firms began to show signs of success,²⁰ the government

13. Shin, *supra* note 4, at 602.

14. Bernard Black et al., Financial and Corporate Restructuring Assistance Project, *Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness – Final Report and Legal Reform Recommendations to the Ministry of Justice of the Republic of Korea*, 26 J. CORP. L. 537, 551 (2000).

15. See Boong-Kyu Lee, *Don Quixote or Robin Hood?: Minority Shareholder Rights and Corporate Governance in Korea*, 15 COLUM. J. ASIAN L. 345, 349 (2002).

16. See Sang Beck Kim, *Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea’s Anti-Corruption Efforts*, 36 NW. J. INT’L L. & BUS. 235, 239 (2016) [hereinafter Kim, *Dangling the Carrot*].

17. *The Top 20 Economies in the World*, INVESTOPEDIA (Mar. 18, 2020), <https://www.investopedia.com/insights/worlds-top-economies/> [https://perma.cc/5EZQ-EKJJ].

18. See Marquis & Ma, *supra* note 9, at 42-44.

19. See *id.* at 43 (quoting Yong Hyo Cho & Young Sup Kim, *The Cultural Roots of Entrepreneurial Bureaucracy: The Case of Korea*, 16 PUB. ADMIN. Q. 509, 509 (1993)).

20. See Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT’L L. 195, 211 (2004) (“[T]he initial wealth of the chaebols originated from the government sale of properties owned by Japanese colonizers and of other resources to their founding families.”).

stepped in and directed their growth through favorable loans.²¹ During Park's reign, the state controlled the banks and ordered them to provide these favored families with low-interest rate loans.²² Even after Park's assassination in 1979,²³ the subsequent democratization of the country in 1987,²⁴ and the privatization of banks, the government continued to encourage inexpensive loans and the banks continued to comply, in part due to the widespread belief that the government would rescue and support any failing firms.²⁵

These firms, known as the "chaebol" (meaning "financial house"), became large conglomerates of related companies spanning a broad range of industries. Chaebol firms are highly centralized and autocratic, revolving around their respective founders and families.²⁶ While they are privately owned, they remain directly connected to the state; in exchange for "preferential policy loans, tax credits, subsidies ... and even bailouts when they got into financial trouble,"²⁷ chaebol firms followed the government's instructions on industry expansion²⁸ and offered political support in the form of bribes.²⁹

C. *The Chaebol's Role in the Asian Financial Crisis*

As chaebol firms grew, so too did the belief that they had become too big to fail. These firms were certain that the government would step in should their financial positions become overly precarious, and so they engaged in highly risky, profit-oriented behavior.³⁰ Their financial structures were based on large

21. See *id.* at 209-10.

22. See Ok-Rial Song, *The Legacy of Controlling Minority Structure: A Kaleidoscope of Corporate Governance Reform in Korean Chaebol*, 34 *LAW & POL'Y INT'L BUS.* 183, 190 (2002).

23. See Rhee, *supra* note 7, at 659.

24. See Licht, *supra* note 20, at 210.

25. See Joongi Kim, *A Forensic Study of Daewoo's Corporate Governance: Does Responsibility for the Meltdown Solely Lie with the Chaebol and Korea?*, 28 *NW. J. INT'L L. & BUS.* 273, 286 (2008) [hereinafter Kim, *Daewoo*].

26. Black et al., *supra* note 14, at 551.

27. Kim, *Daewoo*, *supra* note 25, at 284.

28. See, e.g., Shin, *supra* note 4, at 602 ("[I]n the 1970s, the government ordered Daewoo, a chaebol specializing in textiles, to enter the automotive industry").

29. See, e.g., *id.* (providing examples of rampant bribery of politicians by heads of chaebol firms).

30. See Kim, *Daewoo*, *supra* note 25, at 279.

amounts of debt, rather than equity,³¹ and they had little regard for widely accepted corporate governance systems like accounting and financial discipline.³²

In the 1970s, recognizing the growing dangers of the chaebol firms, the government began its largely toothless attempts to curb the control of chaebol founders by forcing the firms to list on stock exchanges, thereby diluting their ownership stakes.³³ Because of the symbiotic relationship between the firms and bureaucrats, however, the government also protected the founders from ownership threats by limiting investors' ability to acquire control, and thereby also limiting their ability to influence the board of directors and management.³⁴ Thus even while the chaebol families' shares were gradually diluted into minority interests, they maintained control.

In the 1980s, the government continued its efforts by preventing cross-held shares³⁵ from exercising voting rights and prohibiting majority cross-shareholding in another effort to curb founders' control.³⁶ In response, chaebol firms began creating affiliate companies with circular cross-ownership networks amenable to political influence.³⁷ Flagship firms—including Daewoo and SK Telecom,³⁸ which remain household names today—and their affiliates became so entangled in these complex networks that it became nearly impossible to discern the extent to which these various firms were connected or which founder sat at

31. See Rhee, *supra* note 7, at 660-61. See also Kim, *Daewoo*, *supra* note 25, at 280 (“[Daewoo’s] debt gearing in 1998 was allegedly as high as 2,000% or greater.”).

32. See Kim, *Daewoo*, *supra* note 25, at 285.

33. See *id.*

34. This was accomplished by capping any investor’s ownership stake (other than the initial owner’s) at ten percent. See Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol’s Corporate Governance*, 14 *CARDOZO J. INT’L L & COMP. L.* 21, 43 (2006).

35. Crossholding occurs when one publicly traded company owns shares in its parent, subsidiary, or affiliate. This structure can cause abuses in shareholder votes and inaccurate valuation of a company’s security. See Will Kenton, *Cross Holding*, *INVESTOPEDIA* (Jan. 29, 2021), <https://www.investopedia.com/terms/c/cross-holding.asp> [<https://perma.cc/MS9N-88UV>].

36. See Song, *supra* note 22, at 198-99.

37. See Ma & Marquis, *Business Culture*, *supra* note 6, at 21-27, 30. Direct lending involves exchanging funds between related affiliates within a conglomerate, whereas bank lending involves the loaning of funds from institutional lenders.

38. For discussion on these firms, see *infra* Section II.C and Section IV.B.

the helm.³⁹ Sometimes called an “octopus management”⁴⁰ structure, affiliate “tentacles” stretched across industries and surrounded the large chaebol “head.” Thus, chaebol firms were able to circumvent the cross-ownership voting restrictions, as it was impossible to determine which tentacles belonged to which head.

Chaebol firms used these affiliate companies to access capital at favorable terms⁴¹ and prop up the head or other affiliates via direct lending.⁴² Through these related-party transactions, stronger affiliates could support weaker ones and conceal financial instability. Further, because the conglomerate existed in a web of internal debt or payment guarantees, the collapse of one affiliate had the potential to cause the cascading failures of others—and perhaps even the entire conglomerate.⁴³ Thus, even as chaebol firms experienced low profitability due to rapid and ill-planned expansion, they continued to perpetuate an image of stability which, if not particularly convincing, was sufficient to give banks plausible deniability as they continued issuing inexpensive loans.

The affiliates also served to further dilute the shares of the controlling families, which retained control while increasing the proportion of the affiliates’ equity stakes. This dilution allowed the influence of the founders to remain minimal on paper as they retained control of the conglomerate and effectively silenced the voices of other minority investors.⁴⁴ In one of the most glaring examples of this structure, before its bankruptcy in 1999,⁴⁵ the founding family of the Daewoo conglomerate held only .04 percent of the shares of a subsidiary, Daewoo Motors, yet controlled 94.5 percent of Daewoo Motors’ shares through ownership stakes by other cross-held firms.⁴⁶ This stark divide between ownership

39. For a detailed explanation on the shareholding structure, *see generally* Song, *supra* note 22.

40. Julia Tonkovich, *Changes in South Korea’s Legal Landscape: The Hermit Kingdom Broadens Access for International Law Firms*, 32 L. & POL’Y INT’L BUS. 571, 573 (2001).

41. *See* Hale, *supra* note 5, at 13.

42. *See* Song, *supra* note 22, at 205.

43. For a detailed explanation of this relationship, *see* Kim, *Daewoo*, *supra* note 25, at 287-96.

44. *See, e.g.*, Hale, *supra* note 5. In 2006, the “typical dominant family [held] less than 10% of the chaebol’s stock . . . [while] effectively retain[ing] control over all subsidiaries.” Seo, *supra* note 34, at 32.

45. *See* Kim, *Daewoo*, *supra* note 25, at 292.

46. Hale, *supra* note 5, at 36.

stake and control rights allowed the founder families to externalize the risks of their enterprises onto outside shareholders while retaining the benefits for themselves.⁴⁷

As industrialization continued through the 1960s and 1970s, Korea's domestic savings could no longer keep up with the rampant borrowing of the chaebol firms.⁴⁸ In the spirit of nationalism and rather than allow direct foreign investing, the government facilitated the entry of foreign loans guaranteed by state-owned banks.⁴⁹ Not long after, foreign investors began noticing the severe structural issues of the conglomerates and the failure of the government to control them and rapidly withdrew from the Korean market.⁵⁰

As the exchange rate fell throughout Asia and Korea's reserves continued to deplete, the value of the Won⁵¹ crashed and the Asian Financial Crisis devastated the South Korean economy. The chaebols' low profits left them unable to repay their loans to the banks, which in turn were unable to repay their foreign debts.⁵² The cascading failures throughout the conglomerates came to light.

D. Other Aggravating Factors

While the inefficiencies of the chaebol system certainly contributed greatly to Korea's devastating experience in the Asian Financial Crisis, they were not the sole cause. Korean banks, financial regulators, the judicial system, and public guardians also neglected their monitoring roles over the chaebol firms. These system-wide failures worked in concert to place South Korea on precarious footing leading up to the Crisis.

47. See Seo, *supra* note 34, at 54.

48. See Abeer Khandker, *Why is the South Korean Growth Experience Different? An Analysis of the Differences Per Capita GDP between South Korea and South Asian Countries*, 49 *ECON. CHANGE RESTRUCTURING* 41, 44 (2016).

49. See Licht, *supra* note 23, at 209.

50. See Hwa-Jin Kim, *Living with the IMF: A New Approach to Corporate Governance and Regulation of Financial Institutions in Korea*, 17 *BERKELEY J. INT'L L.* 61, 65 (1999) [hereinafter Kim, *Living with the IMF*]. This lack of trust in Korean firms continues to this day, as evidenced by the "Korea discount." See *infra* Section VI.C.

51. The Won is Korea's national currency. See Jason Fernando, *Korean Won (KRW)*, *INVESTOPEDIA* (Feb. 11, 2021), <https://www.investopedia.com/terms/forex/k/krw-korean-won.asp> [https://perma.cc/A9NW-6YJB].

52. Black et al., *supra* note 14, at 553.

1. Banks

Korean banks operated under the assumption that the government would continuously prop up chaebol firms and helped fund these firms through frequent preferential loans, even as the corporate debt-to-equity ratio⁵³ of the firms reached up to 500 percent.⁵⁴ The banks did not engage in any sound corporate governance practices—such as requiring transparent accounting or monitoring borrower firms by placing representatives on their boards—and instead simply followed the directions of policymakers, who desired unfettered funding to chaebol firms to pursue government-led initiatives.⁵⁵ Ultimately, the banks failed to serve the monitoring role often associated with banks in American governance and exacerbated the effects of the crisis.

2. Financial Regulators

Korean financial regulators were similarly derelict in their monitoring duties. They failed to establish compliance regulations that would ensure transparency and accountability in firms or bring their concerns to the government. One agency, the Korean Fair Trade Commission, flagged the instability of the chaebol firms, but could not garner enough political support to monitor the firms and control their reckless expansion.⁵⁶

3. The Judicial System

Even if financial regulators had pursued legal action against firms with poor corporate governance, there likely would have been little resulting enforcement as the Korean judiciary was still inexperienced and largely ineffective. Several forces maintained a “tacit policy of soft enforcement”⁵⁷ and kept the judicial system from pursuing real action against wrongdoers. These forces

53. Generally, a high debt-to-equity ratio signals higher risk to investors because it indicates that a company is financed largely through borrowing. See Jean Folger, *What Is Considered a High Debt-to-Equity Ratio*, INVESTOPEDIA (May 1, 2020), <https://www.investopedia.com/ask/answers/063014/what-considered-high-debttoequity-ratio-and-what-does-it-say-about-company.asp> [https://perma.cc/V5VZ-MM39].

54. Kim, *Daewoo*, *supra* note 25, at 309.

55. *See id.* at 308-09.

56. *See id.* at 329.

57. *Id.* at 333.

included Korea's culture of leniency, the need for economic expansion, inexperienced legal officers, and political pressures exerted on judges. Additionally, many members of the judiciary feared ruining the reputations of the chaebol founders through punishment; even in the 1990s, as chaebol performance grew increasingly risky,⁵⁸ the nation still viewed the founders as an overall benefit to the economy and there was a deep reluctance to hamper this newfound economic growth.⁵⁹

4. Gatekeepers and Other Public Guardians

Finally, other public sector guardians meant to curb chaebol firms' influence failed to take proper action. External auditors, intended to ensure transparency and responsibility in the firms' spending, neither possessed nor enforced the necessary legal might to act as a check on founder families. Like the banks, these auditors believed the government would serve as a safety net for the firms; additionally, the auditors depended on the chaebol firms for business, prompting them to overlook any accounting violations they found.⁶⁰

Credit agencies and securities analysts simply disregarded the firms' failures even until 1998 and 1999—well after the Asian Financial Crisis had revealed the untenability of the chaebol system—likely due to their interest in Korea's unfettered economic growth.⁶¹ Similarly, the Korean media published little about the dangers of the system. There existed a purposeful ignorance among investigative journalists, fueled by a combination of concerns for the reputations of the chaebol firms as well as undue influence from the firms themselves,⁶² as many newspapers were owned by affiliates of the chaebol families.⁶³

58. *See generally id.*

59. *See id.* at 333-39.

60. *See id.* at 316-20.

61. *See id.* at 320-25.

62. Black et al., *supra* note 14, at 552.

63. *See Kim, Daewoo, supra* note 25, at 336.

III. THE OMNIPRESENT IMPACT OF KOREAN CULTURE AND ITS DETERMINANTS

Culture is present at all levels of society and is ingrained in social values, customs, and ways of thought—and by extension, the way a society undertakes and regulates business.⁶⁴ As such, an understanding of the culture in which the various reforms and regulations were implemented in South Korea in the wake of the Asian Financial Crisis is essential to an analysis of these reforms. This culture has historically shaped Korean corporate governance and the application of rules post-Asian Financial Crisis. This Part explores how Confucianism, an ancient Chinese system of thought and behavior, informs Korean culture, and how it has encouraged corruption among chaebol firms and passivity among the general Korean public.

A. Confucianism

Confucianism, a philosophy dictating the ideal social structure and ethics,⁶⁵ rests at the core of Korean culture. As the most ethnically homogenous country in the world, Korean culture remains traditional and pervasive throughout all levels of Korean society and Confucianism is thought to influence it more deeply than it does any other culture in the world.⁶⁶ Scholars imported Confucianism to Korea from China and it was the prevailing school of thought during the Choson Dynasty, which lasted from 1392 until Korea's colonization—over 500 years of entrenchment. The social structure it contemplates was developed around a paternalistic, hierarchical model, where the needs of the community superseded the needs of any individual and elites were expected to care for and be respected by the masses as a composite father figure.⁶⁷ Emphasizing collectivism, the individual's part in society was to follow "proper rituals" and pursue harmony in his

64. See Ma & Marquis, *Business Culture*, *supra* note 6, at 3-6; see also Licht, *supra* note 20, at 226 ("Accounting is a social activity. It rests on continual judgments and decision making. In certain cases, accounting may involve ethical issues (especially in auditing activities). International accounting scholars agree that culture is a major factor among those that affect national account systems, including rules, practices, and institutions.").

65. See Judith A. Berling, *Confucianism*, ASIA SOCIETY, <https://asiasociety.org/education/confucianism> [<https://perma.cc/8TEY-U9KF>].

66. See Licht, *supra* note 20, at 215.

67. See Licht, *supra* note 20, at 215, 219-20.

private actions.⁶⁸ These ideals were gradually embedded into all of Korean society, “dominating the ideological system ... and affect[ing] the country’s politics, economy, culture, and education.”⁶⁹

1. Education

Confucian values were perpetuated and strengthened by Korea’s civil service examination system, through which scholars—usually from upper-class families—became elite bureaucrats based on performance on one annual test.⁷⁰ Success on the exam was based on the scholar’s knowledge and acceptance of Confucian teachings. Thus, civil servants tended to come from the same educational and social backgrounds and espoused similar ideals.⁷¹ Although this exam no longer exists in an identical form today, the Korean education system continues to evince a similar reliance on test scores⁷² and rote memorization⁷³ that characterized the Choson Dynasty.

2. Social Ties

The traditional Confucian view of the family does not end at the nuclear family unit, or even at the extended family. Instead, Koreans view the family as extending to one’s entire clan,⁷⁴ as well as to social groups such as hometowns and school classes (from elementary school through college).⁷⁵ These ties demarcate insiders and outsiders and act as the foundations of trust between Korean individuals.⁷⁶ They are often used as justifications for the exchange of favors, to facilitate the sharing of valuable information,

68. Ma & Marquis, *Business Culture*, *supra* note 6, at 9.

69. *See id.* at 15.

70. *See* Marquis & Ma, *supra* note 9, at 16-19, 30.

71. *See id.*

72. *See id.* at 57.

73. *See* Jingyuan Ma & Mel Marquis, *Corporate Culture and Competition Compliance in East Asia*, 15 S.C.J. INT’L L. & BUS. 1, 91 (2018) [hereinafter Ma & Marquis, *Corporate Culture*].

74. This concept reaches beyond the simple extended family, which would include aunts, uncles, and cousins, to encompass the far-reaching family tree—for example including cousins several times removed. *See* Licht, *supra* note 20, at 224.

75. *See* Ma & Marquis, *Corporate Culture*, *supra* note 73, at 49-75 (identifying this concept as “yongo”); Kim, *Daewoo*, *supra* note 25, at 305 (“[H]igh school ties constitute a powerful bond that often forms the basis of a lifelong, vertical social relationship.”).

76. *See* Ma & Marquis, *Corporate Culture*, *supra* note 73, at 49-50.

and to obtain career positions and advancements.⁷⁷ The relationships within these groups are strictly hierarchical, based on seniority in class, age, or social status,⁷⁸ and span across all sectors, from the media, to business communities, politics, and academia.

3. Government

Confucian thought also shapes the Korean view on the government's role in society and in the economy. The government's participation is seen as "not only necessary, but desirable for the development of a market economy."⁷⁹ Political leaders are expected to act wisely and benevolently for the benefit of the entire country, much like a father is expected to act for the benefit of his family in Confucian tradition.⁸⁰ In an ideal Confucian society, these leaders would recognize the gravity of their power and influence and wield it responsibly and morally for the advancement of the whole community.

This perspective shapes how legislators approach competition law; they consider it a tool through which the government can pursue a particular economic plan in collaboration with industries. They rely on business leaders for advice and hold regular consultation meetings. Although the government remains the head of much of the economic agenda, business groups can influence compliance law and resultant compromises are frequent.⁸¹ Additionally, because many of these business representatives and government policymakers come from a pool of individuals cultivated in the same Confucian education and testing system, they often have little diversity of experience or background, creating a homogenous groupthink focused on singular interests.⁸²

Confucianism remains similarly prevalent in the enforcement of law. It teaches that, through proper moral education, individuals will follow laws simply because doing so is virtuous.⁸³ The role of

77. *See id.*

78. *See id.* at 50.

79. Marquis & Ma, *supra* note 9, at 48 (internal quotations omitted).

80. *See* Ma & Marquis, *Corporate Culture*, *supra* note 73, at 42-44.

81. *See* Marquis & Ma, *supra* note 9, at 52.

82. *See id.*

83. *See id.* at 7-11.

punishments via legal rules was seen more as a deterrent and less important in application, and litigation—bringing private disputes into the public eye—was seen as particularly immoral and shameful. As such, Confucian-educated judges discouraged litigation, which would draw attention to scandals and damage the reputations of the firms involved; they instead encouraged private resolution through mediation.⁸⁴

4. Business

Together with the need for economic growth and Korea's strong nationalism,⁸⁵ the Confucian tradition was both the cultural and ideological base for the country's economic development in the 1960s and 1970s. The idea and language of the family were extended to the business world, applying to relationships both within companies as well as between firms.⁸⁶ These ideals entrenched traditional power structures and impeded the efficacy of corporate governance reform.

A conglomerate consisting of a chaebol firm and its affiliates is operated based on a model of paternalistic leadership. Business meetings are dominated by senior managers, who often come from the same social circles and backgrounds, while junior managers often have few opportunities to offer suggestions or new ideas.⁸⁷ The family ownership structure of the firm results in upper-level positions often being filled by the chaebol founder's family members,⁸⁸ rather than outsiders who may potentially be more qualified or offer innovative ideas born of diverse backgrounds. As a result of this hiring mechanism, family firms are rife with performance issues and internal power struggles, evidenced by their high CEO turnover rate (which is three times higher than that of non-family firms).⁸⁹

84. *See id.* at 10.

85. *See infra* Section III.C.

86. *See* Ma & Marquis, *Corporate Culture*, *supra* note 73, at 34-35 (“[E]xpressions such as parent company and daughter company are also found in many other parts of the world, but there may be somewhat deeper psychological associations in countries where . . . the company often assumes a family-like role.”).

87. *See id.* at 43-44.

88. *See id.*

89. *Id.* at 47.

This ownership structure, combined with the government's perception of its role in corporate governance, militates against the enforcement of governance laws imported from other countries⁹⁰—namely, the United States, Japan, and Germany.⁹¹ Although Korean statutes might be geared toward monitoring and compliance, the application of the laws reflects the network of interdependent relationships between the business and political worlds.⁹² Korea's collectivist culture encourages harmony and private resolution while discouraging outspoken criticism or harsh enforcement.⁹³ The homogenous backgrounds of political and business leaders exacerbate this problem, as they are connected through loyalty ties based on their hometowns or extended families.⁹⁴ Rather than attempting to mitigate any potential bias or self-dealing that might arise as a result of these ties, business leaders instead seek to strengthen them, for example, by appointing retired government officials to their boards.⁹⁵

Within both Korean management cohorts and boards, Confucian culture stands in contrast with Western models of corporate governance because the idea of the corporation as a distinct entity or shareholders' primacy does not exist in Korean tradition. Rather than owing duties to the corporation or to shareholders, managers instead feel they owe duties to the founder families who placed them in their positions.⁹⁶ “

When controlling persons⁹⁷ dominate and one's career depends on patronage, the abstractions of the corporation as

90. See Ma & Marquis, *Business Culture*, *supra* note 6, at 5 (“[M]ost East Asian countries have in recent years promulgated or amended their competition laws under the influence of the U.S. or . . . the EU competition model.”).

91. See Licht, *supra* note 20, at 212 (identifying Germany as an influence insofar as Korea imported Japanese corporate law, which was based on German corporate law).

92. For example, directors that are technically independent by statutory standards still possess a great deal of loyalty to firm chairmen and to the maintenance of the status quo. See Licht, *supra* note 20, at 223.

93. See Ma & Marquis, *Corporate Culture*, *supra* note 73, at 38.

94. See *supra* Section III.A.2.

95. See Ma & Marquis, *Business Culture*, *supra* note 6, at 31; Kim, *Daewoo*, *supra* note 25, at 303-04.

96. See Rhee, *supra* note 7, at 702.

97. Here, referring to chaebol founders and other high-ranking members of their social circles.

a separate and distinct entity and the aggregate interest of all unaffiliated shareholders are merely textbook concepts.⁹⁸

This loyalty, stemming from the small and closely-knit social and professional circles in the upper echelons of Korean society, may be most prevalent among older Koreans, who populate C-suites and other senior positions in businesses.

B. Corruption

Given the elite, interconnected networks that make up Korean society, it may come as no surprise that Korea's political and business systems are rife with corruption.⁹⁹ This problem can be attributed to the combination of Confucian ideals, which encouraged social cohesion through gift-giving, and the government's strategy of economic growth after the Korean War.¹⁰⁰ As the government facilitated the interdependencies between policymakers, banks, and chaebol firms, it also encouraged bribery as a byproduct.¹⁰¹ "The system that produced Korea's economic development eroded its own base."¹⁰²

Because most instances of corruption are never reported in the first place,¹⁰³ it is difficult to implement effective statutory measures to combat them. Confucian traditions of loyalty and the dependence on one's social network for career advancements make it extremely costly for potential whistleblowers to come forward.¹⁰⁴ Whistleblowing is considered "morally repugnant" given the importance of group loyalty,¹⁰⁵ and it is understandably challenging to ask whistleblowers to report the very individuals upon whom they rely for promotions. Instead, bribery and fraudulent accounting are simply accepted as characteristics of the

98. See Rhee, *supra* note 7, at 703-04.

99. See Craig P. Ehrlich & Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 1 (2002) [hereinafter Ehrlich & Kang, *Independence and Corruption*].

100. Andy Spalding, *South Korea: An Anti-Corruption Tiger*, FCPA BLOG (Feb. 18, 2018, 12:28 PM), <https://fcpablog.com/2018/02/16/south-korea-an-anti-corruption-tiger/> [[https://perma.cc/69PD-77\[X\]](https://perma.cc/69PD-77[X])]; Kim, *Dangling the Carrot*, *supra* note 16, at 239-42.

101. Ehrlich & Kang, *Independence and Corruption*, *supra* note 99, at 3.

102. See *id.*

103. See *id.* at 5-6.

104. See *id.* at 44.

105. Kim, *Dangling the Carrot*, *supra* note 16, at 251.

Korean business culture.¹⁰⁶ Even as laws are developed to encourage whistleblowing and institute strict penalties for participation in bribery,¹⁰⁷ there remains little substantive change. “Law cannot change a culture.”¹⁰⁸

In Korea’s short democratic history, four Presidents have been involved in public corruption scandals involving bribery by leading chaebol firms.¹⁰⁹ These high-profile cases of corruption have not, however, changed the traditional idea of civil servants as champions of the people and of the moral good. In fact, they may have even further entrenched the idea that such personnel should be educated in Confucian values and traditions,¹¹⁰ so as to preempt such immoral behavior.

C. Public Support for Chaebol Firms

Historically, Korean countrymen were expected to simply respect the decisions of the bureaucratic elite and the monarch and accepted their role as the caretakers of the general welfare as a part of the Confucian social structure.¹¹¹ Although the country has modernized considerably throughout the past decades, this culture of trust remains embedded in its centuries-long history.¹¹² As a result, Korean society has not accepted the ideas of enforcement through private litigation and of the corporation as a legal personhood that can have interests adverse to the general public.

General acceptance of the chaebol structure also stems in large part from Korean nationalism. Koreans have long held a powerful sense of nationalistic pride, bolstered by their country’s historic struggles as a small nation trapped between two large powers (China and Japan) and the suppression of Korean culture

106. See Ehrlich & Kang, *Independence and Corruption*, *supra* note 99, at 19 (“Any investor or banker who cared to know could have asked a CPA and been told that there was a tendency to accept white lies as a normal business practice.” (internal quotations omitted)).

107. See *infra* Section V.A.

108. *Id.* at 5.

109. See Shin, *supra* note 4, at 603-02 (listing Chun Doo Hwan and Roh Tae Woo); see also Rhee, *supra* note 7, at 667 (listing Lee Myun-Bak and Park Geun-Hye).

110. See Marquis & Ma, *supra* note 9, at 41.

111. See *id.* at 11-14.

112. See *supra* Section III.A.

during the Japanese occupation.¹¹³ It is based not only in anti-imperialist sentiments,¹¹⁴ but also in the shared conception of Korean ethnicity.¹¹⁵ This sentiment has continued into modern day; South Koreans, for example, are known for the passionate support of their national athletes.¹¹⁶ This nationalism may be causing the reluctance to implement legislation that might provide foreign investors the opportunity to pursue takeovers of Korean flagship firms. To Korean citizens, a firm run by a Korean, even if corrupt or inefficient, may be preferable to a foreigner-run efficient firm.¹¹⁷ Thus, as a combined result of Confucian values and persisting nationalism, many Koreans view the chaebol firms as beneficial to the continued growth of the country, or at least find them less objectionable than the alternative of foreign ownership.¹¹⁸

IV. DRIVERS OF AND ROADBLOCKS TO REFORM

There have long been efforts to reform corporate governance in South Korea, driven by a combination of foreign influence and domestic activism. While many of these efforts have resulted in some change, the convergence on foreign (namely, American) standards has been largely formalistic. Due to the continued influences of Korean culture, the government, firms, and citizens

113. See Erin Blakemore, *How Japan Took Control of Korea*, HISTORY (July 28, 2020), <https://www.history.com/news/japan-colonization-korea> [https://perma.cc/NTZ7-JHSF].

114. See Gi-Wook Shin & Paul Yunsik Chang, *The Politics of Nationalism in U.S.-Korean Relations*, 28 ASIAN PERSPECTIVE 119, 121-22 (“Of great[] urgency was establishing the Korean nation as a distinctive unit, safeguarding its sovereignty and promoting national spirit and consciousness.”).

115. See *id.* at 121 (“[T]he Korean word, *minjok*, while most widely used for ‘nation,’ can easily refer to ‘ethnicity’ and ‘race’ as well.”).

116. Monica Kim, *The Everyday Psychology of Nationalism*, ATLANTIC (Mar. 4, 2014), <https://www.theatlantic.com/health/archive/2014/03/the-everyday-psychology-of-nationalism/284188/> [https://perma.cc/U6BD-8RB2].

117. See Hale, *supra* note 5, at 40-41 (“Considering the inroads that foreign hedge funds have made in recent years . . . it is highly likely that the Korean public as a whole does not want to see their flagship firms taken over by foreigners, regardless of the personal views they hold on chaebol governance.”).

118. See Rhee, *supra* note 7, at 694 (“This set of private and public voting blocks[, meaning the chaebol shareholders and the National Pension Service, Korea’s public pension plan,] must be seen as a significant benefit among a consensus of Korean elites and, implicitly, even the general populace in a country that has a strong national identity and a collective sense of shared interest in the national economy.”).

remain unwilling to embrace these reforms in order to create substantive change.

A. *Foreign Influence*

Foreign dissatisfaction has driven much of the corporate governance reform in Korea. The greatest push came from the International Monetary Fund (“IMF”) after it bailed out South Korea in the wake of the Asian Financial Crisis.¹¹⁹ Foreign stock markets have also made an impact on the internal governance of cross-listed Korean firms, as the foreign exchanges on which they are listed forced the firms to adhere to their (often much stricter) regulations.¹²⁰

1. Regulatory Reform

Reform in South Korea has generally proceeded through the importation of American corporate governance principles,¹²¹ like fiduciary duties,¹²² into the Korean Commercial Code (“KCC”). Koreans have also taken inspiration from Japan (and thereby from Germany) in the original creation of the KCC,¹²³ as well as from the Organisation for Economic Co-operation and Development and from the IMF “best practices.”¹²⁴ These changes were likely motivated in part by the government’s understanding that the adoption of internationally recognized governance codes would signal to other countries that South Korea had “good corporate governance,”¹²⁵ thereby making Korean firms more attractive to foreign investors and more competitive on foreign stock exchanges.

While Korea reformed its statutes, it neglected¹²⁶ to implement those laws.¹²⁷ The reforms did not change the

119. See Shin, *supra* note 4, at 604-07.

120. See Licht, *supra* note 20, at 199.

121. See Song, *supra* note 22, at 220.

122. See *infra* Section V.B.1.b.

123. See Licht, *supra* note 20, at 212 (“[T]he Korean Code mirrors the Japanese Commercial Code of 1950.”).

124. See *id.* at 212-13.

125. Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT’L L. 829-30, 836 (2020).

126. These reforms include the creation of a derivative suit for non-controlling shareholders and stricter anti-corruption measures. See *infra* Part V.

127. See *id.*

underlying issues surrounding the chaebol structure or the interdependence of the chaebol firms and the government.¹²⁸ Additionally, the government simply lacked the capability—due to a lack of expertise and training—to create systems of enforcement for the new laws.¹²⁹ The judiciary in particular was accustomed to adjudicating social issues and therefore was ill-equipped in its sudden new role as an arbiter in economic cases,¹³⁰ even with the guidance of statutes.

That is not to say that these new corporate governance imports had no effect on Korean business. The reforms successfully helped strengthen the Korean economy and made it less vulnerable to shocks in domestic and foreign markets, reduced the debt-to-equity ratio of chaebol firms in the aggregate by more than 500 percent, and generally increased transparency and profitability in chaebol firms.¹³¹ These victories, however, remained small and were largely driven by post-scandal and post-crisis activism.¹³² After the initial sting of these events faded away, the culture of government enforcement slipped back into complacency.¹³³

2. Cross-Listing

In some cases, cross-listing on foreign markets with stricter compliance rules can serve as a substitute for effective domestic corporate governance laws. The success of such a strategy depends in large part on the “cultural distance” between the home country and the foreign one.¹³⁴ According to Amir Licht:¹³⁵

128. See Song, *supra* note 22, at 221.

129. See Kim, *Daewoo*, *supra* note 25, at 336; Marquis & Ma, *supra* note 9, at 59-60. See also *supra* Part II.

130. See Lee, *supra* note 15, at 350-51; Song, *supra* note 22, at 212.

131. Bang Nam Jeon, *From the 1997-98 Asian Financial Crisis to the 2008-09 Global Economic Crisis: Lessons From Korea's Experience*, 5 *E. ASIA L. REV.* 103, 130 (2010) (discussing Korea's strengthened ability to ride out the 08/09 recession).

132. Consider, for example, the reform following the Asian Financial Crisis, see *id.* at 127-30, or the reform following the ferry sinking in 2014. See *infra* Section V.A.

133. Stephen J. Choi & Kon Sik Kim, *Establishing a New Stock Market for Shareholder Value Oriented Firms in Korea*, 3 *CHI. J. INT'L L.* 277, 286 (2002).

134. Licht, *supra* note 20, at 199.

135. Amir N. Licht earned his LL.M. and S.J.D. from Harvard Law School and studied law and economics at Tel Aviv University. He currently teaches as a Professor of Law at Harry Radzyner Law School in the Interdisciplinary Center Herzliya.

Cultural distance represents the sum of factors creating, on the one hand, a need for knowledge, and on the other hand, barriers to knowledge flow and hence for other flows between the home and target countries . . . [B]asic concepts of corporate governance—including accountability, self-dealing, and fair and equitable treatment— . . . connote fundamentally different things to Americans than to Koreans.¹³⁶

As such, the efficacy of cross-listing on Western exchanges is hampered by the wide cultural distance between Western liberalism and Eastern Confucianism. While Korean firms might, on paper, adhere to New York Stock Exchange regulations on independent director minimums and accounting procedures, for example, the actual implementation of these requirements will vary significantly from the American implementation due to cultural differences in interpretation.

B. Domestic Activism

Change in Korean governance was not driven by foreign influence alone; there existed important domestic actors who rallied for the reform of Korean commercial law. Chief among them was the People's Solidarity for Participatory Democracy ("PSPD"), a non-governmental organization that has since 1997 been advocating for greater transparency and accountability in large family firms.¹³⁷ The organization is comprised largely of business experts, including attorneys, accountants, and academics.¹³⁸ Its most notable contributions are derivative suits¹³⁹ and aggressive media campaigns against chaebol firms. Through high-profile cases against firms like Samsung in 1999,¹⁴⁰ the PSPD brought the

136. Licht, *supra* note 20, at 221-22, 223.

137. See Lee, *supra* note 15, at 354.

138. See *id.*

139. A suit brought against a director or officer by a shareholder representing the corporation. See *Shareholder Derivative Suit*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/shareholder_derivative_suit [<https://perma.cc/6XC3-ASBT>] (last visited Mar. 3, 2021).

140. Five directors who sold Samsung Chemical shares at an unreasonably low price after only one hour of discussion were found to breach their fiduciary duty of care and were forced to compensate Samsung Electronics in the amount of 62.66 billion Won. See Lee, *supra* note 15, at 364-70. An unaffiliated activist campaign also successfully resulted in non-controlling shareholders adding directors onto the board of SK Telecom, a major Korean chaebol. See Kim, *Living with the IMF*, *supra* note 50, at 71, 89.

abuses of preferential treatment and poor transparency in family firms into the public eye.¹⁴¹

More recently, President Moon Jae-In nominated Kim Sang-jo, dubbed the “chaebol sniper,” as his top antitrust regulator. Kim is famous for spearheading shareholder activist campaigns and President Moon hoped he would work with the Korean Fair Trade Commission “by beefing up investigation of conglomerates, cracking down on unfair deals between chaebols and small and medium-sized companies, and funneling contracts and orders to affiliates of shareholders.”¹⁴² Moon and Kim hoped that these improvements would help in their overall goal of improving corporate governance and granting more power to shareholders outside the chaebol families.¹⁴³

V. REFORM MEASURES

A. Anti-Corruption

Recognizing the deep connections between policymakers and businesses, and the opportunities such connections offered for bribery and fraud, the government set forth several anti-corruption measures to help mitigate the influence of businesses on government actions. These efforts began in 1998 following the Asian Financial Crisis and have continued into modern day. The Improper Solicitation and Graft Act, which specifically targets bribery of public officials,¹⁴⁴ is the most recent attempt to curb Korean corruption. Inspired by the 2014 ferry incident¹⁴⁵—which

141. See Seo, *supra* note 34, at 59.

142. Se Young Lee et al., *South Korea Taps Chaebol Reform Activist as Antitrust Chief*, (May 17, 2017), <https://www.reuters.com/article/us-southkorea-politics-antitrust-nominat/south-korea-taps-chaebol-reform-activist-as-antitrust-chief-idUSKCN18D0U9> [<https://perma.cc/UA67-K873>].

143. *Id.* It remains to be seen, however, how successful their effort might be, as Kim has faced backlash for his criticisms of the chaebol firms. See Hyun-woo Nam, *FTC Chief Under Fire for Anti-chaebol Remarks*, KOREA TIMES (Mar. 13, 2019), https://www.koreatimes.co.kr/www/tech/2020/08/693_265290.html [<https://perma.cc/KVF3-5M83>].

144. Robert Bowen, *Laws Concerning Corruption in Korea*, in ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS: JOINT VENTURES § 17:13.93(2020), Westlaw ECKLICN-JV § 17:13.93.

145. See Spalding, *supra* note 100.

investigators attributed to the corrupt enforcement of safety regulations¹⁴⁶—it was based largely on Western ideals.¹⁴⁷

This Act imposes fines for “improper solicitation” of a wide variety of professions, including public officials, journalists, and members of non-governmental organizations (“NGOs”).¹⁴⁸ The statutes set out punishments for both the givers and receivers of bribes.¹⁴⁹ Additionally, public officials are required to report any knowledge of bribery by another public official.¹⁵⁰ Employees of financial institutions have a similar obligation—this is an affirmative duty, and those covered under the statutes can be penalized for failure to comply.¹⁵¹ Corporations can also be held liable for negligence in supervising employees engaged in bribery.¹⁵² The penalties for corruption offenses include both civil and criminal sanctions.¹⁵³

The inadequacies of these new laws, complemented by Korean culture, limit their efficacy. In order to detect corruption and enforce these statutes, government officials rely heavily on whistleblowers.¹⁵⁴ However, the latest anti-corruption statutes do not provide sufficient protections or incentives for individuals to come forward. Wrongdoers, despite the duty to self-report,¹⁵⁵ rarely disclose instances of bribery.¹⁵⁶ It is simply unrealistic to believe that an individual giving or receiving a bribe would be interested in following the mandates of the law, given that he is actively in the process of breaking the law himself.¹⁵⁷ The new Act

146. In 2014, a South Korean ferry sank, killing over 300 passengers, many of whom were students. Authorities attributed the accident to multiple oversight failures, including licensing of an illegally converted and modified ferry and failure of communication among coast guards at the time of the incident. *See South Korea Ferry ‘Sank Due to Negligence, Corruption’*, BBC (July 8, 2014), <https://www.bbc.com/news/world-asia-28205785> [<https://perma.cc/K5D6-BPWL>].

147. *See Ehrlich & Kang, Independence and Corruption, supra* note 99, at 22-23.

148. *See Lana Rask, How South Korea’s Improper Solicitation and Graft Act (Kim Young-Ran Act) Can Help Protect US Trade Secrets*, 8 CYBARIS INTELL. PROP. L. REV. 208, 227 (2017).

149. *See id.*

150. *See Kim, Dangling the Carrot, supra* note 16, at 249.

151. *See id.* at 245, 249.

152. *See Spalding, supra* note 100.

153. *Id.*

154. *See Kim, Dangling the Carrot, supra* note 16, at 237.

155. *See id.* at 249.

156. *See id.* at 249-52.

157. *See id.* at 249.

fails to guarantee whistleblowers anonymity except in cases where they can prove a high risk of retaliation and that they or their family members are in danger.¹⁵⁸ There are also penalties for false reporting, a lack of proper discovery laws to help a case survive a motion to dismiss, and a low cap on monetary awards.¹⁵⁹ Moreover, the law is also ineffective at enforcing self-reporting because the penalty for failing to do so is lighter than the penalty for getting caught for bribery.¹⁶⁰

Although there does seem to be an improvement in awareness of and compliance with changes in anti-corruption laws,¹⁶¹ the reforms remain largely ineffective in the face of the entrenched culture of corruption in Korean business and politics. Korean culture continues to view gifts as an integral part of social life, and monetary or lavish gifts to a business partner, political superior, or ally remain an everyday part of corporate and political life.¹⁶² Critics view efforts to limit gifts as being counter to Korean tradition.¹⁶³ Korea's collectivist culture also places a premium on group loyalty, and insiders remain reluctant to betray their companies, even if not doing so means violating anti-corruption law.¹⁶⁴

B. Internal Monitoring

The Crisis highlighted the spectacular lack of monitoring of Korean businesses, as well as the dangers that such a lack of monitoring can bring. Policymakers realized that firms had to be held accountable to more than just shareholders.¹⁶⁵ Thus, they created extensive regulations meant to create substantial penalties and to curb the inefficacies of boards of directors, managers, and auditors of chaebol firms.¹⁶⁶

158. *See id.* at 250-51.

159. *See id.* at 250-51, 262-63.

160. *See id.* at 249.

161. *See Kim, Dangling the Carrot, supra* note 16, at 243-44.

162. *See Rask, supra* note 148, at 223.

163. TERRENCE F. MACLAREN & RALPH H. FOLSOM, *ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS: JOINT VENTURE* § 17:13.93 (Robert Bowen ed., 2020).

164. *See Kim, Dangling the Carrot, supra* note 16, at 251.

165. *See Kim, Daewoo, supra* note 25, at 330.

166. *See id.*

1. Board of Directors and Managers

a. Problems

Both the boards of directors and the senior management teams of chaebol firms have historically been under the significant influence of their respective founder families. The chairman's office (occupied by the head of the founder family) makes appointments for management with little to no input by the board¹⁶⁷ and retains "absolute influence over the careers" of those in management or on the management track.¹⁶⁸ The management culture within these firms remains highly authoritarian, with little exchange of new ideas.¹⁶⁹ In this way, the chairman's office is able to exercise control of all affiliates in the conglomerate, despite lacking large ownership stakes in or direct control over the day-to-day operations of the affiliate firms.

The board of directors is similarly governed by the chairman's will even though, in most cases, the chairman is not officially seated on the board.¹⁷⁰ In fact, it is often the chairman himself—or the president or another inside director who is loyal to the chairman—who presides over board meetings.¹⁷¹ Ideas conflicting with the chairman's vision are quashed or entirely withheld; inside directors have no interest in running afoul of the chairmen, and independent directors¹⁷² often lack business expertise¹⁷³ and access to information about the corporation.¹⁷⁴ Meetings lack

167. See Ehrlich & Kang, *U.S. Style Corporate Governance*, *supra* note 4, at 22-23.

168. Kim, *Daewoo*, *supra* note 25, at 297 (quoting Judgment of Nov. 29, 2002, 2001 No 2063 (Seoul High Court), at 80).

169. See Ehrlich & Kang, *U.S. Style Corporate Governance*, *supra* note 4, at 21.

170. See Craig P. Ehrlich & Dae-Seob Kang, *Corporate Governance Reform in Korea: The Remaining Issues*, 21 NO. 3 E. ASIAN EXEC. REP., Mar.-Apr. 1999, at 13, 23 (1999) [hereinafter Ehrlich & Kang, *Remaining Issues*].

171. Jae Yeol Kwon, *The Internal Division of Powers in Corporate Governance: A Comparative Approach to the South Korean Statutory Scheme*, 12 MINN. J. GLOB. TRADE 299, 326 (2003) [hereinafter Kwon, *Internal Division*].

172. An independent director is, generally speaking, one who is outside of the organization. An inside director is someone from within the corporation or someone with significant ties to the corporation. See James Chen, *Independent Outside Director*, INVESTOPEDIA (July 4, 2019), <https://www.investopedia.com/terms/i/independent-outside-director.asp> [<https://perma.cc/G9X9-TAJH>].

173. These roles are often filled by academics, accountants, and retired officials. See Black et al., *supra* note 14, at 557.

174. See *id.*

active discussion¹⁷⁵ or, in some cases, do not occur at all, with meeting minutes drawn up after the fact based on directions from the chairman's office.¹⁷⁶ Although by law, directors owe fiduciary duties to the corporation, they rarely understand or appreciate these duties because their violation rarely garners punishment.¹⁷⁷

b. Reforms

Since the Asian Financial Crisis, policymakers have made several reforms to the governance of Korean boards of directors. These include the expansion of fiduciary duties and an increase in the required number of independent directors. Some of the reforms implemented have, in fact, been ostensibly followed,¹⁷⁸ but substantively, their intentions have not been fulfilled.

Fiduciary duties require a director to act as a "good manager" and operate with a standard of care higher than that with which one would conduct his own business (broadly understood as a corollary to the American duty of loyalty, though it lacks the fairness requirement of its American counterpart).¹⁷⁹ Directors can be held liable for poor business decisions or for failure to fulfill affirmative statutory obligations.¹⁸⁰ While this reform is meant to encourage accountability and to proscribe directors from externalizing the costs of bad business judgment onto the public, it also causes directors to be extremely risk-averse, thereby potentially hampering profitability.¹⁸¹ Additionally, shareholders rarely bring suits for violation of fiduciary duties due to the inaccessibility¹⁸² of derivative lawsuits in South Korea, thus impeding any juristic development of the director's duty of loyalty of the kind that has been seen in American law.¹⁸³ Similarly, the

175. *See id.*

176. *See Kim, Daewoo, supra* note 25, at 302.

177. *See id.* at 302-04.

178. *See Ehrlich & Kang, U.S. Style Corporate Governance, supra* note 4, at 61 ("[C]hairmen are no longer *visibly* directing day-to-day affairs of groups and appear to be letting managers do their jobs." (emphasis added)).

179. *See Jae Yeol Kwon, Corporate Governance from a Comparative Perspective: Specific Applications of the Duty of Loyalty in Korea, 22 UCLA PAC. BASIN L.J.* 1, 15, 18 (2004) [hereinafter "Kwon, *Corporate Governance*"].

180. *See generally id.*

181. *See Rhee, supra* note 7, at 670-72.

182. *See infra* Section V.C.1.b.iii.

183. This is not for a lack of legislation, but rather a lack of sufficient motivation. *See Song, supra* note 22, at 213-14; *infra* Section V.B.iii.c.

government's extension of liability under the KCC to a person who "us[es] his/her influence over the company . . . or [who] exerts de facto influence on important matters related to the management of the listed company" (i.e., the chairman) makes him a de facto director and thereby subjects him to the same liabilities as an ordinary director.¹⁸⁴ However, determinations of what constitutes "de facto influence" are questions of fact that require a sophisticated judiciary and access to courts.¹⁸⁵

The requirement for a three-to-one ratio of inside to independent directors on the boards of firms listed on the Korean Stock Exchange ("KSE")¹⁸⁶ has been similarly followed only superficially. The definition of "independent" in the KCC has not been sufficiently restrictive to prevent controlling shareholders from filling boards with members of their social circles.¹⁸⁷ Most so-called independent directors remain strongly allied to the founding families.¹⁸⁸ Therefore, any other rights given to the board—such as appraisal rights for dissenters in mergers or sales¹⁸⁹ or veto rights of related-party transactions¹⁹⁰—are largely unused and functionally irrelevant, as the board remains full of those loyal to the chaebol family.

Furthermore, even when truly both professionally and socially independent, outside directors often find themselves socially unable to express conflicting ideas. "In East Asia, where conformity is the norm, standing out and speaking one's mind . . . are not viewed positively."¹⁹¹ Furthermore, a truly independent director may be seen as a pariah, standing apart from the social groups that beget trust and loyalty. Other members of the board may distrust and withhold information from such a director, making it difficult for him to fulfill his monitoring duties.¹⁹² Thus, as long as the chaebol families do not value independent

184. See Rhee, *supra* note 7, at 672-73 (internal quotations omitted; citing COMMERCIAL ACT, art. 542-548(2) (Korea Legislation Research Institute 2019) (S. Kor.)).

185. See *id.*

186. See Kim, *Living with the IMF*, *supra* note 50, at 74.

187. See Licht, *supra* note 20, at 224-25.

188. See Ehrlich & Kang, *U.S. Style Corporate Governance*, *supra* note 4, at 60.

189. See Kim, *Living with the IMF*, *supra* note 50, at 72.

190. See Choi & Kim, *supra* note 133, at 283.

191. Licht, *supra* note 20, at 224.

192. *Id.* at 225.

management and directors, any reforms simply mandating further independence are unlikely to create substantive change.

2. Audit Committee

a. Problems

Transparency problems traditionally beset chaebol firms; both internal accountants and external auditors have historically failed to detect or actively overlooked warning signs of financial irregularities.¹⁹³ The KCC also did not require consolidated financial statements until after 1997,¹⁹⁴ thus allowing a single asset to be sold to multiple entities in a conglomerate and generate artificial sales.¹⁹⁵ These internal transactions allowed all affiliates of a firm to show exaggerated company value, while more stable affiliates would “rescue” weaker ones by buying assets at high above-market prices.¹⁹⁶ Fake subsidiaries were also often used to circumvent accounting rules.¹⁹⁷ Generally speaking, the financials of conglomerates were often locked in a black box of irresponsible accounting and auditing, leaving the public largely unaware of their precarious financial situations.

b. Reforms

After the Asian Financial Crisis, the statutory provision requiring a firm to have an auditor¹⁹⁸ was replaced by an option to have either an external auditor or an audit committee,¹⁹⁹ meant to act as an “independent watchdog” over the firm’s financials and act in the interests of shareholders and creditors.²⁰⁰ The auditor or committee is subject to the same duty of care as directors in

193. See Ehrlich & Kang, *Remaining Issues*, *supra* note 170, at 4.

194. See Choi & Kim, *supra* note 133, at 283.

195. See Kim, *Daewoo*, *supra* note 25, at 288.

196. See *id.*

197. See *id.* at 294.

198. This role was similar in form to the Japanese statutory auditor insofar as an auditor is mandated by the Commercial Code, must attend board meetings, and acts as a check on management and as a monitor over directors. See Kwon, *Internal Division*, *supra* note 171, at 330-31.

199. Under the KCC, a corporation may establish an audit committee instead of utilizing statutory auditors. Regardless of what type of auditor a company uses, the entity works as an adversary to management and a monitor of directors. See *id.*

200. *Id.* at 331.

overseeing a corporation²⁰¹ and is subject to liability for failure to perform its duties.²⁰² To safeguard their independence, auditors have a tenure of three years²⁰³ and there are restrictions on the influence shareholders can exert on the election of an audit committee.²⁰⁴ To further curb shareholder abuse, auditors also possess the legal power to call an extraordinary shareholder's meeting should they notice any director impropriety.²⁰⁵

Ostensibly, legislators have brought general Korean accounting standards into "substantial compliance" with the International Accounting Standards.²⁰⁶ Chaebol firms are now held accountable by the Financial Services Commission,²⁰⁷ to which they must provide consolidated financial statements to prevent the previously discussed related party transactions,²⁰⁸ have increased disclosure requirements, and are subject to heightened penalties for fraudulent audit reports.²⁰⁹ Yet statutory law cannot be removed from the cultural context in which it is ratified.²¹⁰ So-called independent auditors experience many of the same issues faced by boards of directors.²¹¹ Most independent committee members are independent only on paper and remain socially tied with chairmen.²¹² They are also generally inexperienced and may bristle at incurring social backlash as a consequence of reporting financial inconsistencies.²¹³ Further complicating matters is that what may be considered misrepresentation, fraud, or insider trading varies across cultures. Certain conduct which may be a

201. *See id.* at 332.

202. *See id.* at 335.

203. *See Kim, Living with the IMF, supra* note 50, at 72.

204. *See Kwon, Internal Division, supra* note 171, at 332 ("[A]ny shareholder owning more than three percent of the outstanding voting shares is not allowed to exercise his vote on his shares in excess of the three percent in the election of statutory auditors.").

205. *See Kim, Living with the IMF, supra* note 50, at 72.

206. Choi & Kim, *supra* note 133, at 283.

207. *See Korea, INT'L FED'N ACCTS.*, <https://www.ifac.org/about-ifac/membership/country/korea> [<https://perma.cc/VQ5J-LZ7T>] (last visited May 4, 2021).

208. *See Choi & Kim, supra* note 133, at 283.

209. Black et al., *supra* note 14, at 558.

210. *See Licht, supra* note 20, at 226.

211. *See supra* Section V.B.1.

212. *See Licht, supra* note 20, at 214.

213. Ma & Marquis, *Corporate Culture, supra* note 73, at 91.

material violation under US law may not be deemed as such under identical statutes in South Korea.²¹⁴

C. *External Monitoring*

1. Minority Shareholders

a. Problem

Minority shareholders are also unable to properly perform their monitoring function²¹⁵ due to the vast control that the chaebol families exercise over their conglomerates. Concentrated ownership can, in some instances, be useful (namely to reduce agency costs). In concentrated *minority* ownership, however, “the agency benefits derived from concentrated ownership are often outweighed by the private benefits of control reaped by the controllers.”²¹⁶

As previously discussed, the controlling minority structure creates a sharp divide between cash-flow rights and voting rights, as the control bloc holds a tiny percentage of ownership stake yet wields all the control.²¹⁷ Additionally, the chaebol families may hold up to sixty subsidiary or affiliate firms, while sales remain concentrated in a few core subsidiaries.²¹⁸ These subsidiaries span across industries through both horizontal and vertical diversification.²¹⁹

As such, rather than consider what might be best for the firm or other shareholders (such as the distribution of dividends), the

214. Cf. Licht, *supra* note 20, at 228-29 (discussing the differences in materiality estimates among European accounting firms).

215. Minority shareholders are often seen as monitors of controlling shareholders, directors, and management due to the availability of the derivative suit. The idea is that, because any given individual shareholder can bring suit on behalf of the corporation, those in positions of power will have a check on abusive behavior. See Zhong Zhang, *The Shareholder Derivative Action and Good Corporate Governance in China: Why the Excitement is Actually for Nothing*, 28 PAC. BASIN L.J. 174, 175 (2011).

216. See Hale, *supra* note 5, at 4.

217. See Seo, *supra* note 34, at 31-37.

218. See *id.* at 39.

219. See *id.* “Horizontal” refers to businesses spanning different industries, whereas “vertical” refers to businesses spanning different levels of the same supply chain. See Evan Tarver, *Horizontal vs. Vertical Integration: What’s the Difference?*, INVESTOPEDIA (Jan. 18, 2021), <https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp> [<https://perma.cc/5879-Q935>].

control bloc considers how to use the whole conglomerate to maximize its own profits, often expropriating the investments of minority shareholders and firm profits to support affiliate firms rather than paying dividends.²²⁰ It can cultivate an “internal capital market,”²²¹ realizing benefits by diverting resources from one affiliate to another, diversifying risk through its broad portfolio of industries, and acting on a greater wealth of information given its involvement across sectors. It also has a lesser interest in maximizing the cash flow of any particular firm because its overall ownership stake is quite low. Instead, it prefers to capitalize not only on profitable projects, but on projects that might enhance its intangible value, such as having the influence and prestige of being a large, controlling conglomerate in the national economy.²²² Other minority shareholders, on the other hand, have less flexibility and tend to bear the cost of the control bloc’s expropriation.²²³

Outside shareholders remain unable to advocate for their own rights even while possessing voting shares, as their votes only make a substantial impact in extraordinary cases requiring a supermajority shareholder vote.²²⁴ This feeling of irrelevance in corporate decision-making aggravates general collective action challenges to result in frequent rubber-stamping at annual shareholder meetings.²²⁵ Even shareholders who may be interested in having a voice lack the regulatory resources to pursue their monitoring function, as high minimum holding requirements for most shareholder rights, a reluctance by insiders to become whistleblowers, and the absence of thorough discovery impede shareholders in gaining the information and motivation they might need to pursue derivative suits or private actions against directors and management.²²⁶ The availability of derivative suits is also limited by other substantial hurdles; South Korea follows the loser-

220. See Hale, *supra* note 5, at 14.

221. See Song, *supra* note 22, at 205.

222. See *id.* at 206.

223. See *id.* at 201.

224. See Seo, *supra* note 34, at 57. Such decisions include the removal of directors or statutory auditors, mergers with another company, and capital reduction, among others. See Lee & Ko, *In Brief: Shareholder Rights and Powers in South Korea*, LEXOLOGY (June 12, 2020), <https://www.lexology.com/library/detail.aspx?g=a84c3662-a0ff-4409-aa82-57219705f001> [<https://perma.cc/PM2F-2E3G>].

225. See Kim, *Daewoo*, *supra* note 25, at 297.

226. See *id.* at 306; Song, *supra* note 22, at 213-14.

pays rule²²⁷ and requires the shareholder to put collateral as security for potential litigation costs.²²⁸

Institutional investors, while potentially in a better position to engage in monitoring due to their larger ownership stakes,²²⁹ still fail to engage in effective direct monitoring. Institutions themselves often lack adequate internal governance structures, and many remain under the influence of the government or are within the cross-ownership affiliate structure of the chaebol firms.²³⁰ There also existed a shadow voting regulation during the Asian Financial Crisis, which restricted financial institutions to voting only in proportion to the votes of the other shareholders in attendance.²³¹ This meant that banks effectively contributed only to the quorum requirement and were unable to use their larger ownership stakes to influence the decisions of management.²³²

Finally, hostile takeovers²³³ have been historically difficult in South Korea. They were initially barred outright;²³⁴ and later, after

227. The loser-pays rule requires the losing party to reimburse the winning party for legal expenses, including attorneys' fees. See Marie Gryphon, *Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System*, MANHATTAN INSTITUTE 3 (Dec. 1, 2008), https://media4.manhattan-institute.org/pdf/cjr_11.pdf [<https://perma.cc/487T-B7C7>].

228. See Song, *supra* note 22, at 213-14; Kwon, *Internal Division*, *supra* note 171, at 314.

229. See Song, *supra* note 22, at 215.

230. See *id.*

231. See *id.*

232. See *id.* at 215-16 ("For example, if the shareholders attending the general meeting, other than the financial institutions, vote 30% (for) vs. 70% (against), the institutional shareholders should also vote their shares 30% (for) vs. 70% (against)."). While this rule was never formally included in any statute—it was located in the "Guidance on Management of Trusted Fund," issued by the Finance and Economic Ministry—banks nonetheless adhered to it due to the obedient relationship between banks and the government. See *id.* at 215 n.106. Thus, it was never officially repealed; rather, in 2017, banks were given affirmative permission to vote their shares in the Securities Investment Trust Business Act. See *id.* at 245 n.140; Interview with Young Su Shin & Hyung Ki Lee, *Public Mergers and Acquisitions in South Korea: Overview*, THOMSON REUTERS 3 (Oct. 1, 2020), [https://content.next.westlaw.com/2-502-1572?_lrTS=20210213162521171&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/2-502-1572?_lrTS=20210213162521171&transitionType=Default&contextData=(sc.Default)&firstPage=true) [<https://perma.cc/Y8KC-W7V8>].

233. A hostile takeover involves the acquirer company buying up shares in the target company or campaigning to place acquirer-friendly directors and officers into the company. See Akhilesh Ganti, *Hostile Takeover*, INVESTOPEDIA (May 15, 2021), <https://www.investopedia.com/terms/h/hostiletakeover.asp> [<https://perma.cc/WP2U-3CA8>].

234. See Kim, *Living with the IMF*, *supra* note 50, at 76.

this ban was removed from Korean statutory law, chaebol firms remained protected from hostile takeovers through the statutory ten percent ownership cap.²³⁵ Today, shareholders remain insulated from hostile takeover attempts through their cross-shareholding; in aggregate, they often possess roughly forty percent of outstanding voting shares through their affiliates, requiring a potential bidder to acquire nearly all of the remaining shares in order to gain power.²³⁶ Such a prohibitively steep requirement makes hostile takeovers almost impossible.

b. Failure of Reforms to Protect Minority Shareholders

i. Enhanced Shareholder Rights

Korean legislators have implemented numerous measures aimed at increasing the rights of minority shareholders and improving these shareholders' ability to monitor the chaebol families. The main mechanism has been expanded shareholder rights. Reforms include shareholder proposal rights,²³⁷ cumulative and proxy voting,²³⁸ the repeal of the shadow voting rule, access to corporate information, fiduciary duties for controlling shareholders, and clear penalties and remedies for wrongdoing.²³⁹

235. This cap applies to all shareholders—founding families and would-be raiders alike. While serving to limit the direct ownership of any one controlling shareholder, it is easily circumvented through chaebol families' cross-ownership structures using affiliates. Therefore, it serves only to entrench these families, as it both allows controlling blocks to exist while prohibiting takeover attempts. See Seo, *supra* note 34, at 43.

236. See Song, *supra* note 22, at 211.

237. Shareholders may submit proposals at annual shareholder meetings to be voted on. See Scott Lesmes, *Frequently Asked Questions About Shareholder Proposals and Proxy Access*, MORRISON & FOERSTER 1 (2017), <https://media2.mofo.com/documents/frequently-asked-questions-about-shareholder-proposals-and-proxy-access.pdf> [<https://perma.cc/GR6M-78Y5>].

238. Cumulative voting allows a shareholder to use all of her votes on one nominee (ordinarily, a shareholder may only cast one vote per nominee). This enables minority shareholders to have greater influence in electing directors. See *Cumulative Voting*, INVESTOR.GOV (last visited Mar. 3, 2021), <https://www.investor.gov/introduction-investing/investing-basics/glossary/cumulative-voting> [<https://perma.cc/5XLU-SFPX>]. Proxy voting allows shareholders to consent to other shareholders voting on their behalf at shareholder meetings. Because a requirement that all shareholders must attend the meeting in order to vote might deter many shareholders from voting, proxy voting enables a greater portion of shareholders' opinions to be considered in decision-making. See Lesmes, *supra* note 237, at 15.

239. See Song *supra* note 22, at 224-25; Black et al., *supra* note 14, at 557-58; Kim, *Living with the IMF*, *supra* note 50, at 73; Ehrlich & Kang, *Remaining Issues*, *supra* note 170,

The minimum ownership requirements to exercise some of these rights (namely shareholder proposals and filing derivative suits) were also reduced, thus making them more accessible to investors other than the largest institutional shareholders.²⁴⁰

Although these new rights and expanded recourse are certainly welcome changes, their efficacy relies on shareholders' willingness to engage in activism.²⁴¹ This interest appears low; for example, shareholder proposals are utilized at only one to two percent of public firms.²⁴² This may be because Korean tradition tends to dictate a preference for informal, private remedies outside of the public eye. Additionally, the collective action issue remains at large public firms, where each shareholder holds only a small percentage of shares, while the firm remains under the effective control of the chaebol family.²⁴³

ii. Availability of Hostile Takeovers

Policymakers have abolished the original ban on hostile takeovers and the subsequent limitations on ownership.²⁴⁴ In 1998, leaders also eliminated tender offer provisions that required would-be raiders intending to acquire more than twenty-five percent of outstanding shares of a listed company to make a tender offer for more than fifty percent of the company's shares.²⁴⁵ However, raiders still face significant challenges in completing successful hostile takeovers and therefore shareholders struggle to realize the benefits that such attempts might bring.²⁴⁶ While the law may have changed, culture may still act as a powerful

at 10. For details on shareholder proposal rights, see Hye-Sung Kim, *Corporate Elections and Shareholder Proposal Rights: From Case Studies in South Korea*, 7 *E. ASIA L. REV.* 257, 263-66 (2012) [hereinafter Kim, *Corporate Elections*].

240. See Song, *supra* note 22, at 225.

241. See Black et al., *supra* note 14, at 557.

242. See Kim, *Corporate Elections*, *supra* note 239, at 274.

243. See Song, *supra* note 22, at 196-202.

244. See Ehrlich & Kang, *Remaining Issues*, *supra* note 170.

245. See Song, *supra* note 22, at 226.

246. These benefits include, for example, shareholder-friendly incentives like special dividends that current management would typically offer to induce shareholders to reject such takeover attempts. See Adam Hayes, *What Happens to the Target Company's Shares in a Hostile Takeover*, *INVESTOPEDIA* (Mar. 17, 2021), <https://www.investopedia.com/ask/answers/042215/what-happens-shares-company-has-been-object-hostile-takeover.asp> [https://perma.cc/C76V-8H6X].

impediment; hostile takeovers may remain antithetical to traditional Korean values.²⁴⁷

iii. Access to Derivative Suits

Legislators have since amended the KCC to reduce the ownership stake requirement for derivative and direct suits to one percent,²⁴⁸ while the Korean Securities and Exchange Act has a .01 percent ownership requirement of shares held for at least six months since the time of filing for derivative suits.²⁴⁹ Neither code requires that the shareholder actively be holding those shares at the time of filing.²⁵⁰ These amendments have greatly expanded the availability for current and previous shareholders to bring suits against their respective corporations and directors.

However, these ownership stake requirements remain difficult to meet, given the highly dispersed ownership between non-controlling shareholders.²⁵¹ Further, under the KCC, even shareholders who fulfill the ownership requirement must first attempt a resolution with the corporation before going to the courts.²⁵² Additionally, shareholders are still required to post security to cover defendants' expenses, and any recovery is awarded to the corporation itself. The only direct benefit a shareholder stands to gain through a derivative suit is reimbursement for legal fees.²⁵³ As a result, many shareholders may still find insufficient incentives to bring derivative suits.²⁵⁴

247. See Ehrlich & Kang, *Remaining Issues, supra* note 170 (Samsung's attempted takeover of Kia in 1993 was "condemned as clashing with Korean values" and subsequently abandoned). More recently, South Korean attorneys affirmed that there are still "negative sentiments" about hostile takeovers. Shin & Lee, *supra* note 232.

248. See Kwon, *Internal Division, supra* note 171, at 315.

249. See Hee-Chul Kang, *Seoul High Court Allows Double Derivative Suit; Supreme Court May Not*, INT'L L. OFF. (Nov. 17, 2003), <https://www.internationallawoffice.com/Newsletters/Corporate-Commercial/South-Korea/Woo-Yun-Kang-Jeong-Han/Seoul-High-Court-Allows-Double-Derivative-Suit-Supreme-Court-May-Not> [<https://perma.cc/5LJ7-VEQ4>].

250. See *id.*

251. See Rhee, *supra* note 7, at 677 ("Only institutional shareholders can feasibly bring a derivative suit against most mid- and large-cap companies. This rule is not egalitarian and shuts the courthouse doors to all retail investors.").

252. See Kwon, *Internal Division, supra* note 171, at 315.

253. See *id.* at 316.

254. See Rhee, *supra* note 7, at 670, 677-78 ("Unless fundamental changes in the structure of incentives are made, notwithstanding a few quixotic actions each year, Korea permits derivative suits in name only.").

iv. Limitations on Affiliate Voting Rights

As previously discussed, chaebol firms quickly circumvented the old restriction on affiliate voting rights by building complex ownership structures.²⁵⁵ Recognizing the abuses of this cross-ownership structure, the Monopoly Regulation and Fair Trade Act (“MRFTA”) has since 1998 restricted affiliate voting rights and thereby given more voice to non-controlling shareholders.²⁵⁶ Based on these new restrictions, non-bank financial institution (“NBFI”) votes can only be exercised in aggregate up to fifteen percent, and chaebol families cannot use more than twenty-five percent of their assets in acquiring²⁵⁷ or possessing more than a twenty-five percent ownership stake in affiliate stocks.²⁵⁸ However, the MRFTA offers lenient exceptions to these requirements,²⁵⁹ and many financial and insurance affiliates are exempted.²⁶⁰ Using these loopholes, chaebol firm affiliate ownership has never dipped below the twenty-five percent threshold,²⁶¹ and they continue to utilize exempt firms to “rearrange their cross-shareholdings and channel their voting rights through more non-financial firms to comply with the limit.”²⁶² They also continue to utilize their political strength to lobby against further regulations on cross-ownership—regulations that might seriously hamper chaebol families’ control—arguing that such regulations would make their national flagship firms susceptible to foreign takeovers.²⁶³

255. *See supra* Section II.C.

256. *See Hale, supra* note 5, at 40.

257. *See id.*

258. *See Seo, supra* note 34, at 60-61.

259. *See id.* at 64-65 (“[C]haebol companies are allowed to own other companies’ shares to the extent that such ownership will enhance the international competitiveness of the industry or facilitate corporate restructuring.”).

260. Financial and insurance companies are exempted because they are regulated by other (less strict) laws. *See Hale, supra* note 5, at 38.

261. *See Seo, supra* note 34, at 65.

262. Hale, *supra* note 5, at 40; *see also* Seo, *supra* note 34, at 65 (“[M]any chaebol affiliates could jointly invest less than their 25% of net assets in a new venture. This joint investment would not violate the rules in the MRFTA, but would further complicate the interlocking web of shareholding among subsidiaries.”).

263. *See Hale, supra* note 5, at 40-41.

v. The Role of Soft Social Controls

Finally, soft social controls both increase accountability and impede the effectiveness of shareholder reforms. Most beneficial is the Confucian emphasis placed on reputation. Chaebol families recognize the value of a positive reputation; much of their political strength has come from their image as integral to and champions of the modern Korean economy.²⁶⁴ As such, to maintain these reputations, they must—at least to some extent—limit the abuses of their cross-shareholding structures.²⁶⁵ Additionally, to the extent that conglomerate chairmen perceive the conglomerate and the employees within it as an extension of the family structure, they may work to cultivate the good of the conglomerate and hesitate to extract private benefits that are detrimental to its members.²⁶⁶

The efficacy of these soft social controls is limited, however, by the absence of the concept of shareholder primacy in Korean culture. Directors are meant to owe their duties to the corporation as a whole, not to any individual shareholder,²⁶⁷ but this “abstraction... has not taken deep root in Korean corporate governance.”²⁶⁸ Rather than internalizing their loyalty to the corporation, or to shareholders generally, directors remain allied to one specific shareholder or group of shareholders—the controlling family.²⁶⁹ Furthermore, although the preservation of one’s reputation might control chairman behavior, Korean culture values private resolution and compromise over public litigation and ensuing scandal.²⁷⁰ Combined with the general scarcity of investigative journalism in South Korea,²⁷¹ chaebol chairmen can keep their personal abuses of the conglomerate private, and thus face no risk to their public reputations.

264. *See supra* Part II.

265. *See* Seo, *supra* note 34, at 58.

266. *See id.* (“[A] chaebol is still regarded as a proxy of a family.”).

267. *See* Rhee, *supra* note 7, at 680.

268. *Id.* at 702.

269. *See id.*

270. *See supra*, Section III.B.

271. *See* Kim, *Daewoo*, *supra* note 25, at 335-36.

2. Banks and Other Creditors

Since Korea's initial industrialization in the 1960s, banks have separated from the government and many now have Western directors sitting on their boards.²⁷² Improvement in monitoring remains hampered, however, by the state's continuous involvement in the financial sector. The government still appoints CEOs of banks and banks still make many secured loans without sufficient credit analysis.²⁷³ Banks continue to disregard future profitability and risk of investment when making loans both because of this influence, as well as because their loans are secured by collateral or guarantees; thus, they fail to execute sufficient monitoring and exercise little to no control until borrower bankruptcy.²⁷⁴

D. Why Chaebol Firms Persist

The ever-present influence of Confucian culture exacerbates the inefficiencies of many of these reforms. Generally speaking, it is difficult to ask directors, shareholders, or other members of a chaebol conglomerate to speak out and voice concerns when culture continues to normalize the suppression of conflicting ideas and perpetuation of hierarchical social structures.²⁷⁵ Even as older directors and managers age out, it is unlikely that the new generation will successfully change the traditional business structure; the Korean education system, from which these new, young professionals are emerging, continues to value rote memorization, respect for seniority, and other traditional Confucian values.²⁷⁶

Furthermore, in light of these social and business structures, the chaebol system "has remained durable not in spite of inefficiencies, but because of them in the sense that inefficiency and legitimate interest are inextricably intertwined... The peculiar Korean system exists because [dynastic families and the government] share a common interest,"²⁷⁷ and chaebol firms'

272. See Ehrlich & Kang, *U.S. Style Corporate Governance*, *supra* note 179, at 62.

273. See Song, *supra* note 22, at 218.

274. See *id.* at 219.

275. See Ehrlich & Kang, *Remaining Issues*, *supra* note 170.

276. See *id.*

277. Rhee, *supra* note 7, at 686.

longevity may represent a true combined effort to benefit the public good.

The mutually beneficial relationship between chaebol firms and the government was the main mechanism by which Korea industrialized in the first place.²⁷⁸ Thus, in the modern day, the Korean government continues to show leniency to chaebol families. While the government has placed sanctions or criminal inquiries against the chaebol families, those measures are typically followed by light penalties or presidential pardons.²⁷⁹ This is due to the public perception of these firms as integral to the national economy, and out of respect for the firms' historical contributions to Korea's growth.²⁸⁰

Furthermore, Korean nationalism places a premium on the importance of Korean control over flagship firms.²⁸¹ Although regulations that allow for chaebol family control render monitors ineffective,²⁸² they also ensure these firms remain in control of Korean nationals. This may be an acceptable compromise; Koreans would rather retain their economic powerhouses than allow foreign investors to take over in pursuit of abstract promises of increasing transparency.²⁸³ Although inefficient, this system of government-driven economic growth—which has, despite its flaws, given South Korea the means to flourish economically—remains preferable to an unknown, unpredictable, and “complex market of innumerable private actors, each acting under private incentives with no obligation owed to public interests—i.e., the American model.”²⁸⁴

VI. MODERN-DAY CHAEBOL FIRMS

A. Overview

Today, chaebol families only own roughly one percent of the economic rights of all chaebol firms, yet still retain significant

278. *See supra* Section II.A-B.

279. *See Rhee, supra* note 7, at 691.

280. *See id.* at 691-92.

281. *See id.*

282. *See, e.g., supra* Section V.C-D.

283. *See Rhee, supra* note 7, at 694.

284. *Id.* at 698.

control over the key corporate groups²⁸⁵—and therefore the national economy.²⁸⁶ Because these few conglomerates dominate the economy, industry remains undiversified and chaebol firms are able to direct the country’s “production, employment, and economic prospect[s].”²⁸⁷ In the early 2000s, the top thirty chaebol firms accounted for forty-five percent of Korea’s corporate assets, forty percent of sales, and twenty percent of employment.²⁸⁸ Korea suffers from an “inverted” shareholder problem, where minority shareholders (the founder families) with sharp disparities between ownership stake and control can silence the voices of other minority shareholders.²⁸⁹

Internally, the chaebol structure has not improved much since its inception. The founder family still dominates top managerial positions (and are often shareholders themselves),²⁹⁰ and the conglomerate continues to be led by the chairman, the patriarch of the family.²⁹¹ The chairman is surrounded by his executive council in an entity known as the chairman’s office, which coordinates among affiliates and sets long-term business strategies for the firm.²⁹²

Externally, in addition to preferential treatment from banks, Korean firms also have considerable influence over non-bank financial institutions NBFIs. Historically, these institutions offered interest rates much higher than those offered at government banks, which were subject to regulation, and soon overtook traditional banks in popularity among chaebol firms.²⁹³ Chaebol firms obtained ownership stakes in these NBFIs and continue to use their influence to offer cheap financing to their subsidiaries and affiliates.²⁹⁴ Likewise, the government has not shifted much from its historical role; even as it passes formal statutory reform, it does not fully embrace the ideals behind rigorous corporate

285. Including, for example, electronics, real estate, biological products, and automobiles. *See id.*

286. *See id.* at 668.

287. *Id.*

288. *See Hale, supra* note 5, at 27.

289. Rhee, *supra* note 7, at 662.

290. *See Kim, Living with the IMF, supra* note 50, at 67.

291. *See Ehrlich & Kang, Remaining Issues, supra* note 170.

292. *See id.*; Ehrlich & Kang, *U.S. Style Corporate Governance, supra* note 4, at 23-24.

293. *See Hale, supra* note 5, at 30.

294. *Id.*

governance and has even encouraged affiliates to “rescue” other conglomerate members in times of financial distress.²⁹⁵

B. Impact on the Economy

The failings of the firms and of the government have resulted in the “Korea discount,”²⁹⁶ the manifestation of the general distrust of Korean firms abroad. The capital market reflects Korea’s notoriously poor corporate governance practices through a heavy discount, by which Korean firms are valued at forty-six percent and twenty-nine percent of their American and Japanese counterparts, respectively. They also trade at 0.8x price-to-book, meaning that the market believes firms’ assets will lose, rather than gain, value in the hands of current management.²⁹⁷ The discount first manifested in the 1990s and persists today—reflecting foreign investors’ skepticism of Korean firms, despite the slew of recent corporate governance reforms.²⁹⁸

This discount has contributed to a vast stratification of social classes and wealth in Korean society. The personal wealth of the average Korean lies principally in real estate holdings, which in Korea are extremely expensive and cannot be acquired without significant amounts of capital.²⁹⁹ Koreans are unable to perform well in financial markets, however, because their domestic corporate entities do not perform well. Average Koreans have fewer investment options, and therefore have fewer options to gain capital and attain class mobility. Social classes remain fixed and barriers high.³⁰⁰

VII. THE PATH FORWARD

The challenges associated with reform in Korea indicate that, while statutory changes are certainly necessary to produce an effective corporate governance system, they are insufficient to create lasting change due to challenges with enforcement. Without a compatible cultural base on which to implement these reforms,

295. Licht, *supra* note 20, at 214.

296. Hale, *supra* note 5, at 41; Rhee, *supra* note 7, at 681-83.

297. Rhee, *supra* note 7, at 681-83.

298. See Choi & Kim, *supra* note 133, at 284; Rhee, *supra* note 7, at 652.

299. See Rhee, *supra* note 7, at 683-85.

300. *Id.*

improvements in the Korean system beyond superficial convergence with Western “best practices” are unlikely. Given that business culture and law developed in large part as an extension of pre-existing cultural traditions in Korea, successful reform to the law and increased compliance must similarly be developed with a careful consideration of culture.³⁰¹

“[I]nformal institutions and cultural norms bridge the gap between formal legal institutions and the judicial system.”³⁰² Rather than wholesale importation from Western countries, regulations should instead be reformed to suit traditional Korean values. This will help incentivize bureaucrats and the corporate elite to truly embrace the spirit of the law—rather than comply only formally—and bring substantive convergence between the Korean model and the American model, allowing the two schools of thought to “meet in the middle.” “In principle, if incentives are correctly set, [Korean regulators] can uphold Confucian values and still maximize shareholder wealth—'[e]ven Confucian managers respond to incentives.’”³⁰³

This Part will explore the various ways in which this shift can be implemented. Section A discusses changes in corporate culture, Section B details possible statutory and administrative reforms, Section C proposes greater market regulation, and Section D highlights the potential role of NGOs and public activism. These methods of change have in the past successfully effected change in Korean governance³⁰⁴ and could be similarly effective to cure the defects discussed above. Section E notes, however, that the challenges to change remain stark, and Korea may see only slow and formal change until some catalyst acts as the “breaking point” for the Korean people.

A. Corporate Culture: Change from the Top Down

Although Confucian norms can be considered responsible for many of the inefficiencies and abuses of the chaebol system, they are not inherently negative. Confucian values of the public good,

301. See Ma & Marquis, *Corporate Culture*, *supra* note 73, at 98.

302. *Id.* at 30.

303. Licht, *supra* note 20, at 216 (quoting Black et al., *supra* note 14, at 545).

304. See, e.g., *supra* Part V.

mutual respect, and morality³⁰⁵ can encourage behaviors that benefit society as a whole. Confucianism also espouses modifying one's thoughts based on new moral education.³⁰⁶ It is, therefore, wholly compatible with the possibility of modifying the role that chaebol firms can play in the public sphere.

For a cultural shift to be successful, it must occur through all levels of business; given the Korean hierarchical culture, this is only possible if the change moves from the top, down.³⁰⁷ Therefore, change must first be instilled in the chaebol leaders, who set the tone for the corporate culture throughout their conglomerates. Korean culture "emphasizes the concept of one's reputation and honor;" therefore, the social stigma associated with public exposure of corruption or bad business judgment could have a deterrent effect on chairmen.³⁰⁸ This goal could perhaps be effected through greater investigative journalism or heightened audit requirements upon firms.

Chairmen may also be convinced by the argument that the "promot[ion of] trust, ethics, and good compliance practices . . . [is] positively correlated with business success, and companies with a strong and sustainable culture of voluntary compliance of all levels can derive substantial value from their compliance efforts."³⁰⁹ This stance both promotes accountability and appeals to chairmen's desires to maximize their personal benefits; while their ownership stakes may remain small and they would not gain as much from profit-based success as other shareholders might, they would stand to gain in reputation and other "soft" profits if their conglomerates become well-known both for profitability and for accountability and high levels of employee trust. Chaebol leaders may be more open to this mutually beneficial conception of corporate governance, and "when a business actor achieves . . . 'sympathetic understanding' of the law," he "internaliz[es those] norms . . . as part of his or her identity."³¹⁰

305. See *supra* Section III.A.

306. See Ma & Marquis, *Business Culture*, *supra* note 6, at 42.

307. See Ma & Marquis, *Corporate Culture*, *supra* note 73, at 79.

308. Daniel Y. Jun, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT'L L. 1071, 1107 (1996).

309. Ma & Marquis, *Corporate Culture*, *supra* note 73, at 79.

310. *Id.* at 75 (quoting John Galgay, *Corporate Plans and Policies for Voluntary Antitrust Compliance*, 19 BUS. LAW 637, 641 (1964)).

Additionally, the mandatory appointment of chief compliance and ethics officers (“CCOs”) with a truly meaningful role in the improvement of corporate governance within firms could spearhead a cultural shift throughout these firms. Confucian paternalism could be invoked by CCOs to encourage directors and managers to have greater regard for corporate social responsibility;³¹¹ given their role as elite members of Korean society and the unique influence they have over the government and the economy,³¹² the highest form of moral Confucianism they could pursue would be advancement of the public good. This mindset could elicit greater transparency and accountability among the chaebol leaders, as they come to see themselves as stewards and benefactors of the Korean public.³¹³

Finally, Confucian doctrines can also be applied at all levels of staff to encourage moral and social responsibility and accentuate the importance of the corporation as a whole acting as a “good corporate citizen.” “[E]mpiricists suggest [that] creating identity between the values of the company and the values of its employees, and making ethical rules and boundaries credible” are vital to the cultivation of good compliance norms within a business.³¹⁴ General staff members may feel inclined to adopt this change in mindset after seeing management at higher levels adopt it themselves. CCOs might also work to encourage such a firmwide shift in thought through opportunities for continued education for staff and management and through regular meetings with independent board members to ensure impartial judgment on the results of such training.³¹⁵ They could build support for the training among upper management by reminding officers of the positive correlation between firm success, a trusting firmwide culture, voluntary compliance.

311. Ma & Marquis, *Business Culture*, *supra* note 6, at 41.

312. *See supra* Section III.A.2-3.

313. *See* Ma & Marquis, *Business Culture*, *supra* note 6, at 41.

314. Ma & Marquis, *Corporate Culture*, *supra* note 73, at 93-94.

315. These directors could form committees similar to American audit committees, which must be comprised of independent directors and which are subject to regular review to ensure their independence. 17 C.F.R. § 240.10A-3(a) (2006).

B. Statutory and Administrative Reforms

With an adjustment of corporate culture, statutory and administrative regulation may finally be effective if similarly adjusted to conform to traditional Korean values. “[A]pproaches to competition law and policy . . . have to be shaped and implemented in ways that respond intelligently to these cultural factors.”³¹⁶ “Korean reformers could devise better corporate governance that draws on the country’s huge social capital that its cultural endowment embodies.”³¹⁷

1. Statutory Reforms

Korea’s export-oriented capitalism makes its economic system “less autonomous and more volatile,” and makes “legalist styles” of governance less effective.³¹⁸ As such, it tends not to benefit from the wholesale import of statutes from juristic systems (like the United States), and would instead benefit more from a political system of regulation.³¹⁹ This would require, however, less interdependence between policymakers and chaebols. Rather than a direct import, a revised regulatory framework should simply borrow general principles of corporate governance from Western codes. Regulations should then be tailored towards Korean traditions, focusing more on incentives for compliance than on punishments for violations or reliance on litigation for enforcement. For example, Article 382 of the KCC currently attempts to enforce “good” firm behavior through penalties for

316. Ma & Marquis, *Business Culture*, *supra* note 6, at 6.

317. Licht, *supra* note 20, at 232.

318. Michael W. Dowdle, *On the Public-Law Character of Competition Law: A Lesson from Asian Capitalism*, 38 *FORDHAM INT’L L.J.* 301, 345-46 (2015).

319. The juristic system is characterized by a general alignment between judicial decision-making and a particular set of founding principles and heavily utilizes “politically ‘independent’ regulatory agencies” (consider, for example, the American system, with an active judiciary and extensive use of administrative agencies). It is ineffective, however, in systems with no united set of principles. In its stead, the political system attempts to weigh and manage different regulatory goals, with the legislative government heavily involved in every aspect of regulatory activity. *Id.* at 356. In South Korea—a young country with a civil law system thrust forcefully into modernization—the juristic system is a poor fit; its principles and statutes cannot effectively be imported. Instead, the government must step in to manage the many divergent interests, and good corporate governance practices must be embraced by bureaucrats, who can work to implement them as regulators in a political system.

non-compliance, meant to act as deterrents.³²⁰ This has proved ineffective;³²¹ thus, firm behavior could instead be influenced through fine reductions or immunization conditioned upon good-faith efforts to comply with regulations. While traditional punishments would still exist for infractions, this incentive-based system could better drive firm behavior.³²²

Statutes should continue providing clear requirements for director (and de facto director)³²³ duties of loyalty and care. Korea is sorely lacking in a fairness assessment when analyzing breaches of fiduciary duty. In the United States, this involves the use of a two-prong assessment: fair price and fair dealing. This allows courts greater flexibility in assessing self-dealing disputes, allowing for case-by-case determination.³²⁴ Adding one directly into the KCC to work alongside Articles 388, 397, and 398—which currently provide for director fiduciary duties³²⁵—would increase director incentives to consider overall shareholder value, rather than simply the wishes of the controlling bloc, when making decisions.³²⁶ The fairness requirement could operate similarly to the good-faith analysis considered above.

Additionally, although the deterrent effect as embodied in laws and regulations has not been particularly useful in the past, it could be improved by increasing possibilities for personal liability in the event of breaches of the duty of loyalty.³²⁷ Doing so could help to decrease instances of self-interested behaviors by chairmen, de facto directors, as it may force them to internalize costs that they were previously able to externalize to minority shareholders. For other directors, the risk of personal liability could counter feelings of allegiance and duty to the controlling

320. See, e.g., *supra* Section V.B.1.b.

321. See *supra* Section V.B.1.b.

322. See Ma & Marquis, *Corporate Culture*, *supra* note 73, at 97.

323. See *supra* Section V.B.1.b.

324. See Kwon, *Corporate Governance*, *supra* note 179, at 11.

325. *Id.* at 8.

326. See Black et al., *supra* note 14, at 576.

327. This could namely be accomplished through the codifying of the common law concepts behind Delaware fiduciary duties, for example requiring directors to prove that they are fully disinterested when exercising their business judgment. See Peter Atkins, Marc Gerber, Edward Micheletti & Robert Saunders, *Directors' Fiduciary Duties: Back to Delaware Law Basics*, SKADDEN (Feb. 19, 2020), <https://www.skadden.com/insights/publications/2020/02/directors-fiduciary-duties> [https://perma.cc/JR6K-NCGD].

shareholder and instead shift their priorities to generating general shareholder value.³²⁸

Finally, rather than the .01 percent rule for derivative suits,³²⁹ Article 191-13 of the KCC could be amended to reflect a monetary minimum investment rule. The .01 percent rule exists to prevent companies from illegitimate or baseless suits, but is also so restrictive that it essentially eliminates all possibility of derivative suits. Instead, a monetary amount of investment could be chosen—Rhee suggests 50 million Won, for example.³³⁰ Such a number could create accessibility for sophisticated shareholders, while still excluding most, and would compound the general inconvenience of litigation, thus discouraging frivolous suits. “The well-to-do retail shareholder, who is not misguided, would serve well as a private monitor of the worst abuses.”³³¹ He would not face the same constraints as an elite investor who shares social circles with chaebol families, an institutional shareholder which chaebol families have historically influenced, or a retail investor who might lack expertise or sophistication.

When considering any further statutory reforms or convergence with the American model of corporate governance, it is important to remember that statutes remain the least effective way to create change in Korean corporate governance. Even with cultural and educational reform, it remains unlikely that chaebol firms would cease circumventing regulations and willingly lose their political and economic influence gained through corruption. As such, policymakers and other investors must work to strengthen themselves against chaebol lobbying. This could be accomplished by diversifying investments and better compensating policymakers to minimize their dependence on chaebol families.

2. Administrative Reforms

Administrative reform is also required to ensure that government officials tasked with enforcing new regulations are properly equipped with the skills to do so.³³² Consultation of

328. Rhee, *supra* note 7, at 706.

329. *See supra*, Section V.C.1.b.iii.

330. *See Rhee, supra* note 7, at 705.

331. *See id.* at 706.

332. *See Marquis & Ma, supra* note 9, at 60.

economic experts and academics when considering economic policy should become a norm, and consultants' reports should be made public to increase transparency and accountability.³³³ The recruiting system for government officials, including judges, should also be reformed, placing less priority on the civil service examination³³⁴ and more on technical competence. Doing so could help reduce the groupthink that often results from similar educational backgrounds and prevent personal or political bias from entering the government.³³⁵

In order to achieve this shift, a modification of the education system of Korea may also be needed. The traditional Confucian style of classroom teaching—involving rote memorization rather than innovation and ingenuity—is likely incompatible with a truly effective system of corporate governance,³³⁶ as it only encourages hierarchical social structures and discourages conflict. The success of creating such a widespread change requires reform in Korean business education—Western styles of teaching could be imported into Korean universities, perhaps through the employment of foreign professors. Young Korean scholars should be encouraged to think of creative solutions and to challenge pre-existing customs, rather than to follow blindly the customs of the generations prior. Thus, when these new academics enter the business field, either as government bureaucrats or as employees at a chaebol firm, they may find success in importing their new modes of thought and values. For this strategy to work, however, it must occur concurrently with re-education within the firms themselves; if these efforts are not simultaneous, new hires may find their voices silenced by the authoritarian culture of the firms.

3. Shareholder Activism: The National Pension System

The National Pension Service (“NPS”) acts on behalf of the public and is the largest single shareholder in South Korea.³³⁷ It is generally viewed positively among both Korean elites and the general population and wields a great deal of influence over corporate affairs. It currently resides in the Ministry of Health and

333. *See id.*

334. *See supra*, Section III.A.1.

335. *See* Marquis & Ma, *supra* note 9, at 66.

336. *See* Ma & Marquis, *Corporate Culture*, *supra* note 73, at 91-94.

337. *See* Rhee, *supra* note 7, at 708.

Welfare and has had its own instances of corruption;³³⁸ it also tends to side with management in shareholder disputes.³³⁹

This does not, however, preclude the possible benefits that the NPS can have on Korean corporate governance. Given its prominent financial role, its internal governance could be moved to the Ministry of Strategy and Finance, where it could then benefit from the influence of officials knowledgeable in economics and industrial strategy. More critically, it is vastly simpler to reform a single organization than the financial system as a whole. If the NPS could be staffed with officials committed to enhanced minority shareholder rights and improved governance, it could serve as a voice for the masses of unaffiliated shareholders, vote “with an eye toward [systemic] efficiency,”³⁴⁰ and spearhead derivative actions. The NPS could act as a monitor over many chaebol firms and take on an activist role in the improvement of corporate governance nationwide. “Reform can be surgical with global effects.”³⁴¹

C. Market Regulation

1. Evidence of Market Regulation

External market regulation could also contribute to improved corporate governance in South Korea. Given the growing globalization of world capital markets, chaebol firms are facing increasing pressure both to list on foreign exchanges and to retain the interest of domestic investors.³⁴² Korean firms interested in listing on foreign exchanges like the New York Stock Exchange are often forced to improve their corporate governance to meet listing standards, and these firms may then realize that improved corporate governance is also necessary to retain domestic investors.³⁴³ Additionally, foreign investors in South Korea could import a Western influence³⁴⁴ that could help weaken traditional

338. *See id.*

339. *See id.* at 709.

340. *Id.*

341. *Id.* at 710.

342. *See Choi & Kim, supra* note 133, at 283.

343. *See id.*

344. Foreign investors could, for example, use their positions to encourage shareholder activism among domestic investors, curtailing the passivity perpetuated among other minority shareholders as a result of Confucian culture.

cultures of loyalty to controlling shareholders. While this informal regulation may not serve as a complete substitute for effective policymaking, it could serve to mitigate problems as the Korean government works to create a reformed corporate governance structure.

While market influence has not historically been effective due to Korean nationalism³⁴⁵ and foreign investor inaction,³⁴⁶ there is some evidence that the market can influence Korean corporate behavior.³⁴⁷ Hyundai's chairman, for example, resigned from his position following dissatisfaction from investors and creditors.³⁴⁸ While affiliates have typically propped up other "arms" of their respective conglomerates in times of financial trouble, in the case of Hyundai, several affiliates refused to bail out the "head," despite government attempts to encourage the bailout plan.³⁴⁹ While there may have been some interpersonal elements at play in the affiliates' reluctance to accept financial support,³⁵⁰ several affiliates specifically identified "their own financial health, their independence, and the minority shareholders" as reasons for refusal³⁵¹—signifying that Korean affiliates are not always opposed to placing their shareholders over the will of the founder.

In another case, the large Korean conglomerate SK experienced a sharp drop in stock price after the controlling shareholder's illegal behavior and the firms' accounting fraud and mismanagement came to light.³⁵² As a result, a foreign investor was able to become the single largest shareholder with a 14.9 percent stake and stage a takeover attempt.³⁵³ While the investor was ultimately unable to remove SK's leader, the attempt forced the chairman to improve the firm's corporate governance and to demand the resignation of all family members except for himself

345. Korean retail investors may prefer investing in Korean firms even if they suffer from weaker corporate governance.

346. Historically, foreign investors have been ineffective at monitoring Korean chaebol firms. See Kim, *Living with the IMF*, *supra* note 50, at 65.

347. See Craig Ehrlich & Dae Seob Kang, *Independence Within Hyundai?*, 22 U. PA. J. INT'L ECON. L. 709, 712 (2001).

348. See *id.*

349. See *id.* at 725.

350. See *id.*

351. See *id.* 725-26.

352. See Seo, *supra* note 34, at 69.

353. See *id.*

from SK subsidiary boards in order to rally shareholder support.³⁵⁴ This example illustrates Korean investors' preference that the firms remain in Korean hands and that more opportunities for hostile takeovers will therefore not necessarily result in loss of Korean ownership to foreign investors. Korean shareholders appear open to continued chaebol leadership as long as the chairmen offer improved corporate governance in exchange.

2. A Possible Role for the Korean Stock Exchange

Researchers Stephen Choi and Kon Sik Kim³⁵⁵ posit that the Korean Stock Exchange could pave the way for Korean market reform.³⁵⁶ They suggest that the KSE institute a new, optional market with higher listing standards that would be imposed through private contract.³⁵⁷ This new market might attract high-value firms that require more capital and managers of these companies might be willing to opt into higher corporate governance standards to reduce their cost of capital. These firms will also be incentivized to become more attractive to outside investors and hire professional managers versed in doing so. This new demand for managers with a high level of technical competence could contribute to the drive to reform Korean business schools and alter the internal corporate culture of the firms themselves. Over time, these heightened corporate governance standards and increased share values would likely attract more investors who would come to expect this higher standard of governance, thus placing pressure on other firms to migrate to the new market.³⁵⁸

354. *See id.* at 70.

355. Stephen Choi is a Professor of Law and Business at NYU Law; he received his J.D. and Ph.D. in Economics from Harvard University. *Stephen Choi*, NYU LAW, <http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=23843> [<https://perma.cc/BJG8-ASE2>]. Kon Sik Kim is a Professor of Law at Seoul National University School of Law; he received his LL.M. from Harvard University and his J.D. and Ph.D. from the University of Washington. *See Kon Sik Kim*, NUS: CENTER FOR ASIAN STUDIES, <https://law.nus.edu.sg/cals/people/kon-sik-kim/> [<https://perma.cc/LVJ9-MPJQ>].

356. Choi & Kim, *supra* note 133, at 288-98.

357. *See id.* at 286-88.

358. *Id.*

D. NGOs and Public Activism

Non-governmental organizations can also play an active role in improving Korean corporate governance. The most active among them is the People's Solidarity for Participatory Democracy, which has successfully spearheaded suits to improve minority shareholder rights in chaebol firms.³⁵⁹ Its greatest success is its derivative suit against Samsung, discussed above, which resulted in five directors compensating Samsung Electronics 62.66 billion Won.³⁶⁰ Other NGOs could operate in a similar capacity, initiating derivative suits on behalf of shareholders. The increased use of derivative suits might then increase both the likelihood of firm compliance and perhaps encourage shareholders to pursue such suits themselves.

More generally, over the past decades, Korean citizens have proven their willingness to engage in political activism, even in the face of prevailing cultures of collectivism and paternalism. Koreans are no strangers to outspoken displays of outrage; most recently, they have come forward in protest of President Park's corruption and their parents and grandparents,³⁶¹ who today are likely the ones clinging most staunchly to traditional customs, have themselves cried out against authoritarian rule in the face of Dictator Park's militant regime.³⁶² Traditional values of collectivism may have fueled these movements, as protesters champion change that they believe will benefit society as a whole. Korean nationalism, a belief in the overall social good, and continued cases of chaebol corruption and abuse could inspire an interest in improved corporate governance among Korean citizens, which could then prompt policymakers to effect more substantive change in corporate governance.³⁶³

359. See Lee, *supra* note 15, at 355.

360. See *id.* at 364-69.

361. See, e.g., *S Korea Sees Largest Protests Against President Park Geun Hye*, BBC NEWS (Nov. 26, 2016), <https://www.bbc.com/news/world-asia-38114558> [<https://perma.cc/T8PP-YXM9>].

362. See Chong-suk Han, *Kwangju Uprising*, BRITANNICA (last updated May 11, 2020), <https://www.britannica.com/event/Kwangju-Uprising> [<https://perma.cc/JK46-3XJJ>].

363. See Rhee, *supra* note 7, at 706, 715-16.

E. The Tipping Point

Great change has historically only occurred in South Korea after a strong catalyst prompted enough outrage to inspire it.³⁶⁴ While the country may eventually implement new statutes that both mandate improved corporate governance and also remain consistent with traditional Confucian norms, widespread acceptance and implementation of its rules may require yet another “tipping point”³⁶⁵ for the Korean public. This will likely occur when the chaebol firms elicit enough scandals to prove to the public that they are no longer working to advance the national economy, but rather for personal gain and the gain of their friends and family members. If such a shift in perception were to occur, it is unlikely that the corrupt relationship between the government and chaebol families alone could continue propping up the abusive system.

VIII. CONCLUSION

While it may seem tempting to borrow the best parts of foreign corporate governance laws when attempting to implement reforms, such a strategy cannot be effective unless those laws are modified to suit the particular culture and history into which they are imported. In Korea, that culture is Confucianism embedded in a society historically plagued by war and invasion. When implementing corporate governance reform, borrowing the best parts of comparable foreign systems can be tempting. Such a strategy, however, is destined to fail if it ignores the implementing country’s culture and history. Although the chaebol system may seem grossly inefficient and antithetical to the principles that characterize American corporate governance, it developed and flourished in South Korea in large part because of its compatibility with Korean values and traditions. While this does not justify the historical systemic abuse, it suggests that the solution for Korean corporate governance does not lie with the complete dismantling and abolishing of the chaebol firms, but rather with reform and robust regulation. If chaebol leaders could embrace a sense of responsibility for the stewardship of Korea’s economy, rather than

364. See Choi & Kim, *supra* note 133, at 286 (discussing “scandal-driven reform”); *supra* Section VII.D.

365. Rhee, *supra* note 7, at 715.

loyalty to their personal profits, and if policymakers could shed their interdependencies on those leaders and instead act more fully on the behalf of the Korean people, Korean society could utilize the chaebol system in a manner financially beneficial to the chaebol families, to the members of their conglomerates, and to the Korean public.