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TRANSPLANTING THE ANGLO AMERICAN CORPORATE GOVERNANCE MODEL INTO ASIAN COUNTRIES: PROSPECTS AND PRACTICALITY

A Context Statement submitted to Middlesex University in partial fulfilment of the requirements for the degree of Doctor of Philosophy by Public Works

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For Simon, Merlin and Chester
ABSTRACT

The works in this document illustrate the difficulties in implementing measures based on the Anglo American model to improve corporate governance in four Asian countries; Korea, China, Malaysia and Japan. The evidence shows that corporate governance transformations in these countries have brought about conflict between newly adopted governance mechanisms and the existing domestic environment. I argue that attempts to improve corporate governance through adopting models from foreign jurisdictions cause enormous complications, and that their adoption is often prompted by a flawed belief that they will naturally bring about order to corporate governance in the host country.

The works in this document also explore the impact of transplanting Anglo American employment practices (an important constituent of the Anglo American corporate governance model) on employment relations in Asian countries. Employment relationships in these countries, traditionally characterised by norms of life long employment, promotion and remuneration based on seniority and strong ‘familial’ relations between employers and workers, are increasingly being undermined by Anglo American employment practices which promote certain forms of labour flexibility, erode trust between employer and workers and encourage increasing reliance on formal legal rights to protect interests. I conclude that Asian countries need to ensure that laws and practices which are adopted to advance corporate success are appropriate for their domestic environments.

The works in this document contribute to the study of corporate governance in three ways. First, it contributes to an understanding of the problems and practicalities in implementing the Anglo American model across different national systems. Second, it contributes to the growing literature on this subject in Asian countries, a significant area of growth in the world economy. Third, it generates ideas which may be useful in instigating empirical research to investigate further impacts on Asian corporate governance of the adoption of foreign models.
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TRANSPLANTING THE ANGLO AMERICAN CORPORATE GOVERNANCE MODEL INTO ASIAN COUNTRIES: PROSPECTS AND PRACTICALITY

INTRODUCTION

The Anglo American corporate governance model is generally regarded in American management literature as optimal. Its corporate governance structures, shareholder friendly laws and active capital markets with high levels of disclosure are regarded as mechanisms which can putatively enable ‘global’ standards of efficiency, accountability and transparency to be achieved. The reasons for its superiority being asserted have been attributed to US and UK economic imperialism and consequently, the leading role they have played in framing corporate governance best practices.¹ Many countries outside of the US and UK are strongly encouraged by the international financial community to emulate this model as a means of attracting business.²

The literature discussing whether national corporate governance systems will ultimately converge towards the Anglo American model is voluminous. Convergence theorists argue that convergence is inevitable for various reasons; firstly, that globalisation is reducing the diversity in corporate governance

¹ In the early 1990s, corporate governance debate centred on how the US could improve its economic success through adopting governance mechanisms from other jurisdictions, such as Germany and Japan. By the mid to late 1990s, however, with the US economy prosperous and the ‘globalisation’ debate taking centre stage, the direction of the debate changed to how other countries could emulate its model in order to recreate its successes. See J Hill, “The Persistent Debate about Convergence in Comparative Corporate Governance” (2005) Sydney Law Review 27, 743 – 752.
practices across countries by forcing them to align their governance structures with the most desirable model. Secondly, the expansion by increasingly powerful US-based multinationals of their businesses into host countries is causing local companies to shake free from their customs and traditions, to evolve toward the Anglo American model of governance and operation. Last but not least, such esteem is accorded to the Anglo American model by global investors and markets that companies outside of the US and UK have succumbed to pressures to adopt this model.3

Others however, have strongly opposed the convergence theory, arguing that factors such as culture, legal systems, individual social and political histories and institutional ‘path dependence’4 are preventing convergence from taking place.5 These scholars posit that different national environments influence companies in different ways in the formulation of strategies to compete in the global economy. Moreover, foreign based multinationals seek legitimacy in


4 ‘Path dependence’ refers to the idea that institutions evolve only very gradually over time, and that only minor deviations from the path are likely.

host countries and themselves adapt strongly to the environments in these
countries, thus ‘hybridising’ their practices. In Germany, where considerable
emphasis is traditionally given to co-operative relations between stakeholders
and worker protection and welfare, the participation of labour in supervisory
boards is still a key corporate governance feature. In France, Italy, Switzerland,
Austria, and also in Germany, where banks and regional government are also
core players in companies, they have not relinquished their role in corporate
governance, despite the rapid growth of capital markets in these countries. In
Japan and South Korea, where cultural collectivism and Confucian values
dominate, companies organise themselves in such a manner as to provide
security and stability for each other. The adoption of foreign governance
models may disrupt the equilibrium and the delicate interdependence between
original models of governance and other national elements. Countries which do
so may experience loss of efficiency, destabilisation and inconsistency. In
other words, a definite evolution toward one model of corporate governance is
very questionable.

The works in this synoptic document have subscribed neither to the
‘convergence’ nor the ‘path dependence’ argument. They simply illustrate the
difficulties in implementing measures based on the Anglo American model to
improve corporate governance in countries with fundamentally different
backgrounds. As will be explained below, many emerging Asian economies
have fashioned their laws and practices on the Anglo American model in order
to attract business and investment. Many also do so in the belief that these laws
and practices can improve corporate governance in their companies. But

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7 See P Hall & D Soskice, (eds.): Varieties of Capitalism: The Institutional
Foundations of Comparative Advantage, (2001), (Oxford: OUP) who use the
term ‘institutional complementarities’ to describe the interdependent and
mutually supporting nature of a collection of institutional arrangements which
together, not only enable comparative advantages for firms, but also steer their
performance and economic development in a particular direction. Disruption of
one institution disturbs the equilibrium and causes loss of efficiency. See also
L Bebchuk & M Roe, “A Theory of Path Dependence in Corporate
Governance and Ownership” (1999), Stanford Law Review, 52, 127 – 170 and
R Schmidt & G Spindler, “Path Dependence, Corporate Governance and
corporate governance transformations in these countries have brought about conflict between newly adopted governance mechanisms and existing national elements. Many of the latter are deeply historically derived and embedded; they cannot be easily reconciled with the Anglo American model. I show across the works submitted here how corporate governance developments through adopting models from foreign jurisdictions cause enormous complications. I conclude that it is misguided to argue that the adoption of foreign governance models will naturally bring about order to corporate governance in host countries, without exploring how transplantation interacts with existing local environments.

The works in Part A of this document concentrated on the issues associated with and actual prospects of transplanting the Anglo American corporate governance model into Asian countries. It also investigated the possibility of whether Asian countries can construct corporate governance models more suited to their economic, social, and political conditions. The works in Part B explored the impact of transplanting Anglo American employment practices (an important constituent of the Anglo American corporate governance model) on the employment relationship in Asian countries. The topic has special significance in Asia because employment relationships in many of these countries have frequently been characterised by norms of life long employment, promotion and remuneration based on seniority and strong ‘familial’ relations between employers and workers. Although ‘employment relations’ is a discipline in its own right, I investigate it in the context of corporate governance because the subject gives meaning to the way companies are organised and managed. The works in Part B demonstrated that employment relationships in Asian countries are increasingly undermined by policies based on Anglo American practices which promote certain forms of labour flexibility by legalising lays offs and mass redundancies, cause existing levels of trust between employer and workers to decline and encourage increasing reliance on formal legal rights to protect individual and collective interests.
OVERALL CONTRIBUTION OF WORKS

The works in this document contribute to the study of corporate governance in three important ways. First, and most obviously, they make a critical contribution to an understanding of the problems and practicalities in implementing Anglo American corporate governance across different national systems. Second, they contribute to the limited but growing literature on this subject in Asian countries, a significant area of growth in the world economy. This topic has only recently received attention in western corporate governance literature, despite the increasing importance these countries are playing in global trade. I present an overview of corporate governance developments in four Asian countries, demonstrate why difficulties in transplantation have arisen and emphasise the conflict between foreign models and existing environments. I also show the importance of blending employment practices with national institutions in order to find the most appropriate regime for advancing corporate success. Third, the works generate ideas which may be useful in instigating empirical research to investigate further impacts on Asian corporate governance of the adoption of foreign models. They complement a wide range of existing research which investigates how corporate governance can be improved in Asian countries.

THE EVOLUTION OF MY THEORETICAL PERSPECTIVES

The transplantation issue may be approached from three perspectives – ‘culturalist’ ‘institutional’ and ‘political/historical’ perspectives. My approach initially concentrated on the influence of culture on corporate governance models. The ‘culturalist’ perspective argues that cultural values are central elements which shape corporate governance development. Importantly, unless corporate governance mechanisms are compatible with the cultural traits of the host country, such mechanisms will be ineffective in promoting good management and advancing corporate success. Culture is taken to mean the deeply embedded and resilient values, beliefs, goals and ‘ways of life’ which are held in common among the members of a particular society and which are passed along from one generation to the next. The influential Dutch expert, Geert Hofstede, who investigated the relationship between national cultures
and organisational cultures defines ‘culture’ as the ‘collective programming of the mind that distinguishes the members of one human group from those of another’. In other words, ‘culture’ is synonymous with a system of collectively held values. Indeed, there is a wide body of recent research on the effect of national culture on corporate governance development, and which stresses its importance in cross country research. I have gradually however, recognised the significance of the ‘institutional’ and ‘political/historical’ perspectives as alternative ways of understanding the difficulties experienced when transplanting foreign governance models.

The ‘institutionalist’ perspective is a strand of discussion which argues that it is institutions, rather than culture, which determine the nature of corporate governance models. The ‘culturalist’ and ‘institutionalist’ approaches may be

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8 Hofstede attributed five dimensions to a country’s cultural attitudes – power distance, uncertainty avoidance, individualism v collectivism, masculinity v femininity and time orientation. See <http://www.geert-hofstede.com/>.

complementary rather than mutually exclusive, but that is not my subject here. The ‘institutionalist’ approach assumes that the institutional environment in which an organisation operates strongly influences its policies and practices. Institutions guide, regulate, constrain and interact with the behaviour of organisations. There is no universally accepted definition of ‘institutions’ for the purposes of the theory. They have been used in the ‘formal’ sense; for example, in referring to frameworks of laws or legal regulations. They have also been regarded as ‘organisational’; that is, organisations such as employers’ associations and trade unions. Finally, they have been used in an ‘informal’ sense, referring to norms of behaviour, customs and conventions.¹⁰

Institutional theorists argue that organisations choose a particular form of structure or set of practices either because they would receive legitimacy within the national environment, or because there is little reason to undertake disruptive change in existing host-country arrangements. Institutions do not operate individually, but rather are linked together in systems of ‘complementarities’. Institutional configurations differ very markedly across countries. They also evolve, albeit gradually. This gradual change is ‘path dependency’, meaning that only minor changes and excursions from the historical ‘path’ are likely as institutional configurations adapt to the environment. Viewed from the perspective of ‘institutionalist’ theory, the

reason why many transplantation initiatives have failed in Asian countries is because their governments have adopted governance models which are inconsistent with their domestic institutions.

The ‘institutionalist’ perspective regards corporate governance as part of, and as structured by, a country’s institutional framework. Hence, the unique institutional arrangement which affect corporate governance practices need to be fully understood. So for example, whether shareholding in companies is dispersed or concentrated is influenced by institutional arrangements such as the extent to which the law protects shareholders from expropriation by company directors and controlling shareholders. Similarly, the extent to which institutional shareholders such as private pension funds involve themselves in corporate governance depends on the welfare arrangements and pension provision in their countries. Where the latter are generous and widely available, it is likely that private pension funds will play a lesser role in corporate governance because they will have lower resources. Last but not least, the capacities of banks and financial institutions to engage in long-term relationships with companies depend strongly on national capital market structures, such as whether or not there are active capital markets which can generate capital quickly and easily for companies.

In one of my recent works, I adopted an ‘institutionalist’ perspective on the development of labour management practices (R Croucher & L Miles, “The Legal Structuring of Women’s Collective Voice in the South Korean Workplace” (2009) Journal of Contemporary Asia, 39, 2, 231 – 246). In this work, the limitations inherent in the Korean legal framework are examined to explain the reduced possibilities for women to address their problems in the

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11 Works by F Lopez-de-Silanes, R La Porta, A Shleifer & R Vishny, “Investor Protection and Corporate Governance”, (2000), Journal of Financial Economics, 58, 1, 3 – 27 and F Lopez-de-Silanes, R La Porta & A Shleifer, “Corporate Ownership Around the World” (1999), Journal of Finance, 54, 2, 471 – 517, for example, suggest that companies in countries in which shareholders enjoy strong legal protection from expropriation by the managers and controlling shareholders of companies tend to have widely held shareholding, conversely, where shareholder protection is poor, companies are typically tightly held.
workplace. Despite the government introducing a range of legislation to rectify the situation, this has had limited impact on employers’ practices. Although these laws could be positively complemented by other legislation to ensure that women have a collective voice at work, this has not taken place, reducing the possibilities for women to address their own problems directly.

The theoretical strand which I label ‘political/historical’ argues that the operation and structure of individual companies is strongly influenced by different political systems. Political factors shape the path taken by companies in the development of their corporate governance regimes, including how companies are regulated, the nature of the relationship between the different organs in the company and the kinds of shareholding structures which exist. Roe, a pioneer of this perspective, (focusing only on the US, the larger continental Europe countries and Japan) argues that political forces account for the difference in choice of corporate governance models. The reason for the variety of corporate governance models which exist today is political environments and the correlation between the two is argued to be powerful. Political forces, such as party systems, political institutions, the orientations of individual governments and ideologies determine the extent to which shareholding is dispersed and the way key players within the company interact with each other. For example, strong social democracies (Germany, France, Italy) are often linked with weak shareholder rights and ownership dispersion because in such societies, directors look beyond profit maximisation for

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13 For an argument that the differences in political institutions among these countries may account for much of the variations in Asian corporate governance, see X Wu, “Political Institutions and Corporate Governance Reforms in Southeast Asia” in KL Ho, (ed.) *Reforming Corporate Governance In Southeast Asia: Economics, Politics And Regulations*, (2005), (Institute of Southeast Asia Studies (ISEAS) Publications, Singapore), 16 – 37.
14 In these countries, governments aim to reform capitalism democratically through state regulation and implementation of policies which ameliorate the social injustice and inefficiencies associated with capitalist economies.
shareholders. Such societies expect directors to cooperate with employees rather than focus solely on shareholders. If the latter wished to ensure that their interests are looked after, then the best way to achieve this is to ensure that their shareholding is concentrated. This explains why such economies have developed corporate governance mechanisms to mitigate the problems created by concentrated shareholding. By way of contrast, the US has had one of the world’s weakest social democratic influences (as a result of its specific historical evolution), and the company has been able to flourish in a relatively laissez faire environment. Large companies were managed by powerful directors with dispersed and distant shareholders. Banks and other financial institutions were not, under the political environment, granted the right to hold significant amounts of equity to control directors – in fact, they were deliberately fragmented for fear that they would gain too much power. Where social democracy is weak, ownership dispersion could proliferate. This also explains the nature of laws enacted to address perceived agency problems in US companies.

All three approaches have some utility when investigating the subject of transplantation and I have drawn on each when examining the appropriateness of transplanting the Anglo American corporate governance model in order to enhance corporate governance standards in the following countries: Korea, China, Malaysia and Japan.

16 See also P Gourevitch & J Shinn, Political Power and Corporate Control: The New Global Politics of Corporate Governance, (2005), (Princeton: Princeton University Press) who similarly introduce a political element to explain or interpret corporate governance. The authors argue that certain political environments encourage policies that promote dispersed shareholding, while others give rise to concentrated shareholding. Further, in G Miller, “Political Structure and Corporate Governance: Some Points of Contrast between the United States and England” (1998), at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=110515>, the author argues that different political systems give rise to different rules on takeovers and derivative actions.
THE ANGLO AMERICAN MODEL: AN OPTIMAL MODEL?
The Anglo American corporate governance model, based on normative ‘free market’ principles, relies on various pre-requisites for its successful operation – entrepreneurship, free allocation of resources, free trade, competition and self regulation with minimal governmental intervention. The focus of corporate governance is on the relationship between the board of directors and shareholders. The company is managed by a board of directors (in agency theory, the agent), nominally appointed by, and responsible to, shareholders (in the same theory, the principal). However, as shareholding in Anglo American jurisdictions is typically dispersed, shareholders are ineffective in controlling the board. Indeed, in their pioneering 1932 work, Berle and Means17 created the now well-known ‘agency theory’ and warned of the concentration of power brought about by the rise of the large companies and the emergence of a powerful class of professional directors. Where shareholding is widely dispersed, the typical shareholder is unable to influence the management of the company. The result is that those who can, i.e. directors, have the ability to manage it to their own advantage. They may do it in a way to further their own interests, divert the assets of the company to themselves and disregard the interests of minority shareholders. Unless shareholders possess sufficient shareholdings in the company, they are unable to discipline and monitor directors. The resulting agency problems, including the financial costs, are a major concern to American corporate governance scholars.

To mitigate these problems, various mechanisms are adopted under the Anglo American governance model to align the interests of directors with those of shareholders. Firstly, independent directors are considered an important aspect of corporate governance control, as they can act as the eyes and ears of shareholders and bring an element of objectivity to internal company discussions. Secondly, the law typically imposes on directors various duties to the company, penalising them when they fail to carry out this duty.18 In

18 Examples of duties include duties to act in the best interests of the company, exercise their powers for a proper purpose, act with reasonable care and skill
addition, the presence of active capital markets continually exposes companies to the prospect of takeovers – providing a strong incentive for directors to manage the company diligently lest they lose their jobs. Further, shareholders are given the power to commence legal actions against the board in the event of breach of duty. The laws which regulate the legal relationship between directors and their companies and between directors and shareholders are highly developed. American corporate culture is also litigious. Where a dispute arises, parties invoke their legal rights and resort to litigation in order to obtain a remedy. Last but not least, the media, industry and the legal and accountancy professions all undertake an active role in setting appropriate standards for directorial conduct.19

(1) KOREA’S (CONFUCIAN) CULTURAL CONSTRAINTS

A large volume of literature exists which discusses the nature of economic measures adopted by the Korean government to spur national growth since the 1960s, as well as the subsequent devastating effect of the 1997 financial crisis on its economy.20 I singled out the effects of the crisis on the corporate sector for discussion, because I wanted to demonstrate firstly, how business was


organised before the 1997 financial crisis and how this changed post-1997. Secondly, I wished to illustrate the difficulties experienced in improving corporate governance because reform measures clashed with various cultural aspects of Korean society.

**REFORMING CORPORATE GOVERNANCE IN KOREA POST 1997**

No meaningful discussion of corporate governance in Korea can take place without the reader being familiar with the large conglomerates which were once the backbone of the Korean economy. Indeed, many attribute Korea’s remarkable growth after two devastating wars to the dynamics between the government and these conglomerates. Based on a state led development model, the Korean government exercised full and direct control over the country’s economy and social institutions. In pursuing high growth, it selected a small number of big businesses to carry out its developmental plans in return for privileges such as low interest credits and monopolistic licenses. These developed into the Korean _chaebols_ as we know them today. I describe how these _chaebols_ function in my works (L Miles “Transferring the Anglo American System to South Korea: At What Cost and Are there Alternatives?” (2008), *Bond Law Review*, 20, 2, 71 – 91, L Miles, “The Cultural Aspects of Corporate Governance Reform in South Korea”, (2007), *Journal of Business Law*, 51, 8, 851 – 867 and L Miles, “The Application of Anglo American corporate practices in societies influenced by Confucian values” (2006), *Business and Society Review*, 111, 3, 305 – 322). I emphasise the point that

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Chaebols are organised around Confucian principles. They are typically founded by one individual, who retained control over them and who passed this control to the eldest son upon his retirement or demise. Their social relations normatively resemble a family, where the employer is regarded as a parent who looks after workers and their families. Management within the chaebols is autocratic and dictatorial, with the influence of the founder apparent in how they are led. Decision making is often centralised. In-group harmony, identity with the firm logo and loyalty to employers are characteristics typical of workers, who in turn are rewarded and promoted on the basis of their seniority. These Confucian ethics are said to be responsible for Korea’s rapid economic growth.

After the Korean government started to pursue economic liberalisation policies in the 1980s, it also started to loosen its hold over the chaebols and they were allowed to expand freely. They pursued ambitious expansions that often lacked economic justification. Their practice of cross-shareholding, debt guarantees and vertical integration resulted in extensive networks which prevented them from disposing of unprofitable businesses. Yet, instead of addressing these fundamental problems, the government simply extended funds to them in order to prop them up. Their subsequent collapse (after the 1997 Asian financial crisis) may be found in SJ Chang, Financial Crisis and Transformation of Korean Business Groups: The Rise and Fall of Chaebols, (2003), (Cambridge University Press, UK).


23 A valuable discussion of the history of chaebols may be found in SJ Chang, Financial Crisis and Transformation of Korean Business Groups: The Rise and Fall of Chaebols, (2003), (Cambridge University Press, UK).
crisis) brought about catastrophic consequences for the Korean economy. As a condition for bailing the Korean economy out, the IMF, to which the government appealed for aid, imposed several conditions, one of which was that its companies had to be restructured along the lines of the Anglo American model.\(^{24}\)

The literature discussing economic reform in Korea\(^{25}\) describes in detail the measures adopted by the government to overhaul the way chaebols were managed after the financial crisis. This was done in several ways, namely improving their corporate governance, welcoming foreign investors to participate in the local economy, promoting labour flexibility and tightening the financial industry. Chaebols were renowned for their multi diversification practices, high levels of debt and because of a centralised and familial style of management, poor levels of internal discipline and oversight. On the basis that they were inefficient entities whose hold on the economy needed to be broken, they were forced to downsize, limit the number of potential affiliates and cut down on amount of debt they could guarantee. Heavy fines were imposed on what was perceived to be ‘unfair’ internal transactions. Laws and regulations based on the Anglo American corporate governance model were introduced to increase corporate transparency and accountability and to align directors’ and shareholders’ interests. The law imposed Anglo American style ‘fiduciary duties’ on directors, required companies to recruit independent outside directors, increased the levels of financial reporting and allowed minority shareholders to commence actions against the board. A corporate governance code of best practice was also introduced.\(^{26}\) Finally, controlling shareholders were forced to accept various disclosure obligations to reveal their interests.

\(^{24}\) This is particularly well discussed in HJ Kim, “Living with the IMF: A new approach to corporate governance and regulation of financial institutions in Korea” (1999), Berkeley Journal of International Law, 17, 1, 61– 94, although many of the sources in Footnote 20 also discuss this subject.  
In addition to overhauling the way chaebols were managed, the literature also shows how the government welcomed foreign investment, on the basis that it would constitute the key to successful corporate and financial restructuring. Indeed, the government viewed their participation as potentially increasing competition, enabling new managerial methods to be imported and destroying the ability of chaebols to block economic reform. With the blame for the crisis laid on chaebols, continued reliance on a chaebol-centred system to ensure economic growth was seriously questioned. To encourage foreign investment, restrictions on foreign ownership of shares and national assets were removed. The percentage of foreign ownership in the Korean economy quickly increased. However, this brought with it two significant consequences – first, the acceleration of Anglo American corporate governance, and second, an increase in mergers and acquisitions. Finally, the government streamlined the provision of credit to chaebols by restructuring the banking system. Through mergers and acquisitions, the number of banks declined dramatically. Rules were introduced to require banks to maintain a Bank for International Settlements (BIS) capital adequacy ratio of 8% as a condition of lending, a standard many banks found impossible to meet. Their credit evaluation systems, prudential regulation and criteria for loan classification and risk management criteria were all brought into line with international standards. This had the dramatic effect of emasculating banks, once core players in the governance of Korean companies.

29 ibid.
31 The BIS capital adequacy ratio is the measure of a bank’s ability to meet the needs of its depositors and other creditors, expressed as a ratio of its capital to its assets.
33 Lee & Rhee, (2007), pp. 157
Many scholars have blamed the measures taken by the government post 1997 as responsible for the significant costs experienced by the country’s financial and corporate sectors, as well as society generally. I show that due to variances in culture, reform measures adopted from foreign jurisdictions have proven unsuitable in addressing the problems of a flailing corporate governance regime. The dynastic control by families of Korean chaebols presented unusual corporate governance problems which required specially tailored solutions; the answer did not lie simply in transplanting laws from other jurisdictions in the hope of reproducing their successes. Thus, simple mimetic adoption of these laws has proved inadequate.

**FAILED REFORM MEASURES**

I explain in two of my works (L Miles, “The Application of Anglo American corporate practices in societies influenced by Confucian values” (2006), *Business and Society Review*, 111, 3, 305 – 322 and L Miles ”Transferring the Anglo American System to South Korea: At What Cost and Are there Alternatives?” (2008), *Bond Law Review*, 20, 2, 71 – 91) how the new corporate governance regime presented challenges which were not readily understandable to a Korean society influenced by Confucian values. I illustrated this by using some examples. Thus, the recruitment of independent directors in Korean companies was problematical, given the nature of their tasks. The need for independent directors to behave without prejudice and in a normatively ‘objective’ manner was viewed as unacceptable in a culture where conformity was expected. Similarly, chaebols experienced difficulty in meeting disclosure obligations under the new regime. Traditionally, there was little need to make disclosures to shareholders in Korean companies for the simple reason that there were few outside shareholders. Companies were owned and managed by controlling shareholders, who were also their founders. Thirdly, the company, traditionally viewed as a support network for workers, disintegrated, in the face of increasing legislation being enacted to legalise lay offs, redundancies and increase reliance on casual and irregular workers. The

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loss of a sense of community and trust in society, increasing inequality between core and casual workers, job insecurity and the low morale which resulted were said to be liable to raise transaction costs and adversely affect the Korean economy in the future.\textsuperscript{35} Fourthly, the financial crisis brought about significant changes in the role of banks, traditionally key players in the economy. In the previous institutional framework, the state, banks and business groups shared the risks involved in managing the economy. As a result of restructuring and mergers in the financial industry, however, the risk taking role was removed from the state and chaebols (in the latter, by banning internal transactions, mutual guarantees and cross shareholding) and given over to financial institutions, despite the fact that their own risk-taking capability was also severely constrained. The primary concern of these institutions was now to meet newly introduced supervision standards, which in general penalised corporate lending. They thus had little incentive to take high risks in lending or resolve problems of bad loans by turning troubled companies around, tending instead, to sell poorly performing firms at a discounted price or liquidating them. All in all, reform measures have brought little but malfunction to the Korean financial industry.\textsuperscript{36} Finally, Koreans traditionally lived their lives in pursuit of harmony. Confucian societies were not litigious. Disputes were solved through mediation and negotiation, not through the court system. Moreover, as directors were often related to controlling shareholders, few instances arose where legal action was taken against the former for misconduct or breach of duties. Individuals and businesses also dealt with each other only after getting to know each other and establishing trust. Unlike business relationships in the west, businesses in Korea did not typically rely on contract or legal rules to conclude business deals. It was thus unsurprising that there has traditionally been little need for black letter law, attorneys or a sophisticated judicial system. Indeed, despite moves to encourage shareholder intervention in the company by strengthening their legal rights, shareholder involvement has continued to be modest. They have experienced difficulties in tackling poor governance practices not only because the board continued to enjoy the

\textsuperscript{35} Kwon, (2005), pp. 223 – 227
\textsuperscript{36} Shin & Chang, (2005), pp. 426
support of controlling shareholders, but because they could not obtain the information they needed, or count on support from other shareholders. Even when they have commenced legal action against the board, they have only obtained relatively modest remedies. Korean judges are traditionally generalists, with no expertise in dealing with company or securities cases. In summary, the adoption of corporate governance measures based on foreign models has not proved cost effective and has not brought about the anticipated results.

THE FUTURE
I also highlight (in L Miles “Transferring the Anglo American System to South Korea: At What Cost and Are there Alternatives?” (2008), Bond Law Review, 20, 2, 71 – 91), the work of Korean scholars who argue that the Korean government should have modernised the traditional model (building on its strengths and minimising its weaknesses), not break with it. The perspectives of the Korean people themselves with regard to the reform measures adopted after the 1997 financial crisis have received little attention in conventional corporate governance literature in the west. This is a gap which I fill. Many Korean scholars argue that the reform process was not carried out in a manner which met the needs of the Korean people. For example, given the historical importance of banks in corporate governance, it might have been more effective to introduce mechanisms to increase their efficiency as management monitors, rather than taking away their ability to do so by radically restructuring them. Secondly, despite their weaknesses, one of the strengths of chaebols was their ability to take business risks, due to financial and resource

37 Indeed, even with radical changes to the corporate governance system, it is argued that problems still remain with regard to the extent of power which controlling shareholders wield over the company, weak public and private enforcement of laws, poor levels of shareholder activism and weak capital markets. See JG Kim, (2006), 28 – 34.
support networks between companies. But the prohibition on internal transactions in *chaebols* drastically reduced their ability to support new ventures. Rather than ban internal transactions altogether, would it not have been more pragmatic to increase company transparency or to strengthen the right of minority shareholders to monitor these transactions? Thirdly, the desire for foreign capital must be set against potential costs. Foreign investors typically prioritise the maximisation of short term profit. It has been argued that this is at variance with the Korean ethic of prioritising long term growth. Finally, despite various claims that capital markets can carry out a disciplining function, their effectiveness in doing so has not yet been demonstrated in Korea, not least because a large proportion of the affiliates of *chaebols* remain unlisted. Due to the practice of cross shareholding, it is still possible for owner directors to accumulate control and voting power despite an apparently low level of ownership. This, coupled with poor levels of disclosure, has continued to protect their position and has restricted the ability of the capital markets to exercise a disciplining function.

Overall, it is misguided to regard the implementation of the new regime as a cure for corporate governance failure in Korean companies. Perhaps recognising the benefits traditional corporate structures can bring, the government recently eased restrictions on *chaebols* so they may invest more in their affiliates. New regulations were introduced to relax the cross shareholding limit and allow *chaebols* to hold up to 40% in affiliates. Despite criticisms that these measures would pave the way for *chaebols* to dominate the economy once again, the government insisted that the revision would encourage corporate investment in the current climate of economic

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39 Chang & Shin (2002), pp. 270
40 Shin & Chang, (2005), pp. 429
41 See BS Min, (2007), in which the author argues that the financial system in Korea has moved from mainly R (relationship)-mode financial contracts towards M (market)-mode contracts since the 1997 financial crisis, due to reforms introducing Anglo-American style corporate governance. However, the effectiveness of this change in improving companies’ performances has yet to be demonstrated.
uncertainty.\textsuperscript{42} It is also anticipated that the government will remove restrictions on chaebols owning banks, counteracting recent attempts to reform the financial sector.\textsuperscript{43} Thus, despite the Anglo American corporate governance model being touted as the solution for corporate and economic revival, it has not proved to be an antidote to Korean corporate governance failure, because many of the practices promoted under the model have proved unsuitable in a fundamentally different culture.

(2) CHINA: A FORMALLY COMMUNIST POLITICAL ENVIRONMENT

I investigate the wealth of literature which discusses the development of corporate governance in China\textsuperscript{44} in my works (L Miles & Z Zhang, “Improving corporate governance in state owned enterprises in China: Which way forward?” (2006), \textit{Journal of Corporate Law Studies}, 6, 1, 213 – 248 and L Miles & M He, “Protecting the rights and interests of minority shareholders in China: Challenges for the future” (2005) \textit{International Company and Commercial law Review}, 16, 7, 275 – 290). Since 1978, various reform measures have been implemented to enable the Chinese economy to progress from a centrally directed economy to one in which elements of ‘free markets’ can play a role. A central theme of the reform programme has been to improve the performance of state owned enterprises (SOEs), which, prior to the adoption of market based reforms, were both unprofitable and inefficient. The government undertook to make SOEs more productive by converting them into companies with separate legal identities (arrangements based on Anglo

\textsuperscript{42} JA Song, “Bill eases limits on power of chaebol”, \textit{The Financial Times}, April 3, 2007, pp. 6
American corporate practice). It believed that corporatisation would improve SOE productivity and performance, allow them to generate income from other avenues and increase overall wealth. Many SOEs were converted into public companies and listed on China’s stock exchanges. In theory at least, they would become independent (of the state), be able to make their own decisions and be responsive to market forces. The number of listed companies expanded rapidly, as did the number of registered investors. Today, over 1600 companies are listed on China’s stock exchanges, virtually all having been converted from SOEs. Within a short space of time, the corporate landscape in China changed remarkably.

Whether or not measures based on the Anglo American model have improved SOE governance and productivity is the subject of contention among scholars of Chinese corporate governance. I show that the adoption of measures based on the Anglo American model has not worked to improve governance because corporate governance reform is incompatible with the country’s political environment. Many of the problems experienced relate to state ownership of shares. Under the communist system, the state owns all property on behalf of the people – the Chinese economy continues to be characterised by this feature. Despite ongoing plans to reform the economy along the lines of ‘free market’ principles, and although other forms of ownership including private ownership have gradually been allowed, the state continues to control the reform process through its ownership of companies. Thus, despite converting SOEs into listed companies, the state continues to control them. Empirical research shows that the direct and indirect control of companies by the state is very substantial;

46 The Communist Party and the Chinese Constitution continue to provide that state ownership should be a dominant feature in the economy. On ownership structures in Chinese listed companies, see Wei, (2007), pp. 520 – 526. The author describes the different kinds of shares which exist and gives an account of state ownership in listed companies in different industries.
the state owns up to two thirds of the total issued shares in China. Various reasons exist for state control, but the desire to maintain employment levels, control sensitive industries and ensure social stability feature highly. That the state as majority shareholder has several negative connotations for corporate governance, is widely asserted in ‘free market’ literature.

I show how corporate governance problems have arisen because the state, as majority shareholder, has not exercised its right to monitor management. As the state has no physical presence in its companies, it has to act through agents. However, these are typically civil servants recruited from government departments, not capitalists interested in the economic performance of companies. Crucial company-related functions are thus liable to be performed without adequate care. For example, as civil servants do not benefit from appointing competent directors nor bear negative consequences if they appointed unsuitable ones, there is little incentive for them to employ the best individuals for the job. In many cases, directors themselves have associates in


the Communist Party as well as in governmental departments, and derive support from them. Despite the law imposing various duties and responsibilities on directors, they have little fear of being dismissed for mismanagement. Embezzlement of corporate property is rife, with directors openly benefiting themselves and their cronies. Secondly, state appointed directors prioritised the achievement of state-set targets rather than maximising profit for the enterprise.\(^\text{50}\) This gives rise to problems for corporate governance. Where civil servants are the same persons as company directors, they are bound by the constraints set by government policies. The objectives of the government (maintaining social stability, ensuring full employment and preserving control over sensitive industries) often come into conflict with the interests of the company as a business enterprise. Thirdly, as authority to direct the company is shared among many different regulatory bodies, institutions and ministries, no one is directly accountable for its failures.\(^\text{51}\) In response to these problems, the government set up an asset management agency (SASAC – State-Owned Assets Supervision and Administration Commission) in 2003 to consolidate the functions previously shared by these agencies, such as carrying out ownership functions on behalf of the state, reorganising SOEs, appointing directors and carrying out audit functions. The intention was for the large numbers of SOEs to be restructured to reduce their number, so as to increase competitiveness and efficiency. To date, however, SASAC has only achieved limited success, in large part because acting both as owner and regulator creates conflicts of interest.\(^\text{52}\)

Research emanating from those within the ‘free market’ tradition argues that state ownership weakens corporate governance.\(^\text{53}\) To improve corporate

\(^{50}\) For a discussion of these and other governance problems in Chinese companies, see Chang & Wong, (2004), Xu, Zhu & Lin, (2005), Chen & Su, (2009).

\(^{51}\) Voß & Xia, (2007), pp. 13 – 14


\(^{53}\) See the sources in Footnote 49. Additionally, this is also discussed in W Shen & C Lin, “Firm Profitability, State Ownership, and Top Management Turnover at the Listed Firms in China: A Behavioral Perspective”, (2009), Corporate Governance, 17, 4, 443 – 456, SO Wu, NH Xu & QB Yuan, “State
governance in Chinese companies, many have called for state ownership of shares to be transferred to private investors. Thus, the state’s dual role of controlling shareholder and holder of political power should be separated. In terms of financial performance, the literature suggests that companies with dominant state ownership performed worse compared to those without dominant state ownership. The literature also indicates that changes to company value and financial performance were much greater when ownership was transferred from SOEs to private entities than when ownership was simply transferred from one SOE to another. Improved performance after ownership was transferred to private investors indicates, it is suggested, that private investors were better equipped and had greater incentive than SOEs to monitor and discipline directors.\textsuperscript{54} In responding to these arguments, the government relaxed the prohibition on the trading of state shares in 2005. At the end of 2004, non-tradable shares accounted for 65\% of total shares in the Chinese capital market.\textsuperscript{55} Virtually all listed companies in China have today been able to dispose of state owned shares on the markets,\textsuperscript{56} although it is anticipated that restrictions on the extent to which such shares can be traded freely will remain for several more years. It is envisaged that governance problems caused by the non-tradability of shares will diminish quickly. It may well also be the case that state shares will be sold to private investors on the open market, which will lead to a more efficient market for corporate control.


\textsuperscript{56} Shi, (2007), pp. 862 – 863.
Although the Chinese state may, for political reasons, maintain control of its companies, I argue in my works that there are other (albeit limited) ways in which corporate governance can be improved even within this framework. These include strengthening the rights of minority shareholders (the law already enables cumulative voting and the commencement of derivative actions, but it is ambiguous), encouraging institutional shareholder activism (institutional shareholders are still low in numbers because of the non-tradability of state owned shares) and strengthening the monitoring capacity of independent directors through education and training. Within the existing company law framework, laws can also be strictly enforced in order to deter directors from engaging in corrupt activities or embezzlement. Public regulators and the judiciary need to understand the rationale of the reforms and fulfil their law enforcement duties accordingly. Professional directorial associations can also be set up in order to set standards, guide and educate directors so they can discharge their responsibilities efficiently. I point out in my works that to date, inadequate attention has been given to these measures to improve corporate governance.57

In summary, I suggest that Chinese corporate governance derives its features from China’s political orientation. The state continues to hold a controlling stake in its companies, formally on behalf of the people. Attempting to reform corporate governance in this context by adopting the Anglo American model raises inherent tensions and difficulties. Indeed, it said that “it is particularly difficult for the Chinese legal system to borrow from Western jurisdictions because the Chinese system, as a result of its history... is concerned more with the balancing of interests than with the vindication of rights.”58 The Chinese system revolves around the supremacy of the state. So long as it refuses to relinquish its shareholding in its companies, the adoption of measures from the Anglo American corporate model (recruitment of business-oriented individuals to manage the company, the establishment of active markets for corporate

control, strengthening the rights of minority shareholders, encouraging shareholder activism, the pursuit of profit etc.) are unlikely to work to improve governance standards. All in all, it may be that the obsession with adopting the Anglo American governance model has not led to sufficient regard being given to whether its specific variant of communist ideology is compatible with this model.

(3) WHERE RELIGION DOMINATES: MALAYSIA
Countries with an Islamic tradition (for example, United Arab Emirates, Malaysia, Brunei, Pakistan, Indonesia and Turkey) are, like all others, subject to pressures to attract investment or be competitive in global markets. Within these countries, Islam wields a significant influence over all aspects of life. Many of these countries have adopted governance templates based on the Anglo American model. But how appropriate are these measures in improving corporate governance within their companies? I explore the compatibility between Islamic and Anglo American values in Malaysia. Malaysia presents an interesting case study, because it is both an Islamic country and one regarded as modern and forward looking. It is also home to many multinationals and foreign investors. Thus it constitutes fertile ground in which to study the application of the Islamic faith to a business environment influenced by western values.

ISLAMIC TEACHINGS
I describe in my work (L Miles & S Goulding, “Corporate Governance in Western (Anglo American) and Islamic Communities: Prospects for Convergence?” (2010), Journal of Business Law, 2, 126 – 149) the principles upon which Muslims are required to conduct business. I also explain that the extent to which a business framework based on religion is compatible with that of the Anglo American model is attracting growing academic interest. Primarily, this is because of increasing trade between Islamic countries and the West, but also because many scholars are arguing that western business principles lack a moral dimension and are advocating a new kind of business conduct (based on Islam) by demonstrating positive associations between religious faith and business transactions. The continuing uneasy relations
between the Middle East and the West have led many Islamic thinkers to debate the likelihood of finding common ground between Islamic and Western values. Indeed, the question of whether or not the Muslim community engages with a world dominated by Western secular values has been propelled to centre stage recently by the rise of Islamic movements determined to resist Western domination and control over Muslim territories. In the light of these developments, it is timely to investigate the compatibility between Islamic values and Anglo American corporate governance.

Islam requires all Islamic organisations to serve God and develop a culture which advances Islamic objectives. Islam does not discourage or prohibit trade, business or the creation of wealth; on the contrary, business is regarded as socially useful and morally justified. However, it introduces a moral filter to which wealth creation is subject. In other words, individual freedom to pursue economic activity does not operate without a sense of responsibility and Muslims are required to observe certain restraints when carrying out business. Although pursuing material wealth is not wrong, wealth has a corrupting effect, and if pursued without restraint, will distract Muslims from achieving spiritual and material well being. Thus businesses are required to fulfil a moral duty toward their stakeholders, such as their workers, and to the environment. Muslims are also required to give alms to help the poor and needy in society. Perhaps most significantly, the Islamic business system emphasises ‘value’ maximisation for the greater good, rather than ‘profit’ maximisation for the

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satisfaction of a few. Businesses which prioritised profit are regarded as wasteful, liable to encourage divisiveness between those who can afford products and services and those who cannot and liable to cause damage to the environment through pollution. The Islamic position is that if businesses turned away from prioritising material wealth, and if justice became an integral part of business, then a harmonious global atmosphere would result, but which would not detract from promoting competitiveness. Adherence to the Islamic ethical framework ensures dignity and freedom from all types of bondage. It also allows individuals to earn their living in a fair and equitable manner without exploiting others, so that ultimately, society benefits. In other words, it has in western terms, more of an emphasis on what economists call ‘welfare’ and ‘public goods’ production.

**ISLAMIC PRINCIPLES AND THE ANGLO-AMERICAN MODEL: INHERENT TENSIONS**

There are various tensions between Islamic business principles and those inherent in the Anglo American corporate governance model. I deal with this point in detail in my work mentioned above. The Anglo American corporate governance model concerns itself with promoting and prioritising the rights and interests of shareholders. Islam however, requires the consideration of a wider range of stakeholders. Secondly, the dominant theoretical model of Anglo American corporate governance is based on agency theory, rather than

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stewardship theory. Directors are regarded not as stewards who are naturally motivated to act in the best interests of the principal, but as self-interested, opportunistic agents who have to be watched over and controlled (see the agency theory discussion above). This view necessitates the creation of laws and other mechanisms to ensure that directors do not abuse their powers. Under strict Islamic principles, however, directors are not viewed in this manner – Muslims are taught to be faithful stewards of assets entrusted to them; indeed, the demonstration of this faithfulness is regarded as an act of worship. Islam thus starts from a different perspective, it does not envisage that directors’ powers be curbed; on the contrary, it presupposes that Muslims desire to live by the word of God. Thirdly, it is said that a capitalist economy emphasises the individual and his pursuit of pleasure. Man is free to satisfy his needs in any manner possible, as long as in doing so, he does not infringe the rights of others or contravene the law. The Islamic religion, on the other hand, believes that God is the only source capable of satisfying the needs and desires of man. It does not deny our needs, but sets guidelines as to how these needs and desires can be fulfilled. Islam condemns waste, exploitation and indulgence and prohibits Muslims from engaging in specific activities, which are considered *haram* (forbidden).  

Many Middle Eastern scholars regard Islam and western capitalist principles (inherent in the Anglo American corporate governance model) as diametrically opposed. Capitalism is rejected on the basis that it lacks balance and moderation, excessively emphasises individual rights, materialism and freedom of enterprise which cause suffering and injustice for those who are poor. The

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68 Islam forbids the taking of alcohol, eating of pork, gambling, hoarding, the charging of interest on financial transactions, extramarital sex and obscenity, all of which are considered *haram*.

69 For a helpful comparison between Islam and Capitalism see S Ganjoo, *Economic System in Islam*, (2004) (Anmol Publications Pvt Ltd). The author argues that the Islamic economic system obeys the requirements of moral and ethical doctrines and therefore is fundamentally opposed to European or American capitalist economic principles, which do not heed moral or ethical concepts. See also the writings of Islamists such as Syed Abul Ala Mawdudi, Sayyid Qutub, Hasan Al Banna and Ayatollah Taleqani in C Tripp, *Islam and the Moral Economy: The Challenge of Capitalism*, (2006), (Cambridge University Press), 46 – 76.
west also represents, to many Muslims, a world which is characterised by disintegrating societies in which selfishness and loneliness prevail. Materialism and the quest for wealth dominate the thinking of people who are imprisoned by their desire for money. Their value systems are seen as being based on secular economics, where people aggressively exploit each other and where society is divided into classes which resent one another, as evidenced by the levels of crime, poverty and frustration among the young and unemployed. Finally, such scholars view the west as aggressive, due to their policies of colonialism, economic exploitation and political domination of the world. As a result, they reject western influences on the basis that they corrupt Islamic societies.  

MY RESEARCH

In order to investigate whether Islamic business principles are compatible with those under the Anglo American (‘free market’) model, I conducted several interviews with Muslim directors in various companies in Malaysia. This study was carried out in 2008 (discussed in my work above) and was funded by the British Academy. Despite the large volume of literature on Islamic business principles, little empirical research has been conducted to examine the extent to which they are in practice, compatible with the Anglo American corporate governance model. I attempt to fill this gap.

As a former British colony, Malaysia inherited the English common law system. Company law in Malaysia is based on the Anglo American model, and follows its developments closely. I briefly discussed the corporate governance regime in Malaysia in my other work on Malaysia (L Miles, “Waking Up after the 1997 Financial Crisis: Corporate Governance in Malaysia” (2004), Journal of International Banking law and Regulation, 20, 1, 21 – 32). It shows the existence of a sophisticated company law regime and describes the active roles

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played by the legal and accountancy professions, the media, institutional shareholders and company regulators in corporate governance.\(^{71}\)

In investigating the compatibility between Islamic business principles and the Anglo American corporate governance model, I pay particular attention to the contribution of Mahathir bin Mohammed (Prime Minister from 1981 to 2003) in blending Islam and modernity. The period under his leadership saw Malaysia change from an agricultural-based economy to an industrialised nation, with its population acquiring extensive knowledge in science and medicine, technology and engineering. Mahathir welcomed foreign investment, reformed the tax structure, reduced trade tariffs and privatised several state-owned enterprises. I show that although he was committed to the ‘Islamisation’ of Malaysia, Mahathir was also critical of Muslims preoccupied with ritualistic Islam and who possessed an introverted or conservative interpretation of religion.\(^{72}\) He urged Muslims to engage with worldly affairs, to achieve distinction in secular education and to look beyond religion. He propagated a ‘progressive’ version of Islam (Islam Hadhari), believing that

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\(^{72}\) This interpretation of Islam is attributable to the influence of traditional Islamic scholars trained in the school of conservative hermeneutics. They have dwelt almost exclusively within the world of the book and the law, not the realities of the world. They have interpreted the Qur’an and the legal texts of Islam to speak for them and their interests, rejecting development, modernity and progress. As they have a monopoly over these sacred legal texts, their power and status are very significant. See E Moosa, “We Need New Intellectual Tools for the Age We Live In” in F Noor, *New Voices of Islam* (2002), at [http://www.isim.nl/files/paper_noor.pdf](http://www.isim.nl/files/paper_noor.pdf), 23 - 28, pp. 26
Islamisation and modernisation can go hand in hand.\(^73\) His message that Islam can be modern, liberal and progressive was aimed not only to challenge the mindset of the Muslim community, but also to encourage the collaboration between the Muslim and non-Muslim population.\(^74\)

Far from rejecting the Anglo American model on the basis that its values were incompatible with that of Islam, all the participants in my study welcomed the model and the ‘free market’ system as frameworks in which business can flourish. All recognised the importance of profit and wealth creation for society and the economy and none perceived a conflict between Islam and capitalist principles. They did however, emphasise the importance of moral values, a sense of accountability and a caring spirit taught by Islam, which they perceived as an antidote to the negative repercussions of the ‘free market’ system. They also stressed the need for Islam to be forward thinking and to be able to change with the times in order to accommodate the needs of modern society, clearly embracing the approach advocated by Mahathir.

A caveat is however, required. The research I conducted in Malaysia was


highly selective and I targeted only high profile, and internationally known, companies. It thus only presented a snap shot of ideas and views of company directors in Malaysia. They may not necessarily represent the experience of the wider community of directors. There may also have been ‘social desirability’ effects in the responses of those interviewed. For a more rounded picture to be presented, research should target smaller, local and less well known companies in order to elicit the views of their Muslim management. The latter may present a different view of the compatibility of western and Islamic business models.

More generally, I point out in my work that the relationship between Islam and the west continues to be a troubled one. One cannot ignore the rise of Islamic movements (e.g. Al Qaeda, Egyptian Islamic Jihad, Hamas, Armed Islamic Group, Hizbul Mujahideen) determined to resist western domination and control over Muslim territories. Their demands to uphold Sha’ria law and to destroy those regarded as ‘enemies of Islam’ has provoked aggression against Islam and its followers. ‘Wahhabism’, a version of Islam which insists on a literal interpretation of the Qu’ran, constitutes an influential force in their lives. Wahhabis regard their version of Islam as the only path of true Islam and oppose any interpretation which aligns Islam with western standards, notably with regards to gender equality and democracy. They also regard individuals who did not practice their version of Islam as heathens and enemies. Many in the west (who are not necessarily aware of the different versions of Islam) openly accuse Islam and the Islamic community of being a threat to security and democracy, although Islamic movements justify their actions on the basis that they are simply resisting western arrogance. Islamic movements have opposed the occupation of Palestine, Iraq and Afghanistan and the adverse publicity Islam receives in the west. The ongoing antagonistic relationship between the west and these Islamists has continued over the decades to stall attempts to initiate dialogue to build peaceful relations across cultural and


76 The industrial relations authority, Paul Edwards, defines ‘employment relationship’ as the (contractual) relationship between employer and employee, which organises human resources in the light of their productive aims. It sets the price for a set number of hours of work, determines how much work is done in that time, sets the tasks, ascertains who defines the tasks and what penalty is imposed if the obligations were not met. Traditionally, the employment relationship was characterised by full time work, under a contract of employment for indefinite duration with a single employer. Recently however, new patterns of employment have emerged, signifying a move away from full time employment. The term ‘employment relations’ (sometimes used synonymously with ‘industrial relations’), on the other hand, focuses on all forms of economic activity where an employee works under the authority of an employer and receives a wage in return. It is concerned with maintaining the employment relationship in order to secure productivity, motivate employees and ensure healthy employee morale. See P Edwards, (ed.) “The Employment Relationship and the Field of Industrial Relations” in Industrial Relations: Theory and Practice, 2nd edition, (2003), (Wiley-Blackwell), pp. 1 – 36.
undermined by practices which, being based on the Anglo American governance model, promote the adoption of flexible working practices, encourage increasing reliance on legal rights to protect individual and collective interests and increase levels of mistrust between employers and worker. The effects of policies derived from the Anglo American model on employment practices, and more fundamentally, on the cultural and traditional values of Asian societies is a topic worthy of consideration because they inform us as to whether adopting employment practices from foreign jurisdictions to improve company efficiency is, for Asian countries, necessarily the most efficient and equitable way forward. I investigate the practicability and consequences of implementing Anglo American employment practices in Japanese and Korean companies, two societies heavily influenced by Confucian values.

CONFUCIAN CULTURE AND ECONOMIC GROWTH

1960s, because of the favourable effects of their Confucian culture.\textsuperscript{79}

\section*{JAPANESE AND KOREAN LABOUR MANAGEMENT PRACTICES}

In my works, I underline the importance of Confucian values in the employment relationship in Japanese and Korean companies. Companies in both countries were traditionally constructed as families. In Whitley’s terms, there were high levels of employer-worker interdependence. Workers integrated themselves into their companies through working hard and demonstrating loyalty to their employers. In return, employers rewarded them by looking after their welfare, and by investing heavily in educating and training them. Workers usually stayed with their companies until retirement age. Directors were appointed from the pool of senior, long-serving workers within the company. As a result, management and workers have shared views and interests.\textsuperscript{80} Japanese and Korean companies traditionally also operated a wage and promotion system based on seniority. Last but not least, companies were very much regarded as providers of social security. In times of distress, they would attempt to keep workers within the business rather than make them redundant, by cutting back on dividends, reducing overtime opportunities and offering voluntary retirement. Trust, long-term commitment and co-operation were central elements in the relationship between the company and its workers. Certainly, the success of the Japanese economy in the 30 years before the financial crisis was attributed by many to the strong relations between

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\textsuperscript{80} T Araki, “Corporate governance reforms, labour law developments and the future of Japan’s practice dependent stakeholder model”, (2005), Japan Labour Review, 2, 1, 26 – 57, pp. 27.
\end{flushleft}

**JAPANESE AND KOREAN COMPANIES ABANDON TRADITIONAL LABOUR MANAGEMENT**

After the Asian financial crisis, many traditional company practices had to be abandoned, because they could not cope with the pressures and demands set by liberalisation and globalisation. In my works mentioned above, I show how traditional employment practices have changed to illustrate how they have been undermined by practices from foreign jurisdictions. Fierce global competition demanded a more efficient utilisation of resources, and calls to formulate a new labour management system based on Anglo American principles, which would provide flexibility and enable companies to compete, were quickly heeded. I then posit, in view of the significant costs which followed, whether there were alternative paths Japanese and Korean companies could have taken. I discuss how these companies, which previously employed almost identical employment practices, have had to discard these. Traditional practices such as life long employment and promotion based on seniority were replaced by reliance on casual labour and performance based pay and promotion systems. Companies removed excess personnel by flattening their organisational hierarchy. Many companies introduced a mandatory retirement age, forcing senior workers to retire. Laws were amended to legalise lay offs and remove employment protection. The use of outsourcing increased. Courts were forced to recognise that economic efficiency necessitated the institution of policies which made it easier for companies to dismiss their workers, and so interpreted statutes allowing dismissals in favour of employers.\footnote{On the South Korean position, see JT Choi, “Transformation of Korean HRM based on Confucian values”, (2004), Seoul Journal of Business, 10, 1, 1 – 26, C Rowley & JS Bae, “Globalisation and Transformation of HRM in...} 

Further, in order to optimise the use of resources, many companies started to experiment with...
Anglo American style performance appraisal systems to evaluate the productivity of workers as the basis for promotion. Lastly, companies began to recruit specialists to meet specific company strategies, rather than employ generalists who could perform different kinds of roles and who could provide internal flexibility. In short, they started to use ‘calculative’ human resource management practices as Gooderham describes them. All in all, confidence in traditional values was shaken.


The power of trade unions in both Japan and Korea also weakened dramatically. In Japan, the proportion of workers joining unions dropped from 55.8% in 1949 to less than 20% in 2005. In Korea, the evidence currently shows a unionisation rate of just 10.8%. With the gradual decline in trade union influence, workers began to turn to the law to protect their interests. In Japan, the number of individual labour disputes has increased sharply in the last ten years. With the gradual erosion of the relationships between companies and workers, laws were introduced to set minimum work standards, prohibit discriminative practices and provide quick and effective dispute resolution mechanisms in the event of dispute. In Korea, laws governing the resolution of individual labour disputes and the guarantee of certain rights in the work place have also increasingly been utilised by

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87 See K Sugeno, “Judicial Reform and the Reform of the Labour Dispute Resolution System” (2006), Japan Labour Review, 3, 1, 4 – 12, pp. 7 – 8
workers in order to protect their interests, as shown by the escalating numbers of individual labour disputes in recent years.\textsuperscript{91}

**THE FUTURE OF JAPANESE AND KOREAN EMPLOYMENT RELATIONS**

I investigate whether recent shifts in employment practices indicate a marginal or central development in Japanese and Korean employment relations. In Japan, some scholars argue that it is inaccurate to say that there is a definite evolution toward the Anglo American model and that whilst Japanese companies are adopting its employment practices, they have been able to adapt and modify their traditional model of governance.\textsuperscript{92} Others say that changes are only “occurring within the framework of the stakeholder model…not likely…[that it will] completely convert into the shareholder value model, at least for the time being”.\textsuperscript{93} Still others propose that employers could opt for a middle way, in order that traditional elements of Japanese labour practices may be retained—that is, through worker share schemes. It is argued that allowing workers to share in the capital of the company would enable the continuation of stable cooperation between management and workers, the very foundation of traditional Japanese management.\textsuperscript{94} Thus whilst employment practices in Japan

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\textsuperscript{91} Figures can be obtained from the National Labour Relations Commission website in Korea, at <http://www.nlrc.go.kr/en/current.html>. See also SY Kim, “The Legal Regulation of Wrongful Dismissal in Korea” (2004), Comparative Labour Law and Policy Journal, 25, 4, 535 – 560, pp. 557 – 558


\textsuperscript{93} Araki, (2005), pp. 53.

\textsuperscript{94} P Debroux, “Internal Corporate Governance Discipline and the HRM system in large Japanese Companies” (2004), Asia Pacific Business Review, 10, 3/4, 346 – 359
are changing, it is difficult to identify precisely to what extent, as there is evidence that its core practices are continuing.\(^{95}\)

The same arguments are made with regard to Korean employment practices. Confucian traits such as patriarchy, collectivism, an emphasis on solidarity and cooperation are no longer regarded as compatible with the modern ‘free market’ system. The importation of new practices has been criticised as causing damage to society.\(^{96}\) Should companies continue to shed traditional practices because they are seemingly at odds with globalisation? Defenders of the Confucian tradition have resisted the spread of western influences and values into Korea, arguing that Confucian values are needed to counteract individualism and materialism which have seeped into Korean companies. The emphasis on individualism and materialism in the west are seen as having caused the Korean economy to disintegrate and become devoid of morals, where families and communities are breaking down and where the gap between the rich and poor is widening. Poorer classes are alienated, material wealth is exalted and success is achieved by exploiting labour and the environment. Confucian values, with their emphasis on solidarity, harmony and support on the other hand, can act as a rehabilitative remedy for modern society.\(^{97}\)

I suggest that following a foreign model may be self-defeating as it destroys national elements which are crucial for future growth. Scholars point to research which shows that companies which keep traditional employment practices have been able to maximise the advantages of Confucian values. For example, some have retained the seniority principle, by applying performance related remuneration and promotion only to managers or workers with higher qualifications. Others have awarded remuneration not on the basis of

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\(^{95}\) Morris, Hassard & McCann, (2006), pp. 1504
individual achievement, but on the basis of group merit. Still others have achieved flexibility by utilising job rotation, offering reduced over time hours, encouraging workers to take temporary leave and making use of temporary retirement schemes instead of dismissing workers outright. The employment of such practices combines the benefits of Confucian culture with those of western practices to produce a system which contains characteristics that reflect traits from both. 98 Thus, it may be over simplistic99 to assume that Korean systems are abandoning traditional employment practices in favour of western ones, rather, it may be that, in the long term, a hybrid model will emerge.

CONCLUSION
The works presented in this document contribute to an understanding of the problems and practicalities involved in implementing the Anglo American corporate governance model in Asian countries. They have drawn on three perspectives (‘culturalist’; ‘institutionalist’; ‘historical-political’) to explain why problems have arisen when foreign corporate governance models are adopted to improve company performance in Asian countries. Initially, I drew only upon the ‘culturalist’ perspective. I soon recognised however, that there were other perspectives which could be used to explain the same subject. I have thus reflected on how ‘institutional’ and ‘political’ theories can be used in this regard. With regard to the first, I realised the need for corporate governance models to be legitimised by existing institutions in the host country before they can facilitate change in corporate behaviour. This does not take place quickly. With regard to the second, I began to understand how

98 Choi, (2004), at 21 – 25 and Rowley & Bae, (2002), pp. 546. See also I Park (2007), which argues that despite rapid change, deeply held cultural views about the nature of work retain significance in charting the future role of the state with respect to regulating the labour market.
99 Indeed, Rowley & Bae (2004) suggest that Korean HRM remains even more of a labyrinth after the Asian crisis as changes in its HRM have been piecemeal, ad hoc, and by no means universal, resulting in a patchwork of practices—for example, the weakening of lifetime employment, but combined with a continuing expectation of very high employee commitment, or the spread of performance criteria in appraisal, rewards, and promotion systems but within a culture where collectivism, seniority, and age remain important aspects in everyday life and society in general.
governance models imported from jurisdictions with different political orientations are unlikely to bring about the anticipated results in the host country. Whichever perspective is adopted, I have shown that the expectation that the adoption of foreign corporate governance models will naturally bring about an ‘ordering’ effect in Asian countries has not materialised. It is only possible to determine the optimal regime for companies through first understanding how individual cultures, institutions and political environments have influenced the way they have developed. I conclude that the challenge for Asian countries is not to implement all or several of the aspects of the Anglo American corporate governance model, but to be selective and shape them as appropriate to their individual environments if their effectiveness as a tool of economic development is to be realised.
BIBLIOGRAPHY

PRINTED BOOKS

(2) B Amable, The Diversity of Modern Capitalism, (2003), (Oxford: OUP)

(3) A Amsden, Asia’s next giant: South Korea and Late Industrialization, (1989), (New York: OUP)


(7) SJ Chang, Financial Crisis and Transformation of Korean Business Groups: The Rise and Fall of Chaebols, (2003), (Cambridge University Press, UK)


(9) JN Gordon & MJ Roe (eds), Convergence and Persistence in Corporate Governance, (2004), (Cambridge University Press, UK)


**CHAPTERS IN BOOKS**


(14) X Wu, “Political Institutions and Corporate Governance Reforms in Southeast Asia” in KL Ho, (ed.) *Reforming Corporate Governance In Southeast Asia: Economics, Politics And Regulations*, (2005), (Institute of Southeast Asia Studies (ISEAS) Publications, Singapore), 16 – 37
PRINTED JOURNAL ARTICLES


(2) T Araki, “Corporate governance reforms, labour law developments and the future of Japan’s practice dependent stakeholder model”, (2005), Japan Labour Review, 2, 1, 26 – 57


(5) J Atkinson, “Flexibility or Fragmentation? The UK Labour Market in the 80s” (1987) Labour and Society, 12, 1, 87 – 105


(7) JS Bae & C Rowley, “Changes and Continuities in South Korean HRM” (2003), Asia Pacific Business Review, 9, 4, 76 – 105


(17) EM Chang, “Individual Pay for Performance and Commitment HR practices in South Korea” (2006), *Journal of World Business*, 41, 4, 368 – 381


(30) RJ Gilson “Globalising Corporate Governance: Convergence of Form or Function” (2001), American Journal of Comparative Law, 49, 2, 329 – 357


(39) Z Hasan, “Corporate Governance: Western and Islamic Perspectives” (2009), International Review of Business Research Papers, 5, 1, 277 – 293


(44) G Jackson, “Stakeholders under pressure: corporate governance and labour management in Germany and Japan”, (2005), *Corporate Governance*, 13, 3, 419 – 428


(51) MG Kang, “Globalisation of the economy and localization of politics?: Restructuring the developmental state via Decentralisation in Korea” *Korea Journal*, 2006, 46, 4, 87 – 114


(53) AE Kim & GS Park, “Nationalism, Confucianism, work ethic and Industrialisation in South Korea”, (2003), *Journal of Contemporary Asia*, 33, 1, 37 – 49

(54) EH Kim & WC Kim, “Changes in Korean Corporate Governance: A Response to Crisis” (2008), *Journal of Applied Corporate Finance*, 20, 1, 47 – 58


(60) Y Kurihara, “The changing corporate governance in Japan: adapting to globalization”, (2005), Global Business & Economics Review, 6, 1, 82 – 91


(64) ES Lee & SS Kim, “Best practices and performance based HR system in Korea”, (2007), Seoul Journal of Business, 12, 1, 3 – 17


(69) MK Lewis, “Islam and Accounting” (2001), Accounting Forum, 25, 2, 103 – 127

(70) JT Li & JR Harrison, “National Culture and the Composition and Leadership Structure of Boards of Directors” (2008), Corporate Governance: An International Review, 16, 5, 375 – 385

(71) Y Li, YF Sun & Y Liu, “An empirical study of SOEs' market orientation in transitional China”, (2006), Asia Pacific Journal of Management, 23, 1, 93 – 113


(76) HC Lim & JH Jang, “Neo Liberalism in Post Crisis South Korea: Social Conditions and Outcomes” (2006), Journal of Contemporary Asia, 36, 4, 442 – 463


(81) R Mabuchi, “How Labour Unions are perceived by Members and Union Disassociation in Japan” (2007), Japan Labour Review, 14, 1, 91 – 111


(87) G Rozman, “Can Confucianism survive in an age of Universalism and Globalisation?” (2002), Pacific Affairs, 75, 1, 11 – 37


(94) G Picco, “The Challenges of Strategic Terrorism” (2005), Terrorism and Political Violence, 17, 1-2, 11 – 16

(95) G Rice, “Islamic Ethics and the Implications for Business” (1999), Journal of Business Ethics, 18, 345 – 358


(114) B Tibi, “The Totalitarianism of Jihadist Islamism and its Challenge to Europe and to Islam”, (2007), Totalitarian Movements and Political Religions, 8, 1, 35 – 54


(121) C Xu, T Zhu & YM Lin, “Politician control, agency problems and ownership reform: Evidence from China” (2005), Economics of Transition, 13, 1, 1 – 24


(123) YW Wei, “An Overview of Corporate Governance in China” (2003), Syracuse Journal of International Law and Commerce, 30, 23 – 48


ELECTRONIC JOURNAL ARTICLES

(2) M Bashir “Islam Hadhari: Concept and Prospect” (2005), at <http://www.islamonline.net/english/Contemporary/2005/03/Article01.shtml>


WEB RESOURCES


LEGAL MATERIALS (UK)
(1) Aberdeen Railway v Blaikie Bros [1854] 1 Macq 461

(2) Howard Smith v Ampol Petroleum [1974] AC 821

(3) IDC v Cooley [1972] 1 WLR 443

(4) Re Barings plc (No 5) [1999] 1 BCLC 433
(5) Re Smith Fawcett [1942] Ch 304

(6) Regal Hastings v Gulliver [1967] 2 AC 134

LABOUR LEGISLATION (JAPAN)
(1) Labour Standards Law 2003

(2) Law Concerning Stabilisation of Employment of Older Persons 2004

(3) Law Securing Equal Opportunity and Treatment between Men and Women in Employment 2006

(4) Law for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers 2006

(5) Minimum Wage Law 2002

(6) Labour Tribunal Law 2004

LABOUR LEGISLATION (KOREA)
(1) Labour Standards Act 1997

(2) Minimum Wage Act 1986

(3) Equal Employment Act 1987

(4) Occupational Safety and Health Act 1990

(5) Act Relating to Protection etc. for Dispatched Workers 2007

(6) Act Concerning Protection etc. of Fixed Term and Part Time Workers 2007

PRINTED NEWSPAPER ARTICLES

(2) JA Song, “S Korean pledge to transform economy” The Financial Times, March 24, 2008, pp. 1,

(3) JA Song, “S Korea leader vows to hit growth target” The Financial Times, March 24, 2008, pp. 4
CORPORATE GOVERNANCE CODES (KOREA)
Code of Best Practice for Corporate Governance, 1999, at

GOVERNMENT REPORTS