THE CHANGING ARENA OF POWER CONTESTATION BETWEEN THE STATE AND *CHAEBOLS* IN SOUTH KOREA: DEMOCRACY AND THE ASCENT OF LEGAL INSTITUTIONS

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INTRODUCTION

The growth of the South Korean economy has often been attributed to the rise of *Chaebols*, or family owned businesses with wide-ranging conglomerate-like economic interests. The embeddedness of the *Chaebol* in Korea's political economy has allowed them to emerge as a major actor, with significant influence in the political arena – as a result of their role as stabilizers of the economy. This is a significant development, considering the relatively weaker position of the *Chaebol* vis-à-vis the state, under authoritarian rule. With democratization and their association with South Korea's economic success, the *Chaebol* has become more powerful after democratization. Even post-democratization, however, the close relationship between the government and *Chaebol* refuses to go away. As a result, the legislative and executive institutions continue to be implicated in negative events that involve the *Chaebol*, such as corruption. South Korea's political economy developed along a similar trajectory as several other East Asian states, such as Japan, Singapore and Taiwan. Among the most extensively documented country studies in this domain has been that of Japan. The Japanese

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business sector, similarly to South Korea, is significantly influenced by the equivalent of *Chaebols* – the Keiretsus. The institutional progenitor of Keiretsus were Zaibatsus, which increased in prominence and power, as the exigencies of World War II necessitated the creation of efficient producers of economic goods, including military hardware for combat. Under Allied Occupation in the post-war years, Zaibatsus were initially planned for dissolution. However, due to a change in the stance of the occupying administration, Zaibatsu dissolution did not achieve success. Consequently, Zaibatsus continue to persist institutionally as Keiretsus. Unlike Keiretsus, the *Chaebols* were even less extensively reformed by the South Korean state. For example, the latter continues to maintain a family-centric model of shareholding, while the former no longer does. Nonetheless, since 1997, a series of external shocks and focusing events have allowed the South Korean state to regain its dominance over the *Chaebol* by adopting a different strategy of control. How exactly have strategies of state control over the *Chaebols* changed?

That being the ambit of this paper, I specifically argue that the state is increasingly relying on legal institutions to control the *Chaebol*, marking a departure from traditional bureaucratic and legislative control measures. Legislative control measures refer to the mechanisms of control availed to the National Assembly – the legislature of South Korea. In tandem with this development, I also argue that *Chaebols* have to adapt to the new political landscape of control by contesting and defending their power in the legal arena instead. This essay is structured as such: first, through a literature review, I account for the rise and expansion of the *Chaebol* from post-Korean War, through democratization in 1988 and until the Asian Financial Crisis (AFC) of 1997; second, I describe both existing and evolving state control mechanisms; third, I discuss the conditions which have led to greater use of legal institutions to control *Chaebols*; fourth, I establish the basis of my argument through a discussion of how these institutions have been increasingly leveraged on. I proceed to describe how the tandem shift in power contestation from political to legal system has forced the *Chaebol* to adapt its strategies for defending its own interests, the most significant of which is attempting to influence legal institutions as well. Finally, I summarise my essay's major points and in doing so, emphasise my central argument.

MAJOR APPROACHES TO UNDERSTANDING THE POWER BALANCE IN THE STATE-*CHAEBOL* RELATIONSHIP

Scholars who study Korean political economy have generally documented the changing balance of power between state and *Chaebol* according to two approaches: the institutional approach and the ideological approach. The institutional approach regards the *Chaebol* as an institution that is interrelated with the environment, with frequent interactions leading the *Chaebols* to accumulate resources and adapt to changing environment.² According to Samuel Huntington, institutional power and stability is enhanced through greater adaptability, organizational complexity, unity and autonomy from other institutions.³ This school of thought argues that *Chaebols* were initially weak during the formative years of the developmental state under authoritarian leader Park Chung Hee.⁴ The *Chaebols* were dependent on the state, and were therefore not autonomous and relatively unstable. Due to an import-substitution industrialization (ISI) policy, coupled with strong but selective state support for high potential industries, *Chaebols* expanded under the state's supervision.⁵ Because of ISI, *Chaebols* were able to increase economic influence through their monopolistic supply of goods and services to the Korean society. Chang points out that monopoly power distorts economic efficiency, as *Chaebols* could raise profit margins due to lack of market competition.⁶ As such, the *Chaebol* as an institution gained in prominence and power by using their market dominant position to accumulate financial capital, as well as control the goods and services that Korean society was receiving. The switch from ISI to export-oriented industrialization only cemented *Chaebol* power further, as it increased their access to overseas markets, increasing export revenue and therefore financial strength.⁷ Thus, scholars taking an institutional perspective posit that the

² See, for example, John Scott, "Networks of corporate power: A comparative assessment," *Annual Review of Sociology* 17, no. 1 (1991): 181-203.

³ Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 2006).

⁴ Kim, Hyung-A. *Korea's Development under Park Chung Hee* (London: Routledge, 2004).

⁵ Ibid.

⁶ Chang, Sea-Jin, *Financial Crisis and Transformation of Korean Business Groups: The Rise and Fall of Chaebols* (London: Cambridge University Press, 2003).

⁷ Kelley K Hwang, "South Korea's bureaucracy and the informal politics of economic development," *Asian Survey* 36, no. 3 (1996): 306-319.

Chaebol's source of power is the result of their organizational size and complexity, and their ability to influence economic activity. One indicator of complexity is the several subsidiaries that *Chaebols* have established, in an intricate network of cross share-holding. All things considered, monopolistic power confers significant financial capital to the *Chaebol*, which allows them to continuously increase in scale and scope of economic activities. Hence, their institutional autonomy started to increase from a financial perspective as well.

Although the institutional approach provides a straightforward economic perspective to tracing the source of *Chaebol* power and the history of its expansion, it is not immediately apparent that financial strength and organizational size are sufficient to explain the *relative autonomy* that the *Chaebol* have enjoyed since the early 1990s. As such, another approach to understanding *Chaebol* power emerged to address this weakness of the institutional approach.

The *ideological approach* focuses on significant political events in South Korea and punctuations in ideology to explain how the *Chaebol* has increased its autonomy and power vis-à-vis the state. Scholars who adopt the ideological approach emphasize the role of a strong authoritarian state in moderating and controlling the power of the *Chaebol*.⁸ During the authoritarian period of rule between the 1960s and 1970s, the *Chaebol* was dependent on the state for continuous growth and economic licensing. The state determined whether a *Chaebol* was permitted to exist or was forced to collapse. Edward Graham, for example, points out the state's retribution towards several *Chaebols* which had "illicitly accumulated wealth during the Syngman Rhee period."⁹ Such threats forced *Chaebols* to comply with the state's intentions and avoid being antagonistic. Kim Eun Mee similarly highlights that *Chaebols* accepted state dominance, since the state promised more business opportunities to the most cooperative *Chaebols*.¹⁰ Hence, under authoritarian rule, *Chaebols* were subservient to the state and largely marginalized in terms of power. With democratization in the late 1980s,

⁸ Stephan Haggard, Wonhyuk Lim, and Euysung Kim, *Economic crisis and corporate restructuring in Korea: Reforming the Chaebol* (London: Cambridge University Press, 2003). See also Han Jongwoo, *Power, Place, and State-Society Relations in Korea: Neo-Confucian and Geomantic Reconstruction of Developmental State and Democratization* (Lexington, MA: Lexington Books, 2015).

⁹ Edward Graham, *Reforming Korea's Industrial Conglomerates* (Peterson Institute for International Economics, 2003), 19.

¹⁰ Kim, Eun Mee, "The industrial organization and growth of the Korean chaebol: integrating development and organizational theories," *Asian Business Networks* 64 (1996): 231.

the decline of authoritarianism was followed by greater liberal democracy. Kim Yun Tae argues that it was no longer socially popular for the state to intervene with the economy too extensively, as this would be reminiscent of authoritarian behaviour.¹¹ Kang posits that a movement towards a democratic political system also created incentives for contesting political parties to solicit the *Chaebols'* financial support, in order to finance larger electoral campaigns.¹² Consequently, an ideological movement from authoritarianism to liberal democracy led to *Chaebols* accumulating power in two ways: 1) through the unshackling of *Chaebol* from authoritarian control and repression; and 2) through the increasing reliance of political parties on *Chaebols* for electoral-related support, because of a movement towards competitive elections under ideological shift to democracy.

Despite the theoretical contributions of the two major approaches, there is a lack of explicit analysis into how the Korean state controls *Chaebol* power in the contemporary democratic environment. Most of the analyses in the literature are confined to explanations of how *Chaebols* rely on financial resources to seek favourable political and administrative decisions from politicians and senior bureaucrats. But democratization is also accompanied by a preference for accountability through the rule of law. A country with strong rule of law inevitably must be buttressed by strong and effective judicial institutions. Also, more contemporary events continue not only to influence the *Chaebol* as an institution, but also the ideological preferences of the state under a more dynamic and anti-*Chaebol* societal environment. Although ideological changes have made *Chaebols* less conducive to control, *shifts in ideological preferences* in an opposite direction can make it easier to control *Chaebols*. The institutional independence of the *Chaebol* remains strong, but the Korean state is still able to devise mechanisms to control *Chaebols*.

Considering the above, this paper's contribution to the literature on Korean state-business relationship is principally focused on establishing the shift in state control mechanisms over *Chaebols*, which have evolved to become more legalistically-oriented in the post-democratization era (1988-present). Both approaches in the literature are relevant and useful in understanding

¹¹ Kim, Yun Tae, "Neoliberalism and the decline of the developmental state," *Journal of Contemporary Asia* 29, no. 4 (1999): 441-461.

¹² David C. Kang, "Bad loans to good friends: money politics and the developmental state in South Korea," *International organization* 56, no. 01 (2002): 177-207.

the shifts in such mechanisms. The rise of *Chaebols* as significantly autonomous institutions arose from their ability to accumulate resources and become more organizationally complex – the result of institutional strengthening. In addition, the elevation of judicial institutions as an important branch of government is the product of democratization, an outcome of the mentioned ideological shift towards greater societal preference for political freedom. As such, I aim to combine both approaches to show exactly how judicial institutions have increasingly become the main sources of state power over the *Chaebols*.

CONVENTIONAL STATE CONTROL MECHANISMS

The South Korean government has conventionally relied on various administrative and legislative mechanisms to increase its control of the *Chaebols*. The National Assembly operates a legislative audit system similar to that used in the United States Congress. Assemblymen in audit committees are empowered to summon *Chaebol* leaders to answer questions during these annual audit sessions.¹³ Questions typically aim to uncover wrongdoing in the *Chaebols*. These committees are usually most active during periods of intense public scrutiny into events that are major and controversial, such as bribe-paying scandals. However, limits to the committee are significant—the most important being that Assemblymen have no certain means of ascertaining where wrongdoing has been committed. *Chaebols*, as complex institutions, are able to sequester information in ways difficult to validate. Interpreting business information also requires technical knowledge. Since Assemblymen are not specialists in issues regarding business activities, they are inherently handicapped through such information asymmetry.

Various regulatory agencies are also present to detect illegal activities, such as tax evasion, and ensure that *Chaebols* comply with regulations. In doing so, regulators theoretically inhibit the freedom of *Chaebols* to act autonomously and outside state regulation. Agencies such as the Korean Fair Trade Commission (KFTC) and the Anti-Corruption and Civil Rights Commission monitor, expose and investigate offences of business and criminal behaviour respectively.¹⁴ Again, the complexity of *Chaebols* makes it difficult to

¹³ Cho Chung-Un, “Lee Jae Yong put at center in largest hearing on chaebol,” *The Korea Herald*, December 6, 2016, accessed April 14, 2017, <http://www.koreaherald.com/view.php?ud=20161206000973>.

¹⁴ Lee Min Ho, “Recent Developments in the Treatment of Collusion by Korean Courts,” *J. Korean L.* 4 (2004): 155. See also Choi, Jin-Wook, “Institutional structures and effectiveness

truly ascertain the extent of wrongdoing. Furthermore, as is subsequently shown in the next section, both administrative regulatory agencies and the National Assembly audit committees have also been weakened by corrupt ties with *Chaebols*, where material bribes are paid by the latter in exchange for special favours from the former. Before examining the legal mechanisms that have now become just as – if not even more – important than these mechanisms mentioned, I account for the conditions that have promoted the emergence of the use of legalistic mechanisms. As it is difficult to attribute exactly what the chronological inflection points responsible for legal mechanisms becoming a major state strategy were, I have focused on general events that have become most salient in the contemporary democratic environment, after the end of authoritarian rule and continuing into the present.

CONDITIONS THAT PROMOTE LEGAL MECHANISMS OF *CHAEBOL* CONTROL

Although democratization has theoretically created a more rule-based political institutional structure, whereby there are legislative, administrative and judicial institutions acting independently of each other, the judicial institutions have increasingly become the most dominant state control of the *Chaebols*. While control is facilitated by state and society's willingness, the reason for empowering judicial institutions is the unsuitability of alternatives. In tandem with the preceding, there are two major conditions which have facilitated this phenomenon: first, the construction of a negative *Chaebol* reputation and calls for greater accountability by society; and second, society's mistrust of elected politicians and the bureaucracy.

Antagonistic Societal View of Chaebols and Calls for Accountability

Despite the economic benefits that *Chaebols* have created for the South Korean society, the conglomerates are perceived negatively by many sections of the society. The *Chaebols* are major actors which have allowed South Korea to pursue high rates of economic growth, through favourable government policies from the nascent post-independence years and into the present.¹⁵ Through high-

of anticorruption agencies: A comparative analysis of South Korea and Hong Kong," *Asian Journal of Political Science* 17, no. 2 (2009): 195-214.

¹⁵ Mo Jongryn, "Political learning and democratic consolidation: Korean industrial relations,

er economic activity, the *Chaebols* created many employment opportunities for citizens, while the taxation revenue generated and paid to government has been a budgetary source for infrastructure development to benefit society.¹⁶ However, at least in the past two decades, *Chaebols* have been increasingly seen as controversial actors, with societal support for them being mixed, or even negative.¹⁷ The general reason for such sentiments is the public's perception of *Chaebols* as self-interested and insensitive to societal welfare.¹⁸

The 1997 Asian Financial Crisis (AFC), for example, was attributed to poor corporate governance in the *Chaebols* and their ability to evade proper regulation and controls.¹⁹ As a result, financial institutions were substantively weakened, as lending to *Chaebols* often was poorly evaluated and monitored, leading to spillover effects on the economy as a whole.²⁰ Negative *Chaebol* sentiments have persisted even into the present. Societal support for *Chaebols* has continued to be low or even negative, due to various other contributing factors that undergird the selfish image projected on *Chaebols* - citizens perceive economic growth to have disproportionately aggrandized *Chaebols*, with society only benefitting marginally. This is reflected in the increasing income inequality of South Korea since 1998, even as corporate profits continue to outperform by increasing year-on-year generally.²¹ Furthermore, *Chaebol* profits have grown, even without growth in jobs available.²² This is partly attributed to the capital-intensive structure of *Chaebol* operations, which rely more heavily on machine capital than human capital. Mo Jongryn also notes that there was a fundamental ideological shift in how the "general public" perceived the overly self-interested business sector.²³ This is because of the spread of publications that were "critical of market fundamentalism,"

1987-1992," *Comparative Political Studies* 29, no. 3 (1996): 290-311.

¹⁶ Jong Seeun, "Reforms of Korean tax system to transform into a welfare-led economy," *Paper presented at Conference for Decent Work Network*, Geneva, Switzerland, 2015.

¹⁷ Yonhap News Agency, "Majority of S. Koreans negative of chaebol: survey," *Yonhap News Agency Website*, January 13, 2017, accessed April 8, 2017. <http://english.yonhapnews.co.kr/business/2017/01/13/0502000000AEN20170113007300320.html>.

¹⁸ Mo Jongryn, "Political learning and democratic consolidation."

¹⁹ Ha Y.C and Lee W.H, "The politics of economic reform in South Korea: crony capitalism after ten years," *Asian Survey* Vol. 47 No. 6, 894-914.

²⁰ Ibid.

²¹ Mo Jongryn, "Transformation of Korean developmental capitalism," in *Japanese and Korean Politics*, ed. T. Inoguchi, 121-146 (New York: Palgrave Macmillan, 2015).

²² Ibid.

²³ Ibid, 131.

which brought economic equality and social justice into discussions on the society-*Chaebol* relationship.²⁴ All in all, South Korean society has generally internalized a negative view of *Chaebols*, which are perceived as only wanting to maximize corporate self-interest at the expense of equitably sharing such gains with society.

Therefore, there is the impression that many problems in the economy can be attributed to poor *Chaebol* accountability, which the state has not satisfactorily resolved. Greater accountability can be promoted through a system of law that is fair, equitable, and enforced impartially. Accountability has been challenged by the image that *Chaebols* routinely show little respect for national law.²⁵ This has been the result of several focusing events such as *Chaebol* family members abusing their authority for personal benefits.²⁶ Other more significant cases involved *Chaebol* owners such as the Samsung Group that engaged in influence-peddling corruption. The past two chairpersons and the current chairperson of Samsung Group have been implicated in acts of corruption, indicating that it is a structural occurrence within the *Chaebol*.²⁷ With an increased preference for accountability, there is greater public support for the government to more strictly regulate *Chaebols* and monitor their compliance with the law.

Mistrust of the Executive and the Legislature

The preference for greater accountability through rule of law becomes complicated by society's suspicion and loss of trust in their elected politicians and the bureaucracy. According to Quah, corruption is an endemic issue in South Korean politics, reflected by the numerous reforms that different presidents

²⁴ Ibid, 131-135. See also Dong-Jin, Jang, "Rawls in Korea," *Contemporary Korean Political Thought in Search of a Post-Eurocentric Approach* (2014): 213.

²⁵ Park, Eun-Young, "The Rule of Law in the Republic of Korea," *NTU L. Rev.* 6 (2011): 312-313.

²⁶ A famous case was that of Heather Cho, a *Chaebol* family member abusing airline staff. See The Guardian, "Korean air chairman's daughter denies conspiring in nut-rage coverup," *The Guardian Website*, January 19, 2015, accessed April 14, 2017, <https://www.theguardian.com/world/2015/jan/19/korean-air-chairman-daughter-heather-cho-denies-conspiring-nut-rage-coverup>.

²⁷ Carlos Tejada, "Money, power, family: inside South Korea's chaebol," *CNBC*, February 17, 2017, accessed April 14, 2017, <http://www.cnbc.com/2017/02/17/money-power-family-inside-south-koreas-chaebol.html>.

have tried to implement.²⁸ The *Chaebols* have consistently been associated with senior politicians and bureaucrats, through solicitation of special favours from the government, in exchange for illegal bribes or other material rewards. Since the late 1980s, nearly every democratically elected government has continued to be involved in corruption-related situations with *Chaebols*, leading the public to have a pessimistic view of whether the elected president, National Assemblymen or senior bureaucratic officials can truly be trusted to act in a legally appropriate manner to keep *Chaebols* under control. This is even more significant given that various presidents pledged to eliminate corruption during their terms of office, even though their administrations still continued to engage in such activities. Under President Roh Tae Woo, corruption investigations into his predecessor, Chun Doo Hwan, were launched and effectively concluded.²⁹ But corruption continued as six National Assemblymen associated with Roh were found to have extorted bribes from *Chaebols*.³⁰ Also, a Chaebol owner, Chung Tae Soo, provided funding to political parties and Roh's personal political fund in exchange for land development favours.³¹ Public trust in elected politicians continued to decline as successive presidents and legislators continued to receive bribes from *Chaebols*. Under President Kim Young Sam, seen to be a strong anti-corruption leader, various initiatives to tackle corruption were implemented, such as the Public Officials' Ethics Law and the Real-Name Financial Transaction System – both initiatives aiming to increase transparency and make it easier to detect corrupt activities involving politicians and public officials.³² However, Kim's own son was convicted for corruption-related payments and a senior government assistant to Kim helped in facilitating the payments.³³ Rhetoric of anti-corruption combined with the reality of complicity in corruption also characterizes nearly all successive presidents and their administrations as well, including Roh Moo Hyun (2003-2008), Lee Myung Bak (2008-2013) and Park Geun Hye (2013-2017). In all these cases, allegations of bribery for preferential treatment by *Chaebols* are evident,

²⁸ Quah, Jon ST, "Combating corruption in South Korea and Thailand," in *The Self-Restraining State. Power and Accountability in New Democracies* (Boulder, Colorado: Lynne Rienner Publishers, 1999), 245-256.

²⁹ Yoon, Sanghyun, "South Korea's Kim Young Sam Government: Political Agendas," *Asian Survey* 36, no. 5 (1996): 511-522.

³⁰ Mo Jongryn, "Developmental capitalism," 131-137.

³¹ Ibid.

³² Ibid.

³³ Ibid.

implicating not just the presidents themselves but also their senior political and administrative subordinates.³⁴ Public trust that politicians and administrative officials are impartial and able to objectively control the *Chaebols* is low, given this negative history of political leaders and their administrations. Accordingly, the nexus of corruption in politics and in business is jointly able to explain the public's lack of trust in the bureaucratic-political arena to address the problems caused by *Chaebols*.

THE RISE OF LEGAL INSTITUTIONS

Given public pressure to hold *Chaebols* more accountable, alongside this mistrust of the legislature and executive to truly achieve this outcome, the state's approach to controlling *Chaebols* has increasingly turned to judicial institutions that are relatively more trusted by the public and more effective in its actions. This increasing desire for judicial intervention can only be possible, under a system of law that is perceived as democratic. Two major judicial institutions, apart from the Supreme Court, are the Prosecutors' Office and the Special Prosecutor. In addition, the Korean government has created various legal mechanisms of control over the *Chaebol*, which facilitate greater accountability. Since the AFC, more corporate governance regulations have been imposed on the business sector, which aim to ensure more transparent and accountable organizational processes and decision-making within firms – especially the *Chaebols*.³⁵ Also, various laws have been passed, that are targeted at *Chaebol* owners who carry out “unfair transactions for personal gain.”³⁶ However, legislation is ineffective without proper enforcement. This, in turn, requires active participation of the various prosecutors. Before using a case study to illustrate the power of judicial institutions, I provide a background to the Prosecutors' Office and the Special Prosecutor.

³⁴ Nyshka Chandran, “South Korean court upholds motion to impeach President Park Geun-hye,” CNBC, March 10, 2017, accessed April 14, 2017, <http://www.cnbc.com/2017/03/09/south-korean-president-park-geun-hye-impeached-after-court-ruling-south-korean-president-park-geun-hye-avoids-impeachment-after-court-ruling.html>.

³⁵ Ha Y.C and Lee W.H, “crony capitalism after ten years,” 894-914.

³⁶ Song Su-Hyun, “Assembly approves chaebol legislation,” *Korean Joongang Daily*, July 3, 2013, accessed April 8, 2017, <http://mengnews.joins.com/view.aspx?aId=2973963>.

The Prosecutors' Office and the Special Prosecutor

The judicial institutions that are tasked with investigation and prosecution operate with generally similar purposes, although the Special Prosecutor enjoys a more influential position vis-à-vis the Prosecutor's Office. The Prosecutor's Office is divided into three organizational levels, with varying degrees of geographical jurisdiction.³⁷ Subordinate units ultimately report to the Supreme Prosecutors' Office (SPO), located in Seoul. On a general level, the Prosecutors' Office formally investigates suspected acts of criminal and corporate misdeeds and prepares for litigation in the judicial courts.³⁸

The Special Prosecutor is appointed by the National Assembly and is the latest judicial institution, created in March 2014.³⁹ The Special Prosecutor's role emerged from a concern that the Prosecutors' Office could be politicized, in cases that involve elected political leaders. This is because the SPO is ultimately subordinated to the Ministry of Law, a government institution. But the Special Prosecutor is appointed on the basis of political neutrality, thereby minimizing the risk that he or she will act partially to political principals.⁴⁰ In practice, the Special Prosecutor is more powerful than the SPO, as it can request cooperation and assistance from the SPO and other government agencies, including deployment of resources.⁴¹ Through the Prosecutors' Office and the Special Prosecutor institutions, the South Korean government has increased its control of the *Chaebols* through a more legalistic mechanism. The prominence of the Prosecutors' Office and Special Prosecutor in high-level cases involving *Chaebols* precisely shows that judicial institutions are increasingly the source of government power leverage in the state-business relationship.

The increase in the use of legal prosecutorial powers on *Chaebols* indicates the South Korean government's growing reliance on the judicial process to control the *Chaebols*. Since 2003, at least six senior *Chaebol* leaders have been successfully convicted for various corporate and criminal offences, or are presently

³⁷ Supreme Prosecutors' Office [Republic of Korea], "About SPO," accessed April 14, 2017, <http://www.spo.go.kr/eng/about/departments.jsp>.

³⁸ Ibid.

³⁹ Act on the Appointment, Etc. of Special Prosecutor, Act No. 12423, retrieved from <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=special+prosecutor&cx=21&y=25#liBgcolor0>.

⁴⁰ Ibid.

⁴¹ Ibid.

in the process of being prosecuted.⁴² This figure excludes convictions of *Chaebol* executives below the top-tier leadership which are likely to increase the number of successful conviction cases. In all the cases, the role of the prosecutors was significant, as they not only need to collect evidence, but need to present convincing prosecution positions to the court. The prosecutors have been successful in their efforts, duly supported by the legislations that empower them. For example, prosecutors are legally allowed to perform any search and seizure operations at any time of the day – a privilege denied to bureaucratic agencies, such as the KFTC.⁴³ See Annex A for a list of major cases. The police force is also obliged to provide all necessary support to prosecutorial investigations.⁴⁴ The power that prosecutors have can be seen in the recently concluded prosecution of a *Chaebol* chairman, Lee Jae Yong of Samsung Group. Lee was accused of political corruption with ex-President Park Geun Hye and her political aides. The prosecution, led by Special Prosecutor Park Young Soo, was able to utilise its legal powers to carry out a wide range of investigative activities.⁴⁵ This included searching facilities belonging not only to Samsung Group, but even government agencies suspected of being involved in the crime being investigated, including the Financial Services Commission.⁴⁶

Based on the historical trend, the prosecutors' extensive and effective investigations have led to credible prosecution efforts in the court, whereby the prosecution was able to achieve guilty verdicts for the *Chaebol* owners being prosecuted.⁴⁷ The jail sentences typically range from three to eight years. The state's willingness to allow the Prosecutors' Office and Special Prosecutor to investigate and prosecute *Chaebol* owners indicates that this is a form of control

⁴² See Annex A for a list of major cases.

⁴³ OECD, "Progress in Implementing Regulatory Reform." *OECD Website*, Accessed April 14, 2017, <https://www.oecd.org/korea/41399033.pdf>.

⁴⁴ Act on the Appointment, Etc. of Special Prosecutor, Act No. 12423, retrieved from <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=special+prosecutor&cx=21&y=25#liBgcolor0>.

⁴⁵ BBC News, "Samsung boss Lee Jae-yong goes on trial in South Korea," BBC News, April 7, 2017, accessed April 14, 2017, <http://www.bbc.com/news/world-asia-39524334>.

⁴⁶ South China Morning Post, "South Korean prosecutor expands charges against samsung heir Lee Jae-yong," *South China Morning Post*, February 15, 2017, accessed April 14, 2017, <http://www.scmp.com/news/asia/east-asia/article/2071088/south-korean-prosecutor-says-expands-charges-against-samsung>.

⁴⁷ See Annex A.

that is being increasingly leveraged on and the arena of state control over business is evolving. Accordingly, as the next section will show, the consequent strengthening of the legal arena has led to the *Chaebols* adapting their strategies to resist control.

COPING MECHANISMS BY *CHAEBOLS*

The shift towards the legal arena of *Chaebol* control has led to *Chaebols* adapting to increase their ability to defend themselves against the state. *Chaebols* have attempted to adapt through a plethora of measures, which generally can be distilled to two major areas: 1) recruitment of legal experts and former judges; and 2) strengthening audit mechanisms to evade detection by the state.

Recruiting Legal Experts and Retired Judges

Chaebols have increasingly hired more top lawyers and retired judges to serve on the board of directors, in other advisory roles or even as litigation attorneys.⁴⁸ In doing so, *Chaebols* can receive strategic legal advice that helps them to act in ways that advance their corporate interest, without being easily detected by the state. This practice is common, based on available statistics which show that the top seven *Chaebols* have forty-nine lawyers as independent directors, representing 66% of total directorships in the same category.⁴⁹ Furthermore, the engagement of top-level lawyers as attorneys also helps *Chaebols* to present a stronger defense vis-à-vis the prosecution. This is seen, for example, in Lee Jae Yong's case, whereby 10 lawyers from Bae, Kim & Lee – one of South Korea's top law firms – were hired to defend Lee against the Special Prosecutor.⁵⁰ Apart from hiring private sector lawyers, *Chaebols* have also noticeably recruited more retired judges to act as advisors and senior attorneys.⁵¹ These retired judges typically have wide ranging connections with judges that preside over cases involving *Chaebols*. By hiring these

⁴⁸ John Kang, "Star-studded legal team will seek to save samsung chief," *Asian Legal Business*, March 7, 2017, accessed April 14, 2017, <http://www.legalbusinessonline.com/news/star-studded-legal-team-will-seek-save-samsung-chief/74084>.

⁴⁹ The Korea Times, "Many firm lawyers work as outside directors for conglomerates," *The Korea Times*, September 5, 2011, Accessed April 14, 2017, http://www.koreatimes.co.kr/www/news/biz/2016/10/%20%20123_94207.html.

⁵⁰ John Kang, "Star-studded legal team will seek to save samsung chief."

⁵¹ Kim Tae-jong, "Chaebol favor ex-officials as outside directors," *The Korea Times*, September 10, 2012, accessed April 14, 2017, http://www.koreatimes.co.kr/www/news/biz/2016/06/123_119567.html.

judges, *Chaebols* can use them as lobbyists to seek more favourable judgments from the presiding judges.⁵² In her study of business-judiciary relations in South Korea, Choi Hansoo proves that in litigation cases led by retired judges-turned attorney, presiding judges are more likely to issue suspended sentences or more lenient penalties to defendants.⁵³ If this type of relationship is true, then the hiring of retired judges only serves to enhance *Chaebols'* power in the legal arena.

Strengthening Audit Mechanisms

Through a series of actions, *Chaebols* have also managed to increase their evasion of the state's ability to detect potential business wrongdoings and other illegal transactions. This is achieved through procedural enhancements that make it more difficult to accurately audit *Chaebol* finances. *Chaebols* have relied on cross shareholdings to hide their true proportion and extent of ownership in businesses. The creation of multiple subsidiaries makes it logistically more difficult to investigate business transactions that the *Chaebol* has with external actors, including other businesses and politicians. Independent audit committees are one of the latest government regulations imposed on *Chaebols*. These committees theoretically increase corporate accountability as they impartially examine the account books of *Chaebols*. To circumvent such a regulation, *Chaebols* have also been accused of exploiting a loophole to avoid establishing such audit committees. As the regulation only applies to business firms with more than KRW7 trillion in assets, excluding affiliate companies, *Chaebols* theoretically are able to establish more affiliate companies to hold assets up to KRW7 trillion.⁵⁴ Hence, the *Chaebols* can hire their own auditors, allowing for better control and possible manipulation of financial statements. Detection of wrongdoing is also minimized making it more difficult for prosecutors to investigate corporate wrongdoing in the *Chaebols*.

Chaebols have also hired regulatory experts and ex-government officials to serve as auditors, further increasing their ability to strengthen internal audit

⁵² Ibid.

⁵³ Choi Hansoo, "Essays on business groups and the judiciary in South Korea," PhD Dissertation, University of Pittsburgh, 2014.

⁵⁴ Mo, Jongryn, and David Brady, *The rule of law in South Korea* (Stanford, CA: Hoover Press, 2013).

processes against outside investigations.⁵⁵ Lawyers with specialized knowledge of South Korea's financial code have been hired to head internal audit teams.⁵⁶ Also, ex-government officials are aware of how the government conducts various types of audits, which allows *Chaebols* to pre-empt detection of wrongdoing by concealing evidence in ways that government audits would be unable to discover. In all, the various coping mechanisms show that *Chaebols* have adapted to the increasingly leveraged use of legal mechanisms by the state to control them.

CONCLUSION

In this essay, I have argued that the state has increasingly leveraged on legal mechanisms through the judicial institutions to control *Chaebols*. This is facilitated by public support for such action, due to rising unpopularity of *Chaebols*, society's preference for greater accountability, as well as a mistrust of elected politicians and the bureaucracy. The state therefore depends on the Prosecutors' Office and Special Prosecutors to ensure *Chaebols* are kept under control. But *Chaebols* are not static entities and have adapted to the changing arenas of power contestation by strengthening their internal audit safeguards and hiring more legal experts and retired judges to ensure higher quality litigation and chances of successful defence against the prosecution.

However, it should be noted that *Chaebol* control mechanisms are not perfect or always robust. Most significantly, all *Chaebol* owners have managed to receive relatively lenient jail sentences – or even avoid jail terms altogether. Even those successfully jailed have often managed to receive presidential pardons because of a fear that their jail sentences would detrimentally impact the South Korean economy.⁵⁷ Therefore, there is no certainty that material improvements in *Chaebol* control will be sustained.

Preliminarily, there is cause to believe that the near future could lead to more high-profile cases of anti-*Chaebol* judicial action led by the Special Prosecutor and the Prosecutor's Office. This view is based on an assessment of society's significant intolerance towards *Chaebol* misbehavior, evidenced through the strong public push for Lee Jae Yong and Park Geun Hye's prosecution. This is because there is incentive for the current Moon Jae-In administration to support

⁵⁵ Kim, "Chaebol outside directors."

⁵⁶ The Korea Times, "Conglomerates."

⁵⁷ This rationale has been cited in the cases of Samsung Group's previous chairpersons.

the judicial institutions in their investigation of politics-business corruption, since this will reinforce Moon's legitimacy as a President elected on a firm anti-corruption platform. The fact that *Chaebols* have attempted to strengthen their legal position points to an encouraging outcome for South Korea's democracy: the increasing reinforcement of the rule of law. This is a significant departure from authoritarian rule from the 1960s to the 1980s. But the state cannot solely rely on judicial institutions alone. The executive and legislative branches must also work towards a more honest, transparent and integrity-based system of governance. This system must be fundamentally driven by a genuine desire to create a corruption-free environment, where the goals of government, business and citizens can be responsibly and fairly negotiated in an open and democratic setting. If this is achieved, then it is more likely that future governments can truly act for the benefit of society to reinforce democratic governance in South Korea.

ANNEX A – SELECTED LIST OF *CHAEBOL* OWNERS PROSECUTED / CONVICTED

<i>Chaebol</i>	<i>Name of Leader</i>	<i>Offence/Year Convicted</i>
SK Group	Chey Tae-Won	Corruption / 2003
Hyundai Motor Group	Chung Mong-Koo	Embezzlement / 2006
Hanwha Group	Kim Seung-Youn	Embezzlement / 2012
Samsung Group	Lee Kun-Hee	Corruption / 2008
Samsung Group	Lee Jae Yong	Corruption / 2017
Lotte Group*	Shin Kyuk-Ho and Family	Embezzlement / 2017

* Pending prosecution as of this paper's submission date

Data compiled from various web sources, found in bibliography

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