
Introduction

In East Asia, cultural norms that drive behaviour are rooted, to varying degrees, in Confucian heritage and Confucian ethical doctrines. It is suggested in this book that these influences have played a subtle but meaningful role in the development of competition laws and enforcement institutions in East Asian countries. Bringing culture into conversations about competition law is not an obvious initiative, as discourses in this field tend to be dominated by economics-oriented rationality. The concept of culture in these discourses is almost nowhere to be found, other than occasional vague rhetorical references to the desirability of establishing a ‘competition culture’ in places where competition is weak. However, for various reasons presented in this book, it is submitted that culture – and in the present context, ‘Confucian culture’ – is a factor too often neglected.¹ Confucian culture appears to have influenced, for example, a number of institutions and attitudes that are common in East Asia, and this impact affects the effectiveness of policies and enforcement as well.

¹ Recently, Professor Gerber noted the connection between the historical influence of Confucian ideas and what he calls embedded, politically supported ‘bureaucratic centralism’ in China, Japan and Korea. See David J. Gerber, *Competition Law and Antitrust: A Global Guide* (New York: Oxford University Press, 2020) 121 (‘These ideas have animated East Asian cultures for some two millennia.’). The observation underlying this book, to the effect that culture requires more attention in the field of competition law studies, was well articulated in Thomas K. Cheng, ‘How Culture May Change Assumptions in Antitrust Policy’, in Ioannis Lianos and D. Daniel Sokol (eds.), *The Global Limits of Competition Law* (Stanford, CA: Stanford University Press, 2012) 205–220. Another pertinent contribution, focusing on China, is Thomas J. Horton, ‘Confucianism and Antitrust: China’s Emerging Evolutionary Approach’ (2013) 47 *International Lawyer* 193. At page 208, Horton expresses a view we share: ‘In understanding and assessing the current Western criticisms of China’s AML and its enforcement, it is crucial to appreciate how different Chinese Confucianism and its morals are from the current American neoclassical economic and individualistic philosophies that largely have driven American antitrust enforcement since the 1980s.’ (footnote omitted)

In brief, we will explain links between the Confucian tradition and business ethics and behaviour, for example in relation to the duties and responsibilities that apply within the Confucian ideal-type of a family. We will also suggest that, as a function of culture, the moral and social environments contribute to the shaping of a 'logic of appropriateness' within commercial organizations, and we underline the importance of such factors for developing a 'compliance culture' based on moral commitment. The book will also discuss how culture can contribute to an understanding of the nature of the administrative agencies and bureau officials that are responsible for competition law and policy. It is also argued that while culture is not a sole determinant, it also has an effect on the degree to which the 'private enforcement' of competition law achieves its objectives within the competition law enforcement systems of the countries and regions discussed. Further, the book will suggest that Confucian ethics, such as the principle of 'righteousness', and more generally the notion of moral wrongfulness, are relevant to the subject of cartel conduct. As we will contend, the moralization of the discourse on cartels can enhance the effectiveness of prohibitions and sanctions, including in particular the criminalization of cartels.

With a view to understanding these subjects better, the book discusses various dimensions of Confucian cultural influence: business culture generally, 'corporate' culture (that is to say, the organizational culture of a particular corporate entity) and its relationship with corporate compliance, political-bureaucratic culture, 'litigation culture' and legal culture. These dimensions are outlined in (the subsections of) Section 1.3 of this chapter. But we begin in Section 1.1 with a preliminary discussion of the concept of culture itself. Then, in Section 1.2, we briefly introduce the varying 'Confucianisms' found in different East Asian countries. To finish the chapter, Section 1.4 lays out the structure of the book.

1.1 The Concept of Culture

'Culture' is a notoriously elusive concept.² It can be given wide, narrow or intermediate definitions. Douglass North, for example, has described it as an informal constraint that provides a 'language-based conceptual framework for encoding and interpreting the information that the senses are

² With revisions and updates, and by permission, the content in this chapter and in Chapter 2 is based on our article entitled 'Business Culture in East Asia and Implications for Competition Law' (2016) 51 *Texas International Law Journal* 1.

presenting to the brain'.³ Taking North's definition as a starting point, one may build on it by noting that culture is often used as an indicator for purposes of cross-cultural comparisons. This point emerges in the definition used frequently by Dutch social psychologist and culturologist Geert Hofstede, according to whom culture is 'the collective programming of the mind that distinguishes the members of one category of people from those of another'.⁴ Following this definition, culture is developed in a particular place at a certain time, and it is not easily transferred.⁵ Whereas attitudes might change from time to time, and perhaps rapidly, culture is more psychologically embedded and is said to be generally more resistant – though not impervious – to change.⁶ Another basic foundation for the discussion in this book is the proposition that cultural factors often have a profound influence on the behaviour of individuals, and on business activities in a given society.⁷ In more systematic terms, culture contributes to the shaping of institutions, which in turn shape business systems and business culture, which in turn shape business decisions and conduct.⁸

1.2 Confucian Culture and *Confucianisms* in East Asia

When considering the notion of a 'collective programming of the mind' in the context of East Asian countries, one inevitably confronts the

³ Douglass C. North, *Institutional Change and Economic Performance: Political Economy of Institutions and Decisions* (Cambridge: Cambridge University Press, 1990) 37.

⁴ This definition appears in many of Hofstede's works. See e.g. Geert Hofstede and Michael Harris Bond, 'The Confucius Connection: From Cultural Roots to Economic Growth' (1988) 16 *Organizational Dynamics* 5, 5–6; Geert Hofstede, *Culture's Consequences: International Differences in Work-Related Values* (London and Beverly Hills: Sage Publications, 1980) 13–28; Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations across Nations*, 2nd ed. (Thousand Oaks, CA: Sage Publications, 2001) 3–4.

⁵ Hofstede and Bond, 'The Confucius Connection', at 6–7.

⁶ Ronald Inglehart and Wayne E. Baker, 'Modernization, Cultural Change, and the Persistence of Traditional Values' (2000) 65 *American Sociological Review* 19, 37–38.

⁷ Many scholars have observed that culture is a crucial factor in political and economic activities, although economists generally have tended to dismiss this factor in rational models of decision making. See e.g. Daniel I. Okimoto, *Between MITI and the Market: Japanese Industrial Policy for High Technology* (Stanford, CA: Stanford University Press, 1989) 1–3 (discussing the influence of culture on Japan's economic success).

⁸ See Gordon Redding, 'The Capitalist Business System of China and Its Rationale' (2002) 19 *Asia Pacific Journal of Management* 221, 225 (emphasizing the role of government in mediating culture's impact on institutional formation).

ubiquitous influence of Confucianism.⁹ Confucius, who was born in 551 BCE and died 72 years later in 479 BCE, lived most of his life in China's 'Autumn and Spring Period'¹⁰ and is still well known for establishing both pragmatic and ethical rules for Chinese society.¹¹ We will discuss the principles of social organization and conduct advocated by Confucius and the thinkers who followed him in subsequent chapters. It is useful to note at the outset that, as intended in this book, the term 'Confucianism' should be understood as an elastic concept that includes not just a set of ideas in their original (pre-Qin) form but also a heterogeneous category of derivative schools that often blended with – occasionally contradictory – local attitudes and practices such as nationalistic ethnocentrism, or particular religious beliefs and so on. Illustrative of the many sources acknowledging the variety of *Confucianisms* in East Asian countries is the following observation by Professor Huang:

[S]ince East Asian Confucianisms exist in the midst of, and not over and above, the cultural exchanges and interactions among the countries of East Asia, [Confucianism] cannot be regarded as a single, fixed, and unchanging intellectual form that originated and rigidly defined over 2,600 years ago on the Shandong Peninsula in China. Rather, we must appreciate that it has undergone a continuous and ongoing process of development for over two thousand years across East Asia. Not only have East Asian Confucianisms progressed over time; they have adapted to suit each different locale they have encountered so that the manifestations of Confucian tradition in each locale seamlessly reflect the special features of that place while still instilling the central core values of Confucianism.¹²

Given the diversity of local experiences as the Confucian tradition was introduced and adapted, and given the non-linear development of this

⁹ See e.g. Tu Weiming, 'Implications of the Rise of "Confucian" East Asia' (2000) 129 *Daedalus* 195, 195–196.

¹⁰ The Autumn and Spring Period is generally held to have lasted from 771 BCE to 476 BCE, and it is also associated with the first half of the reign of the Eastern Zhou Dynasty. Biographical notes on Confucius are found in numerous sources. See e.g. Shu Jichen et al. A Comparison between the Ethics of Socrates and Confucius, S. Ill. U. Edwardsville, www.siue.edu/EASTASIA/paxon_102199.htm (last visited 26 June 2020).

¹¹ See Hofstede and Bond, 'The Confucius Connection', at 7–8.

¹² Chun-Chieh Huang, 'Why Speak of East Asian "Confucianisms"?', in Roger T. Ames and Peter D. Hershock (eds.), *Confucianisms for a Changing World Cultural Order* (Honolulu: University of Hawai'i Press, 2017) 75–86, at 76–77. From the same edited collection, see also Chen Lai, 'Historical and Cultural Features of Confucianism in East Asia', 102–111, at 109–110 (noting that, due to distinct socio-historical conditions and social structures, different values of the Confucianist ethical system – such as benevolence, loyalty and righteousness/appropriateness – were weighed differently in China, Japan and Korea).

tradition – marked for example by occasional backlash, dilution and hybridization – the degree of acceptance and degree of embeddedness of Confucianism in different places has quite naturally varied. In this regard, one may note the complex trajectory of Japan, where Confucianism and different strands of Neo-Confucianism waxed and waned in different historical periods, and mixed with other influences (not least Buddhism and Shintoism); and where in the twentieth century the Confucianist tradition dimmed yet again (though it survived in more tacit forms) when Japanese society experienced the post-War shock of democratization and the suppression of the nationalist-expansionist-totalitarian ideals (such as *kokumin dōtoku*, a militaristic ‘national ethics’) that had deformed the country.¹³ As explained by Professor Tucker: ‘With the defeat of Japan in 1945, Confucian notions came to be regarded negatively because of their unfortunate appropriation by Inoue [1855–1944] and other philosopher-ideologues. They had manipulated the core ethics of Confucian philosophy into a teaching of loyalty to the imperial state and self-sacrifice for the sake of its glory.’¹⁴ At various points of time, and through episodes of social upheaval, Confucianism has also waxed and waned in China and Korea.¹⁵ One dramatic example of this was an anti-Confucius crusade that peaked in 1972 in the midst of China’s Cultural Revolution.¹⁶ In Korea during the Chosŏn (Joseon) Dynasty, one faction of Confucians representing the interests of the nobility persecuted and repeatedly carried out brutal and quite un-Confucian purges (in 1498, 1504, 1519 and 1545) of another faction of

¹³ See e.g. Takahiro Nakajima, ‘The Formation and Limitations of Modern Japanese Confucianism’, in Ames and Hershock (eds.), *Confucianisms for a Changing World Cultural Order*, 87–101. Adding to this complexity is that different schools of Neo-Confucianism played different roles at least in the Edo period. The orthodox *Shushi-gaku*, as propounded by Zhu Xi (1130–1200), constituted a Confucianism ‘for the nation’; whereas a distinct Confucianism ‘for the people’ was provided by a more Mencius-influenced strand known as *Yōmei-gaku*, distilled by Zhu Xi’s critic, Wang Yangming (1472–1529). See *ibid.*

¹⁴ John Tucker (2008; revised 2018), ‘Japanese Confucian Philosophy’, from the online *Stanford Encyclopedia of Philosophy*, section 4, <https://plato.stanford.edu/entries/japanese-confucian> (last visited 29 January 2021).

¹⁵ See Gilbert Rozman (ed.), *The East Asian Region: Confucian Heritage and Its Modern Adaptation* (Princeton, NJ: Princeton University Press, 1991). See also Cheng Chung-ying, ‘Confucianism: Twentieth Century’, in Antonio S. Cua (ed.), *Encyclopedia of Chinese Philosophy* (New York: Routledge, 2003) 160–172.

¹⁶ See Cheng, ‘Confucianism: Twentieth Century’, at 166.

reform-minded Confucian literati.¹⁷ In general, however, the subterranean Confucian roots in China and Korea have always (since the eleventh century) grown deeper and more tenaciously compared to Japan.

The fact that different varieties of Confucianism – and different degrees of the Confucian influence – exist across different spatial and temporal dimensions does not mean that core Confucianist values are not shared by these three countries today. For example, the values of self-cultivation and of ‘benevolence’ or ‘humaneness’ each remain relevant. While they are not necessarily accorded the same weight in China, Japan and Korea,¹⁸ they still constitute unifying elements across the region. To quote Huang once more:

First, Confucians in all of the East Asian countries firmly believe that the foundation and starting point of Confucianism lay in a self-cultivation process that involves extending sympathy – proceeding along a continuum from self, to family, to society, to state, and then on to the world. East Asian Confucians all hold, in effect, that the transformation of self is the starting point of transforming the world. [. . .] The second core value shared in common by the Confucians of each East Asian country and tradition is Confucius’ teaching of *ren* 仁, rendered variously in English as “humanity”, “humaneness”, “humane heartedness”, “benevolence”, and “authoritative personhood.”¹⁹

We will return throughout this book to a number of ethical principles, such as those just mentioned and others, which have informed the attitudes, practices and social fabric in East Asia, and which to varying degrees continue to do so in the twenty-first century.

1.3 Confucian Culture and Competition Law

Leaving aside the recent aberration of Covid-19 and its economic consequences, East Asian countries have experienced dramatic overall

¹⁷ See Chen, ‘Historical and Cultural Features of Confucianism in East Asia’, at 107–108 (‘[T]he tragic deaths of these famous Confucians subsequently served to fire the unyielding *daoyi* [. . .] spirit of Korean Confucianism.’).

¹⁸ See *ibid.* at 107. Professor Chen underlines the transcendental and universal nature of *ren* in traditional Chinese Confucianism, whereas in the Japanese tradition *ren* did not ascend to the same plane. Despite the attention it drew from seventeenth-century scholars Yamazaki and Itō, it was instead a less lofty principle that guided personal moral practice. As Chen states, ‘it is a simple fact that Japanese Confucianism cannot be summarized as the study of *ren* as it is in China’. *Ibid.*

¹⁹ See Huang, ‘Why Speak of East Asian “Confucianisms”?’, at 78.

economic growth in the past few decades. Yet the influence of Confucian teaching and culture on these countries suggests the economic goals and values in these societies might be significantly different from, and may be conditioned in ways that differ from, those observed in the 'West'.²⁰ According to Shroeder, the Confucian ethical system was 'bound in the first place to maintaining the harmony of the divine and to an ideal of self-perfection which precluded the mere means-end calculation of utilitarian advantage'.²¹ Considering that the countries we are examining tend to be characterized by collective and consensual decision making, family ownership and a hierarchical social structure, it is no great surprise that the ways of doing business in East Asia often diverge from patterns familiar in Western countries.²² From this proposition we argue that, to some extent, economic regulation of business behaviour should be conceived, formulated and communicated in ways that are tailored to fit the particular cultural roots in these East Asian countries. It seems very likely that the same point could be made with regard to many regions around the world, but we are not here concerned with geographic areas beyond the objects of this study.

Another reason it is useful to consider the subject of culture concerns the fact that, in East Asia, the 'visible hand' of government directly steered the industrialization process and profoundly influenced the structure and functioning of the relevant national economies. The predominant role that governments have played in facilitating economic activity may be understood, in part, by reflecting on the Confucian tradition.²³ In this regard, it is significant that in East Asia, government decisions in the

²⁰ See Hofstede and Bond, 'The Confucius Connection', at 18.

²¹ Barry Wilkinson, 'Culture, Institutions and Business in East Asia' (1996) 17 *Organization Studies* 421,422 (quoting Ralph Schroeder, *Max Weber and the Sociology of Culture* 48 (1992)).

²² See e.g. Po Keung Ip, 'Is Confucianism Good for Business Ethics in China?' (2009) 88 *Journal of Business Ethics* 463, 468–469; Redding, 'The Capitalist Business System of China and Its Rationale', at 241.

²³ As Ling and Shih put it: 'Confucianism views governance from above: it analogizes the relationship between leaders and [those] led as that of parent to child.' L.H.M. Ling and Chih-yu Shih, 'Confucianism with a Liberal Face: The Meaning of Democratic Politics in Postcolonial Taiwan' (1998) 60 *Review of Politics* 55, 55–56. In China, state-owned enterprises (SOEs) used to be described as the 'eldest son in the family', a metaphor reflecting the prioritized treatment of SOEs over non-state enterprises and foreign enterprises. Peijun Duan and Tony Saich (2014), 'Reforming China's Monopolies', Harvard Kennedy School Faculty Research Working Paper Series, Working Paper No. 14-023, http://ash.harvard.edu/files/reforming_chinas_monopolies.pdf (last visited 10 May 2021). Implicitly, that same depiction also suggests that the relationship between

economic sphere are often of a ‘top-down’, ‘instructional’ or even ‘punitive’ character.²⁴ The trajectories of competition law and policy in this region have likewise been determined to a large extent by the economic goals set by the government.²⁵ To cite just one example, government-sponsored cartels were considered to be an important way to solve the overproduction problem when the Japanese economy spiralled into depression in the mid-1920s.²⁶ After the World War II, the Republic of Korea (‘Korea’) and Japan both implemented export-oriented economic and industrial policies that accelerated economic growth and ultimately standards of living.²⁷ As a consequence, business groups in Japan and Korea benefited from quite favourable political treatment and related perks.²⁸ In Korea in the 1960s, the *chaebol* (i.e., the massive Korean family-controlled conglomerates) were encouraged by the government to expand and lead the development of a modern industrial economy capable of competing in global markets.²⁹ Government planning and supervision were also prominent characteristics in China’s industrialization process after it launched its long process of economic reform in 1978.³⁰

state power and subordinates is similar to the hierarchical relationship between parents and children.

²⁴ See Ling and Shih, ‘Confucianism with a Liberal Face’, at 55–56.

²⁵ See e.g. Duan and Saich, ‘Reforming China’s Monopolies’, at 19.

²⁶ See e.g. Harry First, ‘Antitrust Enforcement in Japan’ (1995) 64 *Antitrust Law Journal* 137, 141–142.

²⁷ In 1993, the World Bank acknowledged the economic development of Hong Kong, Taiwan, South Korea and Singapore (the Four Tigers) as an ‘East Asian Miracle’. See generally Lawrence MacDonald (ed.), *The East Asian Miracle: Economic Growth and Public Policy – A World Bank policy research report* (Washington, DC: World Bank Group, 1993), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/975081468244550798/main-report> 1993 (last visited 10 May 2021).

²⁸ See MacDonald (ed.), *The East Asian Miracle: Economic Growth and Public Policy*, 83, 89–90.

²⁹ For discussion of the *chaebol*, see e.g. Jae-Seung Shim and Moosung Lee, *The Korean Economic System: Governments, Big Business and Financial Institutions* (New York: Routledge, 2008) 59–101 (analysing the relationship between the Korean government and the *chaebol* in Korea’s economic development). See generally Michael A. Witt, *Changing Japanese Capitalism: Societal Coordination and Institutional Adjustment* (Cambridge: Cambridge University Press, 2014) 216.

³⁰ See Zhengyi Wang (2002), ‘Understanding Transition in China: Domestic Tensions, Institutional Adjustment and International Forces’, paper presented at the Joint Workshop on Cleaner Vehicle Development and Deployment, Harvard University, at 3–6.

Although China, Japan and Korea have at various times promulgated or amended their competition laws under the influence of the United States competition model or (especially) the EU competition model,³¹ the enforcement of competition law in these countries is still distinctive. It is carried out by administrative agencies that are not always sufficiently independent of government interests and are strongly influenced by a bureaucratic regulatory culture.³² The complex, often interdependent relationships between governments and business entities – yet another dimension that is partly influenced by Confucian culture³³ – are therefore relevant for understanding the development of competition law and policy in East Asia.³⁴

Since, as this book proposes, Confucian doctrines have deeply influenced modern business culture in East Asia, and since cultural norms in business in turn influence business conduct,³⁵ approaches to competition

³¹ See e.g. Tony Prosser, 'Competition Law and the Role of the State in East Asia', in Michael W. Dowdle et al. (eds.), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013) 199–227, 228, 238.

³² As an historical example, Iyori explained that 'the law in Japan is, by contrast [to the law in the West], considered primarily an instrument of government control, especially bureaucratic control'. Hiroshi Iyori, 'Antitrust and Industrial Policy in Japan: Competition and Cooperation', in Gary R. Saxonhouse and Kozo Yamamura (eds.), *Law and Trade Issues of the Japanese Economy: American and Japanese Perspectives* (Seattle: University of Washington Press, 1986) 56–81. See also Mark Furse, *Antitrust Law in China, Korea and Vietnam* (Oxford: Oxford University Press, 2009) 3.

³³ The mutual obligations of the Sovereign (benevolence and exemplary leadership) and his subjects (loyal obedience or 'filial piety') may be applied *mutatis mutandis* to the relationship between the Sovereign and his economic subjects. See Danny Lam et al., 'The Confucian Entrepreneur? Chinese Culture, Industrial Organization, and Intellectual Property Piracy in Taiwan' (1994) 20 *Asian Affairs* 205, 206.

³⁴ However, there are relatively few studies on culture and competition law in Asia. The pioneering work has been done predominantly by Thomas K. Cheng and Ki Jong Lee. See generally Cheng, 'How Culture May Change Assumptions in Antitrust Policy'; Ki Jong Lee, 'Promoting Convergence of Competition Policies in Northeast Asia: Culture–Competition Correlation and Its Implications', in Lianos and Sokol (eds.), *The Global Limits of Competition Law*, 221–235; Thomas K. Cheng 'Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law' (2012) 12 *Chicago Journal of International Law* 433; Ki Jong Lee, 'Culture and Competition: National and Regional Levels' (2008) 21 *Loyola Consumer Law Review* 33; Wolfgang Pape, 'Socio-cultural Differences and International Competition Law' (1999) 5 *European Law Journal* 438. For a study on Confucianism and Chinese competition law, see generally Horton, 'Confucianism and Antitrust', cited in FN1.

³⁵ See Redding et al., 'Culture and the Business Systems of Asia', in Michael A. Witt and Gordon Redding (eds.), *The Oxford Handbook of Asian Business Systems* (Oxford: Oxford University Press, 2014) 358, 376.

law and policy in East Asian countries should be shaped and implemented in ways that respond adaptively and strategically to these cultural factors. For example, the family is generally considered to be the most basic and important social entity in a Confucian society.³⁶ Of course, Confucian societies are not unique in this regard, but it is worth noting the consequences of Confucian ideas in this context. In particular, many East Asian companies are both owned and controlled by their founding family.³⁷ The internal relationships within the company, such as organization and management structures, often follow Confucian principles concerning the duties of family members.³⁸ Moreover, Confucianism can sometimes affect the way Asian companies deal with external relationships, such as with clients and suppliers, and it can affect how entrepreneurs perceive relationships between peers and competitors.³⁹ These characteristics of East Asian firms should also be taken into account for purposes of competition law and policy, not merely in the sense that particular vigilance is required but also because it underlines the need for proactive and creative efforts to change cultural attitudes. Existing attitudes and mental frames may not always be aligned with the legal rules that appear on the books, and they may impede the emergence of cultural pre-conditions that could support or catalyse desirable legal and behavioural change.

A number of additional arguments will be made regarding the relationship between what we call, as a shorthand, ‘Confucian culture’ and competition law. In the following subsections we describe the gist of the main substantive chapters of the book, after which we provide a summary of the book’s structure in Section 1.4.

³⁶ See Jiyoung Song, *Human Rights Discourse in North Korea: Post-colonial, Marxist and Confucian Perspectives* (New York: Routledge, 2011).

³⁷ See e.g. Robert Westwood, ‘Harmony and Patriarchy: The Cultural Basis for “Paternalistic Headship” among the Overseas Chinese’ (1997) 18 *Organizational Studies* 445, 455–458.

³⁸ See Angus Young (2010), ‘Corporate Governance in China and Hong Kong: Reconciling Traditional Chinese Values, Regulatory Innovation and Accountability’ (unpublished manuscript; on file with the authors); ‘What about Hong Kong?’, Hofstede Ctr., <http://geert-hofstede.com/hong-kong.html> (last visited 12 February 2018) (showing the results of Geert Hofstede’s study on the decision making of management boards of Hong Kong family-owned businesses).

³⁹ See e.g. Horton, ‘Confucianism and Antitrust’, at 214.

1.3.1 *Confucian Business Culture*

Chapter 3 of this book examines the business cultures prevalent in East Asian countries and regions (mainland China, Japan, Korea, and the Hong Kong and Taiwan regions), explores their intellectual origins and identifies characteristics that may be usefully considered when designing and implementing competition law and policy in the East Asian region. Following on from the view we expressed in the introduction to this chapter, Chapter 3 underlines the links between culture at the level of society, culture at the level of business communities and enterprises, the norms and practices of such enterprises, and their competitive effects. In the light of these links, it would seem appropriate and constructive to take account of elements of culture in order to develop and pursue a well-designed, bespoke competition law and policy.

To put forward a qualification for the sake of clarity: The suggestion made in Chapter 3 is not that tools and concepts developed largely on the foundations of rational actor-oriented economic reasoning should be abandoned in favour of cultural relativism. To the contrary, we embrace the use of sound economic theory while advocating for the position that more attention should be given to factors that standard economic assumptions sometimes overlook. In short, therefore, the more modest point is that the effectiveness and suppleness of standard tools and concepts might be enhanced if applied with a nuanced understanding of the cultural influences on business decisions in the countries and regions examined.

1.3.2 *Confucian Corporate Culture and Its Relationship to Compliance*

Chapter 4 concerns Confucian corporate culture and corporate compliance. It seeks to show that efforts to secure competition law compliance among commercial operators can usefully be tailored in a way that takes account of cultural characteristics. Since the organizational culture within a corporation forms part of the conditions in which the development of a (ideally robust and credible) compliance system occurs, it makes sense to approach compliance issues in a manner sensitive to that cultural background.

In the context of East Asian enterprises, this implies a need to take account of the legacy of Confucian ethics, which has had a profound influence on the organizational psychology and behaviour of commercial entities in the region. The importance of that legacy suggests that

compliance will not be achieved within East Asian firms solely on the basis of the external legal environment, an environment in which deterrence-oriented factors such as sanctions and the threat of detection play a central role. Beyond traditional tools, more attention should be given to the internal moral and social environment, and to shaping the logic of appropriateness within a given firm. A compliance culture can thus be constructed on the basis of elements such as moral commitment, Eastern-style education, the cultivation of virtue and the constructive convergence of the interests of the enterprise and those of its employees.

1.3.3 Confucian Political-Bureaucratic Culture

Chapter 5 considers the cultural legacy that underpins shared features of administrative competition law enforcement in China, Japan and Korea. The chapter explores points of continuity between centuries-old bureaucratic practices and modern administrative structures. While competition law and policy are today making important strides in some of the countries concerned, old traditions have sometimes impeded the spread of a more complete trust and confidence in competitive, open markets. As we suggest, the traditional adherence in East Asia to a Confucian model of administration helps to understand the historically comprehensive programmes of industrial policy in this region. The chapter recounts the influence of the Confucian heritage on the relevant countries and discusses the bureaucratic characteristics that derive from that cultural tradition, all of which sheds some light on the historical-cultural shaping of the administrative model of competition enforcement in East Asia. We also question the desirability of this model and the soundness of its assumptions, such as the notion that the decisions of bureaucrats are in some sense self-validating and need not be closely controlled by a rigorous, independent judiciary.

Considering that far-reaching reforms such as the abandonment of an administrative model would entail profound upheaval and are highly unlikely for the foreseeable future, we underline instead the feasibility of less radical improvements. In this regard, more effective enforcement of competition law in East Asia appears to require a modernization of national bureaucratic systems. The mere restructuring and consolidation of a competition agency, as occurred in China in 2018, is unlikely to suffice. The quality and effectiveness of law enforcement are more likely to be secured by adopting reforms that: (i) enhance formal and actual independence from government; (ii) increase accountability

through legal and judicial checks and balances; and (iii) promote predictability and certainty through transparency in rules, policies and decision making. The implementation of such reforms will require governments *inter alia* to re-think their conventional practices in hiring, training, rotating and evaluating agency officials.

1.3.4 *Confucian 'Litigation Culture' and Its Relationship to Private Antitrust Enforcement*

Chapter 6 discusses the 'litigation culture' in the countries concerned – and finds it to be weak in many respects. As in many other parts of the world, the private enforcement of competition law in East Asian countries has in general progressed only very slowly, particularly outside the B2B context. A common way of understanding the underdevelopment of private enforcement in East Asia is to regard it as a 'barrier to justice' problem. In the East Asian context there are barriers to justice in the sense that economic incentives may be insufficient to stimulate the level of private litigation necessary to ensure that all victims of anticompetitive conduct (not just businesses with deep pockets) are able to obtain fair compensation and other appropriate relief. From this perspective, the fundamental problem concerns the cost-benefit analysis of prospective litigants – a calculation that could be altered, for example, by incorporating mechanisms allowing broader access to evidence, some measure of punitive damages and (opt-out) class actions. Interestingly, Korea is taking some bold steps in this regard, as we will discuss, though the consequences remain to be seen. However, while an emphasis on institutional barriers and economic incentives is entirely appropriate, it is not clear that the underdevelopment of private enforcement in East Asia is attributable exclusively to these issues. It seems to be the case that cultural factors, assumptions relating to the behaviour of *homo economicus* and the development of legal institutions are interrelated, which would suggest that they likely reinforce each other.⁴⁰

Here again, therefore, elements of culture appear to have some relevance. Chapter 6 suggests that, in the context of private competition law litigation in East Asia, cultural norms and values may interact with

⁴⁰ For a contrasting view that downplays the role of culture, see e.g. J. Mark Ramseyer, 'The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan' (1985) 94 *Yale Law Journal* 604; and other works by Ramseyer cited throughout Chapter 6.

institutions and may inhibit consumers from bringing lawsuits before the courts. This is not to say that a baseline norm of non-adversarialism cannot evolve, or that it cannot be overcome, where the institutional environment provides adequate incentives prompting greater assertiveness of rights and remedies. To the contrary, institutions and incentive structures can make vital contributions to the promotion of desirable levels of private litigation.

1.3.5 Confucian Legal Culture and Its Relationship to the Criminalization of Cartels

Chapter 7 explores how the legal culture found in Chinese, Japanese and Korean society relates to the criminal punishment of cartels, or lack thereof. The global trend towards formal criminalization of cartel conduct is typically justified by reference to deterrence theory and the economic incentives that influence behaviour. Other factors have often been treated with, at best, benign neglect. Some scholars have helpfully begun to highlight links between the likely effectiveness of criminal sanctions for cartel practices on the one hand and, on the other, a social norm that recognizes such behaviour as deserving punishment that goes beyond administrative sanctions and possible private remedies. Where social acceptance of the need for criminal sanctions to fight cartels is absent or underdeveloped, there may be a wide gap between the formal adoption of a criminal regime and its effective implementation.

Chapter 7 discusses legal culture in this context. It suggests that criminalizing cartels is less likely to be effective in the absence of moral condemnation, and further suggests that an understanding of moral norms in East Asian countries is aided by a thorough investigation of the history of ancient Chinese jurisprudence. Underpinned by the foundation of a communal natural order, Confucian moral thought is distinct from the tenets of 'Western' moral philosophy. Condemning cartel conduct and characterizing it as morally wrongful thus requires a conception that goes beyond individualist assumptions and calculations. To explore the intertwined roots of criminality and morality in East Asia, we trace a legal history in which Confucian ethics were incorporated into the criminal codes of ancient China. Such an exercise suggests, *inter alia*, the possibility of stigmatizing cartel conduct on the morality-based ground that it constitutes improper profit-making in violation of the Confucian principle of righteousness. The chapter thus submits that debates concerning the morality of cartel conduct and the legal prohibitions of

cartels in East Asia are properly informed by an understanding of norms derived from Confucian principles – which include not only the rules and norms that allow an actor to achieve virtue internally but also those associated with one's status and the maintenance of harmonious social order externally. We propose that, in the East Asian context, the likely effectiveness of criminal sanctions targeting cartel behaviour can be enhanced if the moral wrongfulness of such behaviour is properly defined, and if its immoral character becomes widely recognized and internalized.

1.4 Structure of the Book

Having summarized the positions advanced in this work, the paragraphs that follow describe, in somewhat more concise terms, the structure of the text. Chapter 2 begins by unpacking the term 'Confucian culture'. In addition to an introduction to Confucianism and well-established Confucian principles, the chapter follows up on Section 1.2 by briefly outlining some of the different points of emphasis in the Confucianist traditions in East Asian countries and regions (specifically, in mainland China, the Hong Kong and Taiwan regions, Japan and Korea).⁴¹

In the light of the cultural background described in Chapter 2, Chapter 3 examines the business cultures prevalent in the relevant countries and identifies characteristics that may be usefully considered when designing and implementing competition law and policy in the region. The chapter argues that the effectiveness of competition law tools and concepts can be enhanced if applied with a deeper understanding of the cultural influences on business decisions.

Chapter 4 explores corporate culture in East Asia with a view to understanding how cultural characteristics can inform efforts to promote compliance with competition law. On the basis of this discussion, it is

⁴¹ Discussions of the influence of Confucianism on Korea can refer to the Korean peninsula as a whole, and not just South Korea. See generally Key P. Yang and Gregory Henderson, 'An Outline History of Korean Confucianism: Part I: The Early Period and Yi Factionalism' (1958) 18 *Journal of Asian Studies* 81 (discussing the development of Korean Confucianism during various dynastic periods before the division of the peninsula into North and South). Since there are limited resources and still less political will to support the development of competition policy in North Korea, references in this book to 'Korea' relate to South Korea only.

suggested that resort to the traditional levers of implied sanctions and deterrence is a necessary but limited and ultimately insufficient strategy to secure compliance. A more solid foundation would go further and seek to frame the compliance imperative in terms of (Confucian) morals and business ethics. Once internalized, the moral foundation of compliance may deliver more sustainable compliance outcomes. The chapter discusses a number of practical implications of this point of view.

Chapter 5 discusses the bureaucratic characteristics that derive from the Confucian tradition, and the historical and cultural shaping of the administrative model of competition enforcement in East Asia. We also question the desirability of this model and the soundness of some of its assumptions, and we suggest some practical improvements that could be made. Among other things, the chapter advocates reforms that would enhance the independence of competition authorities from government; increase accountability through checks and balances; and promote predictability and certainty through transparency in rules, policies and decision making.

In Chapter 6, we note first of all that the United States is the one jurisdiction where, beginning in the 1960s (i.e., seven decades after the Sherman Act was adopted), private antitrust damages claims have thrived. While the United States is often portrayed as an example to be studiously avoided, and while there are indeed legitimate concerns with the US model, there are also good arguments supporting the need for an effective system that allows victims of anticompetitive conduct to be made whole. In recent years, a small handful of jurisdictions have made progress in this regard. A modest degree of private enforcement activity is also occurring in East Asia, but it remains very rare for victims of anticompetitive conduct (especially natural persons and small enterprises) to recover damages. This chapter examines the reasons why private damages actions have failed to emerge in the relevant countries. A number of suggestions are made that could potentially alleviate some of the obstacles. Ultimately, however, it is acknowledged that effective private enforcement in this part of the world can only develop in very long timescales.

Chapter 7 applies the cultural perspective developed throughout the book to the issue of the modest, non-linear and uneven – but still significant – international trend towards criminalization of cartel conduct. The chapter suggests a historical-cultural explanation for the relatively limited extent to which individual wrongdoers are prosecuted and

actually punished for cartel behaviour in the countries concerned; and it emphasizes the importance of going beyond deterrence-based justifications for criminal sanctions and of developing the morality-based foundations for such sanctions.

Chapter 8 briefly recaps some of the points highlighted throughout the book and provides some final observations and remarks.