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Varieties of Independent Directors in Asia: A Taxonomy

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I Introduction

At first blush, the rise of the independent director in Asia appears to be a straightforward example of a significant legal transplant from the United States (US) to Asia. A few decades ago, independent directors, which are an American legal invention,[1] were virtually non-existent in Asia.[2] Today, as this book reveals, they are ubiquitous throughout Asia.

Even for those familiar with corporate governance in Asia, the evidence in this book demonstrating the extent to which Asian jurisdictions have promoted and adopted 'independent directors' will likely surprise. A recent report from the leading American proxy advisory firm Institutional Shareholder Services (ISS) claims that over 70 per cent of listed companies in China now have a board comprising a majority of 'independent directors'—ranking China far ahead of Australia and the United Kingdom (UK) in terms of its percentage of boards with a majority of 'independent directors'.[3] For over a decade, Singapore has reported that a majority of all of the directors in its listed companies are 'independent', and that 98 per cent of its listed companies comply with the 'independent director' provisions in its 'comply or explain' Code of Corporate Governance—a higher compliance rate than in the UK, where the 'comply or explain' model was invented.[4] In 2000, South Korea made it *mandatory* for all large listed companies to have a board composed of at least half 'independent directors'.[5] Additionally, since 2004, such boards have been required to have a majority of 'independent directors'[6]—which on its face is a stricter requirement than in any major jurisdiction in the European Union,

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[1] See Chapter 1 at III for a brief history of the American origins of the independent director.

[2] See, for example, Chapter 4 (Japan) at I (Japan's apparent resistance against the adoption of independent directors); Chapter 5 (South Korea) at III.1.b (Korea first enacted statutory requirements for independent directors in 2000); Chapter 6 (China) at II.2 (first Chinese company to adopt independent directors did so in 1993 to comply with the listing rules of the Hong Kong Stock Exchange); Chapter 7 (Taiwan) at II.1 (Taiwan Stock Exchange first enacted listing rules for independent directors in 2002); Chapter 8 (Hong Kong) at II.4 (Hong Kong Stock Exchange first enacted listing rules for independent directors in 1993); Chapter 9 (Singapore) at III.1 (Singapore first enacted statutory requirements for independent directors in 1989); Chapter 10 (India) at III (Securities and Exchange Board of India first enacted listing requirements for independent directors in 2000). See also C.H. Tan, 'Corporate Governance and Independent Directors', *Singapore Academy of Law Journal*, 15 (2003), 355, 365.

[3] The ISS Report found that approximately 50 per cent of listed companies in Australia and the UK have boards composed of a majority of independent directors. See T. Gopal, 'Japan: A Closer Look at Governance Reforms' (ISS 2015), available at www.issgovernance.com. No information was provided in this report as to the definition of 'independent directors' used, or the method used to collect the information presented in the report. For further discussion on the report's shortcomings in its classification of China's board architecture, see note 75 below. Email clarification was sought from the author of the report on 2 June 2016, but no response was forthcoming as of the publication of this book.

[4] By 2006, 98 per cent of all Singapore-listed companies reported full compliance with the recommendation in Singapore's Code of Corporate Governance that one-third of the board be composed of independent directors, and the majority of directors in listed companies were reportedly independent. See Chapter 9 (Singapore) at I; H. Tjio, *Principles and Practice of Securities Regulation in Singapore*, 2nd edn (LexisNexis, 2011), 326. By contrast, compliance with the recommendation in the UK's 2010 Code of Corporate Governance and 2012 Code of Corporate Governance that at least half of the board be composed of independent non-executive directors for companies listed on the Financial Times Stock Exchange 350 Index ranged from 80 per cent in 2011 to 92 per cent in 2015. See Financial Reporting Council, 'Developments in Corporate Governance and Stewardship 2015' (Financial Reporting Council 2016), available at www.frc.org.uk; Financial Reporting Council, 'Developments in Corporate Governance and Stewardship 2011: The Impact and Implementation of the UK Corporate Governance and Stewardship Codes' (Financial Reporting Council 2011), available at www.frc.org.uk. Given that the recommended proportion of independent directors on the board for Singapore and the UK were different (one-third and half respectively), a strict comparison of these compliance rates may not be perfectly accurate, but nevertheless provides a useful guide. For a detailed explanation of the 'comply or explain' model, see Chapter 1 at IV.1.

[5] See Chapter 5 (South Korea) at III.1.b.

[6] See Chapter 5 (South Korea) at III.1.b.

where the regulation of 'independent directors' generally takes the form of non-mandatory recommendations.[7] In 2000, India made it mandatory for publicly listed companies to have a board with at least one-third 'independent directors', and if the board chair is also an executive of the company then the board must be at least half 'independent directors'[8]—which again appears to be a stricter requirement than in most leading Western countries.[9] In as early as 1993, Hong Kong made it mandatory for all listed companies to have a board with at least two 'independent directors', and more recently made it mandatory for at least one-third of such boards to be composed of 'independent directors'.[10]

These facts reveal a reality which is the opposite of what conventional wisdom suggests: many of Asia's leading economies have surpassed those in the West in terms of the proportion of 'independent directors' on their corporate boards.[11] In a similar vein, many of the laws and regulations in Asia's leading economies appear to do more to promote or require 'independent directors' on the boards of listed companies than those in many leading Western economies.[12] The reality that most leading listed companies in Asia now have a significant number (or, in fact, in many cases a majority) of 'independent directors' on their board is a striking development that has been largely overlooked.[13]

To be clear, this does not suggest that 'independent directors' have been vigorously promoted and widely adopted in every jurisdiction in Asia. In fact, until recently, a majority of listed companies in Japan had no 'independent directors'[14] and about one-third of listed companies in Taiwan still have none.[15] Even in Japan and Taiwan, however, recent legal reforms have driven significant increases in the number of 'independent directors' on corporate boards—a

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[7] P. L. Davies and K. J. Hopt, 'Boards in Europe: Accountability and Convergence', *American Journal of Comparative Law*, 61 (2013), 301, 319.

[8] See Chapter 10 (India) at III.

[9] Davies and Hopt, 'Boards in Europe'.

[10] See Chapter 8 (Hong Kong) at II.1.

[11] Conventional wisdom suggests that the boards of Asian companies are often dominated by insiders. See S. Claessens and J. P. H. Fan, 'Corporate Governance in Asia: A Survey', *International Review of Finance,* 3 (2002), 71, 82; C. L. Ahmadjian, 'Corporate Governance and Business Systems in Asia' in G. Redding and M.A. Witt (eds), *The Oxford Handbook of Asian Business Systems* (Oxford University Press, 2014), 342-343.

[12] See Chapter 4 (Japan) at I.1.b-c; Chapter 5 (South Korea) at III; Chapter 6 (China) at III.2; Chapter 7 (Taiwan) at II.1; Chapter 8 (Hong Kong) at II; Chapter 9 (Singapore) at II.4; Chapter 10 (India) at III; Chapter 11 (Australia) at III.

[13] As South Korea requires all large listed companies to have their board composed of a majority of independent directors, all large listed Korean companies now have a majority of independent directors on their boards. See Chapter 5 (South Korea) at III.1.b. Another prominent example is in Singapore where all of the directors on the board of Temasek (the holding company for Singapore's Government-Linked Companies), except for the CEO, are non-executive independent directors. In addition, 64.87 per cent of the directors in the 23 listed Government-Linked Companies—which comprise the vast majority of the most prominent listed companies in Singapore—are independent directors. See Chapter 9 (Singapore) at III.3. It also noteworthy that independent directors constitute at least half of the boards of many of the most prominent Asian companies such as Lenovo (7 out of 11), Samsung (5 out of 9), Tencent (4 out of 8), Sony (9 out of 12), Tata Steel (6 out of 12), Acer Group (4 out of 7) and DBS Group Holdings (7 out of 9). See, for example, Lenovo, 'Corporate Governance; Board of Directors', available at www.lenovo.com; Samsung, 'Board of Directors', available at www.samsung.com; Tencent, 'Board', available at www.tencent.com; Sony, 'Corporate Governance', available at www.sony.com; Tata Steel, 'Board of Directors', available at www.tatasteel.com; Acer Group, 'Corporate Governance', available at www.acer-group.com; DBS Group Holdings, 'Annual Report 2015; Board of Directors', available at www.dbs.com.

[14] G. Goto, 'The Outline for the Companies Act Reform in Japan and Its Implications', *Journal of Japanese Law,* 35 (2013), 13, 19.

[15] See Chapter 7 (Taiwan) at II.2.a: 'As of 2014, 66.34 per cent of TWSE-listed and OTC-traded companies have independent directors on their boards.'

trend that appears likely to continue in both countries.[16] In several important[17] but often overlooked developing Asian countries, such as Bangladesh,[18] Indonesia,[19] Malaysia,[20] the Philippines, Thailand and Vietnam,[21] unbeknownst to most comparative corporate governance experts, 'independent directors' have become a mainstay in corporate boardrooms.[22] As such, it is now indisputable that the 'independent director' is a ubiquitous feature of corporate governance throughout Asia—and its rise appears to have no immediate end in sight.[23]

As explained in section II of this chapter, however, the meteoric rise of the 'independent director' in Asia is considerably more complex than it appears. A comparison of the jurisdiction-specific chapters in this book reveals that although the *label* 'independent director' has been transplanted precipitously from the US (in some cases via the UK) throughout Asia, who is labelled an 'independent director' (i.e., the 'form' that independent directors take)[24] and what independent directors do (i.e., the function they perform)[25] in Asia differ significantly from the American concept of the independent director. To add to the complexity, the form and function of 'independent directors' vary *within Asia* from jurisdiction to jurisdiction.[26] As

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[16] Political and regulatory support for independent directors has driven their gradual adoption by companies in Japan and Taiwan. See Chapter 4 (Japan) at IV; Chapter 7 (Taiwan) at IV.

[17] Collectively, these five countries – Bangladesh (158 million), Malaysia (30 million), Thailand (67 million), Indonesia (252 million) and the Philippines (100 million) – have an estimated total population of 607 million. See UNData, 'Data', available at data.un.org.

[18] Emerging Markets Committee of the International Organization of Securities Commissions, 'Corporate Governance Practices in Emerging Markets' (2007), available at www.iosco.org.

[19] M. Prabowo and J. Simpson, 'Independent Directors and Firm Performance in Family Controlled Firms: Evidence from Indonesia', *Asian Pacific Economic Literature,* 25 (2011), 121.

[20] H. Ibrahim and F.A. Samad, 'Corporate Governance Mechanisms and Performance of Public-Listed Family-Ownership in Malaysia', *International Journal of Economics and Finance,* 3 (2011), 105.

[21] D. Vo and T. Phan, 'Corporate Governance and Firm Performance' (2013), available at www.murdoch.edu.au.

[22] For a basic overview of some of the rules regarding independent directors in many Asian jurisdictions, including Indonesia, Malaysia, the Philippines and Thailand, see generally, ACGA, 'Rules & Recommendations on the Number of Independent Directors in Asia' (2010), available at www.acga-asia.org/.

[23] Most of the jurisdictions surveyed in this book predict a potential increase in the number of independent directors in their respective jurisdiction. See Chapter 4 (Japan) at IV; Chapter 7 (Taiwan) at IV; Chapter 8 (Hong Kong) at IV; Chapter 9 (Singapore) at V; Chapter 10 (India) at VII.

[24] The precise requirements for independence may differ across jurisdictions, which may take the form of a positive definition of independence consisting of a broadly framed standard, or negative definition of independence in the form of a list of disqualifications, or both. See, for example, Chapter 4 (Japan) at II.1 (broadly-framed standard of independence with a list of disqualifications); Chapter 5 (South Korea) at III.3.b (a list of disqualifications); Chapter 8 (Hong Kong) at II.2 (a broadly-framed standard of independence with a list of situations in which the director's independence is more likely to be questioned).

[25] The primary purpose of the 'American-style' independent director is to monitor management on behalf of dispersed shareholders—as such they are required to be independent from management (but not significant shareholders). See U. Velikonja, 'The Political Economy of Board Independence', *North Carolina Law Review*, 92 (2014), 855, 863 – 864; B. R. Cheffins, 'The History of Modern U.S Corporate Governance: Introduction' in B. R. Cheffins (ed.), *The History of Modern U.S. Corporate Governance* (Edward Elgar, 2012); J. Gordon, 'The Rise of Independent Directors in the US, 1950-2005: Of Shareholder Value and Stock Market Prices', *Stanford Law Review*, 59 (2007), 1465.

[26] Independent directors in the jurisdictions surveyed in this book may possess idiosyncratic skills that allow them to perform particular roles in their specific jurisdiction. See *infra* Part III.4 and III.5. See also Chapter 5 (South Korea) at IV.4 (observing the increasing preference in South Korea for appointing former government officials as independent directors, possibly to act as a communication channel between the listed company and the government); Chapter 6 (China) at II.3, Chapter 7 (Taiwan) at II.2.b; Chapter 9 (Singapore) at III.2 and III.3 (opining that independent directors in Singapore family companies are likely to operate as mediators and advisors to family members; also opining the independent directors in Singapore Government-Linked companies are appointed to fill the managerial monitoring gap created by Singapore's unique regulatory environment); and Chapter 10 (India) at IV.2 (observing that former government officials or politicians are often appointed as independent directors; also noting that academics are often appointed as independent directors in South Korea,

such, in reality, there are *varieties* of independent directors in Asia—none of which conform to the American concept of the independent director. This challenges the widely-held assumption that 'independent directors' are universally similar[27] and follow the American concept of the independent director.[28] It also complicates inter-jurisdictional comparisons of 'independent directors' within Asia, which is a core objective of this book.

Section III of this chapter attempts to overcome this significant hurdle for comparative analysis by offering an explanation for why distinct varieties of independent directors have emerged throughout Asia. At first blush, this question is perplexing. All of Asia's leading economies claim to have either explicitly adopted or been heavily influenced by the American and/or 'Anglo-American' independent director model.[29] With a common model, one would expect to find a high degree of uniformity among independent directors in Asia—not diverse varieties. However, a comparative analysis of the jurisdiction-specific chapters in this book reveals six principal factors that have driven independent directors in Asia to evolve in a variety of unique jurisdiction-specific ways: (1) shareholder ownership structures; (2) legal origins; (3) types of shareholders; (4) functional substitutes; (5) political economy; and (6) cultural norms. Understanding how these factors have driven distinct varieties of independent directors to emerge and evolve in Asia's leading economies allows us to construct a loose taxonomy of the varieties of independent directors in Asia. This taxonomy provides a useful tool for identifying which inter-jurisdictional comparisons are likely to yield significant insights, and which are likely to mislead.

China, Taiwan and India respectively.). Other commentators have also made similar observations. See, for example, D.W. Puchniak, 'Multiple Faces of Shareholder Power in Asia: Complexity Revealed' in J. Hill and R. Thomas (eds.), *Research Handbook on Shareholder Power* (Edward Elgar, 2015), 514, 525-526 (observing that in Asia's controlling shareholder environment independent directors may be a mechanism for amplifying the block shareholder's controlling power or a signaling device for 'good' corporate governance; also noting that in Japan outside directors have sometimes served to reinforce *keiretsu* and cross-shareholding links, and in China some have suggested that 'independent' directors may be puppets for the government); D. C. Clarke, 'Independent Director in Chinese Corporate Governance', *Delaware Journal of Corporate Law,* 31 (2006), 125, 207-208 (noting that a survey of 500 listed companies in China found that 45 per cent of independent directors were university professors or researchers from institutes, and observing that the common stereotype of independent directors was a well-meaning but ineffectual academic or celebrity appointed for their prestige and possibly to satisfy regulatory requirements).

[27] The assumption that independent directors are the same regardless of their jurisdiction of origin is common in much of the leading research in the field. See, for example, B. S. Black et al., 'Corporate Governance Indices and Construct Validity', ECGI Finance Working Paper No. 483/2016, September 2016) 27 Table 2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838273; D. Katelouzou and M. Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013', *Journal of Corporate Law Studies*, 15 (2015), 127; B. S. Black et al., 'Does Corporate Governance Predict Firms' Market Values? Evidence from Korea', *Journal of Law, Economics and Organisation*, 22 (2006), 366. Similar assumptions also appear to have been made in other corporate governance surveys and rankings. See N. A. Chakra et al., 'Doing Business 2017: Equal Opportunity for All' (World Bank 2016), available at www.doingbusiness.org; N. A. Chakra et al., 'Doing Business 2016: Protecting Minority Investors' (World Bank 2015), available at www.doingbusiness.org; N.A. Chakra and H. Kaddoura, 'Doing Business 2015: Measuring Business Regulations, Protecting Minority Investors in [Name of Economy], (World Bank 2014), available at www.doingbusiness.org; L.A. Bebchuk and A. Hamdani, 'The Elusive Quest for Global Governance Standards', *University of Pennsylvania Law Review*, 157 (2009), 1263, 1302–1304, 1311.

[28] This is implicit in the literature surveyed at note 27 above, given that it did not occur to any of the authors to explicitly draw a distinction between US-style independent directors and independent directors as an umbrella concept.

[29] See Chapter 4 (Japan) at II.1.a; Chapter 5 (South Korea) at II.4; Chapter 6 (China) at II.1; Chapter 7 (Taiwan) at I; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.3; Chapter 10 (India) at III. The roots of the 'Anglo-American' concept of the independent director are explained below at II.1 and II.2; the 'American' concept of the independent director is explained below at II.3.

Section IV of this chapter concludes by highlighting how an understanding of the varieties of independent directors in Asia can advance corporate governance practice and contribute to comparative corporate governance theory. The conclusion illuminates the importance of jurisdiction-specific knowledge for accurately understanding the rise and functions of independent directors in Asia. However, while this chapter extracts the important comparative lessons from the jurisdiction-specific chapters in this book, the details in each of the jurisdiction-specific chapters remain essential.

II Varieties of Independent Directors in Asia: Diversity Revealed

1 The Myth of the Monolithic 'Anglo-American' Independent Director

Counting the number of 'independent directors' on corporate boards has become a key metric for comparing the quality of corporate governance across countries and companies around the world. Leading corporate governance advisory firms, which influence the allocation of trillions of dollars of global capital, have developed multijurisdictional comparative indices that treat the number of 'independent directors' on corporate boards as a critical factor for measuring 'good' corporate governance.[30] The World Bank uses the requirement for 'independent directors' to be on corporate boards as one of the metrics in its influential 'Ease of Doing Business Index', which ranks the business regulatory environments of 190 economies each year.[31] The number of 'independent directors' on corporate boards is a key variable in several of the most influential corporate governance research indices that drive entire areas of comparative corporate governance scholarship.[32]

All of these influential comparative corporate governance measures make the same assumption: that the term 'independent director' universally refers to people who meet the same criteria and perform the same corporate governance function. Indeed, the assumption that independent directors universally take the same form and perform the same function is the foundation upon which many multijurisdictional policy initiatives and leading academic research that focus on independent directors are built.[33] Obviously, if the criteria for labelling a person an 'independent director' and/or the function that a person labelled as an 'independent director' performs differ significantly from jurisdiction to jurisdiction, then comparing 'independent directors' across jurisdictions is essentially an exercise in comparing 'apples and oranges'.

Based on a comparative analysis of the jurisdiction-specific chapters in this book, it appears that the form and function of independent directors in Asia's leading economies differ significantly from the American concept of the independent director. Although there are important similarities in the form and function of 'independent directors' within Asia, there are also significant intra-Asia jurisdictional differences. While intra-Asia comparisons of 'independent directors' may have more utility than Asia–US comparisons, jurisdictional

[30] See, for example, ISS, 'Board Independence at a Glance' (2016), available at www.isscorporatesolutions.com; MSCI, 'ESG Ratings', available at www.msci.com.
[31] See, for example, Chakra et al., 'Doing Business 2017: Equal Opportunity for All'; Chakra et al., 'Doing Business 2016: Protecting Minority Investors'; Chakra and Kaddoura, 'Doing Business 2015: Measuring Business Regulations, Protecting Minority Investors in [Name of Economy]'.
[32] See, for example, Katelouzou and Siems, 'Disappearing Paradigms in Shareholder Protection', 127; Black et al., 'Does Corporate Governance Predict Firms' Market Values?', 366.
[33] See notes 27 and 28 above.

differences in the form and function of independent directors within Asia must also be recognised and accounted for in comparative analyses.

In sum, the comparative evidence in this book reveals that the label 'independent director' masks the reality that the form and function of 'independent directors' in Asia depart significantly from the American concept of the independent director. This monolithic label obscures the reality that jurisdictional differences in the form and function of 'independent directors' within Asia may be significant. Most importantly, the label conceals interesting intra-Asia jurisdictional similarities that provide valuable opportunities for tailored and insightful comparative analyses. The balance of this section of the chapter will explain how 'independent directors' in Asia depart significantly from the American concept of the independent director, as well as highlight important similarities and differences in the form and function of independent directors in leading Asian economies.

2 The Independent Director in Asia: Untangling Its Anglo-American Roots

The genesis of the independent director as a global corporate governance mechanism can be traced to the 1970s in the US.[34] Since then, the primary function of independent directors in American corporate governance has been clear: to monitor management on behalf of dispersed shareholders, who are hindered by collective action problems from monitoring management themselves.[35] This managerial-monitoring function is at the core of the American corporate governance model, which for decades has been focused on solving the primary governance problem in companies with dispersed shareholders: functionally autonomous managers taking advantage of their unchecked power to enrich themselves at the expense of dispersed shareholders.[36]

Despite the fact that independent directors account for the vast majority of directors on American boards, there is still considerable debate about whether American independent directors are effective managerial-monitors.[37] It is, however, uncontroversial that the 'independent director' in the US was (and still is) designed to function as a corporate governance mechanism primarily to monitor management on behalf of dispersed shareholders.[38] As such, it makes perfect sense that the NYSE and NASDAQ definitions of 'independence' focus on ensuring that independent directors are independent from the managers of the corporation on whose board they sit.[39]

It is also uncontroversial that in the US, independent directors were not (and are not) primarily designed to be a mechanism for monitoring controlling shareholders.[40] On the contrary, at least based on the theory that underlies the American corporate governance model, independent directors become functionally redundant in companies with a controlling shareholder. As the

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[34] See Chapter 1 at I.2; Chapter 2 at II; Chapter 9 (Singapore) at II.1.
[35] Gordon, 'The Rise of Independent Directors in the US, 1950-2005', 1490.
[36] See Chapter 9 (Singapore) at II.1; B. R. Cheffins, 'The History of Corporate Governance' in M. Wright et al. (eds.), *Oxford Handbook of Corporate Governance* (Oxford University Press, 2013).
[37] See Chapter 1 at III.7; Chapter 2 at II and IV; Chapter 10 (India) at IV.
[38] See Chapter 1 at I.2 and III; Chapter 2 at II.
[39] § 303A.02, NYSE Listed Company Manual, available at http://nysemanual.nyse.com/lcm; § 5605(a)(2), NASDAQ Listing Rules, available at http://nasdaq.cchwallstreet.com.
[40] See Chapter 1 at III.4; Gordon, 'The Rise of Independent Directors in the United States', 1580 at n 168; B.M. Ho, 'Restructuring the Boards of Directors of Public Companies in Hong Kong: Barking up the Wrong Tree', *Singapore Journal of International and Comparative Law*, 1 (1997), 507, 518 – 524.

theory goes, in controlled companies, controlling shareholders are fully capable of either monitoring management or managing the company themselves—rendering nugatory the problem of unchecked self-interested managers, which is the primary corporate governance concern in companies with dispersed shareholders that independent directors in the US are designed to fix.[41]

This theory is evident in the NYSE and NASDAQ listing rules, which explicitly exempt companies with a controlling shareholder from the otherwise mandatory requirement that boards of listed companies must have a majority of independent directors.[42] It is also clear that the definition of 'independence' employed in the NYSE and NASDAQ listing rules do not prohibit significant shareholders or those connected with significant shareholders from qualifying as 'independent directors'.[43] Instead, in the US, share ownership by independent directors is often viewed as an effective way to align their interests with dispersed shareholders and incentivise them to monitor management more effectively on behalf of dispersed shareholders.[44]

Given this context, it is unsurprising that in the 1990s, the American concept of the independent director became a core feature of the UK's Combined Code of Corporate Governance (UK Code).[45] It is well recognized that the US and UK share the unique distinction of having a high proportion of listed companies with dispersed shareholders.[46] As such, it is understandable that the original definition of 'independence' in the UK Code focused on ensuring that independent directors were independent from the company's management, without any restriction on significant shareholders qualifying as independent directors—wholly embracing the American managerial-monitoring concept of the independent director.[47] Moreover, the UK provided a corporate governance architecture similar to the US within which its American-style independent directors could function, as the typical UK listed company had (and still has) a one-tier board with sub-committees for nomination, remuneration and audit.

In sum, it is clear that the inaugural UK Code did more than merely transplant the 'independent director' *label* from the US to the UK. It transplanted the form of the American independent director (i.e., directors who are independent from management only) to perform the function of the American independent director (i.e., monitoring management on behalf of dispersed shareholders) into a corporate governance architecture similar to the US (i.e., a one-tier board with committee system). From this perspective, it appears that the American concept of the

[41] B. M. Ho, 'Restructuring the Boards of Directors of Public Companies in Hong Kong', 527.

[42] Weil, Gotshal & Manges LLP, 'Public Company Advisory Group, Requirements for Public Company Boards: Including IPO Transition Rules' (2013), 2, 13, 15, available at www.weil.com; Wachtell, Lipton, Rosen & Katz, *Compensation Committee Guide* (2014), 3 n. 3, 73, available at www.wlrk.com. See also § 303A.02, NYSE Listed Company Manual; §IM-5615-5, NASDAQ Stock Market Rules.

[43] In fact, the NYSE and NASDAQ listing rules go a step further by exempting controlled companies from the requirement that their nomination committee and remuneration committee must be composed entirely of (American-style) independent directors. See US Securities Exchange Commission, 'NASD and NYSE Rulemaking: Relating to Corporate Governance' (Release No.34-48745, 2003), available at www.sec.gov; Findlaw, 'SEC Approves NYSE and NASDAQ Proposals Relating to Director Independence' (23 March 2006), available at http://corporate.findlaw.com.

[44] D. C. Clarke, 'Three Concepts of the Independent Director', *Delaware Journal of Corporate Law*, 32 (2007) 91.

[45] See Chapter 1 at IV.1; Chapter 9 (Singapore) at II.1.

[46] See Chapter 1 at III.6, IV.1.

[47] See Chapter 1 at IV.1; Chapter 9 (Singapore) at II.1.

independent director was indeed transplanted into the inaugural UK Code, arguably creating the concept of the 'Anglo-American' independent director. In this context, UK-US comparisons of the independent director are more akin to 'twins separated at birth' than 'apples and oranges'.

This is not to suggest that the UK independent director has *remained* true to its American origins. The American-style definition of independence in the inaugural UK Code was amended in 2003 to require independent directors to be independent from both the management *and* significant shareholders.[48] The UK also amended its rules in 2014 for electing independent directors in premium-listed companies[49] with controlling shareholders to give minority shareholders a non-binding vote over their election—aiming to make independent directors a more effective mechanism for monitoring controlling shareholders.[50] Moreover, since the Global Financial Crisis, the UK has decreased its emphasis on the independence of directors, while the US has moved in the opposite direction.[51] In sum, it appears that the form and function of the UK independent director has evolved away from its US origins.

In addition, longstanding differences in UK-US corporate law and governance suggest that it is likely that independent directors in the UK and US had different functions even at the time of transplantation. The importance US corporate law places on independent directors as gatekeepers for hostile takeovers and derivative actions contrasts sharply with the UK, where independent directors play a peripheral role in such critical matters.[52] The absolute right under UK company law to remove (independent) directors at any time[53] in public companies is diametrically opposed to a history of staggered boards in listed US companies.[54] The mandatory approach of regulating independent directors in the US contrasts sharply with the UK's hallmark 'comply or explain' regulatory regime.[55] Such differences in UK-US corporate law and governance suggest that upon closer examination, even at the time of transplantation, references to an 'Anglo-American' concept of the independent director may have masked important differences.

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[48] Section 1(A.3.1), The Combined Code on Corporate Governance (Financial Reporting Council 2003), available at www.ecgi.org. This was at the recommendation of D. Higgs, 'Review of the Role and Effectiveness of the Non-executive Directors' (2003), available at www.ecgi.org.
[49] Premium-listed companies are required to comply with UK-specific rules that are higher than the European Union minimum requirements. See London Stock Exchange, 'Listing Regime', available at www.londonstockexchange.com.
[50] Where a premium-listed company has a controlling shareholder, the election and re-election of independent directors is subject to approval by the (1) shareholders as a whole; and (2) independent (i.e. minority) shareholders. If the company fails to obtain the necessary approvals, it may propose a special resolution that (1) must be voted on within a period of 90 to 120 days from the original vote and (2) must be approved by the shareholders as a whole. See Listing Rule 9.2.2.AR, 9.2.2.ER and 9.2.2.F; Financial Conduct Authority, 'PS 14/8: Response to CP13/15 – Enhancing the Effectiveness of the Listing Regime' (May 2014), available at www.fca.org.uk.
[51] See Chapter 2.
[52] See Chapter 1 at III.3; Chapter 2 at IV.4.
[53] A director may be removed at any time without cause pursuant to an ordinary resolution passed by the company's shareholders: see section 168(1), Companies Act 2006, c. 46 (UK). Similar provisions are present in other jurisdictions: see section 152, Companies Act, 2006, c. 50 (Singapore); section 462, Companies Ordinance, c. 622 (Hong Kong); art 339, para. 1 and art 341, Company Law, Art No. 86 of July 26, 2005 (Japan).
[54] R. Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd edn (Oxford University Press, 2009), 60 – 61.
[55] See Chapter 1 at IV.1.

Ultimately, although the core concept of the American independent director—a managerial-monitor director, on a one-tier board, in a company with dispersed shareholders—was transplanted into the inaugural UK Code, it is clear that the UK independent director has evolved in its own way. Moreover, even at the time of transplantation, distinct aspects of UK-US corporate law and governance required UK-US independent directors to perform different functions in different regulatory environments. This realisation does not comport with the widely-held assumption of a universal concept of the independent director or even an 'Anglo-American' concept of the independent director.

For at least three reasons, this nuanced understanding of the American concept of the independent director and its evolution in the UK are essential for understanding the rise of the independent director in Asia. First, all of Asia's leading economies claim to have either explicitly adopted or been heavily influenced by the American and/or 'Anglo-American' independent director models.[56] As such, to evaluate these claims and understand their historical roots requires a clear understanding of the history of the independent director in the UK and US. Second, the clear differences that have emerged between the UK-US independent director models suggest that varieties in the form and function of the independent director in Asia should be expected. Indeed, the fact that the UK and US—two common law, English speaking, Western countries, with similar corporate board and shareholder ownership structures—have developed different concepts of the independent director suggests that diversity, rather than uniformity, among independent directors in Asia should be expected; the opposite of what conventional wisdom suggests.[57] Third, differences between UK-US independent directors and the evolution that has occurred in the UK concept suggest that claims that Asian jurisdictions have modelled their systems on the US, UK and/or 'Anglo-American' concept of the independent director should be scrutinised.

3 The Form of Independent Directors in Asia: Decisively Un-American and Surprisingly Diverse

A comparison of the jurisdiction-specific Chapters in this Book reveals that none of Asia's leading economies (i.e., China, India, Hong Kong, Japan, Singapore, South Korea, and Taiwan) have adopted the American concept of the independent director in form and function. In its thinnest conception, the form that 'independent directors' take can be considered to be the object of their independence (i.e., what they are designed to be independent from). Based on this conception, the thinnest form of the American independent director is to be a director who is independent from the company's management—but not from the company's significant shareholders.[58]

Considering the US-origins of the independent director and the conventional wisdom that the American concept of the independent director has become a global phenomenon,[59] it is

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[56] See Chapter 4 (Japan) at II.1.a; Chapter 5 (South Korea) at II.4; Chapter 6 (China) at II.1; Chapter 7 (Taiwan) at I; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.3; Chapter 10 (India) at III.

[57] For further discussion on convergence in corporate governance, see H. Hansmann and R. Kraakman, 'The End of History for Corporate Law', *Georgetown Law Journal* 89 (2001), 439; Chapter 13 at II.

[58] See Chapter 1 at I.2 and III.

[59] B. R. Cheffins, 'Corporate Governance Reform: Britain as an Exporter', in David Hume Institute, *Hume Papers on Public Policy: Corporate Governance and the Reform of the Company Law* (Edinburgh University Press, 2000); D.C. Langevoort, 'The Human Nature of Corporate Boards: Law, Norms, and the Unintended

surprising that *none* of Asia's leading economies currently use the American concept of the independent director, even in its thinnest form. Today, independent directors in all of Asia's leading economies are designed to be independent from the company's management *and* significant shareholders.[60] In fact, in China, India, Hong Kong, South Korea, and Taiwan it has always been this way (i.e., none of these jurisdictions have ever used the American concept of the independent director, even in its thinnest form).[61]

Japan and Singapore stand out as two leading Asian economies that, at one time in their histories, have utilised or claimed to utilize the American concept of the independent director in its thinnest form. Japan's situation is somewhat complex. In 2002, Japan amended its company law to *ostensibly* provide the option of adopting an 'American-style board' with 'American-style independent directors'.[62] However, upon closer examination, these so-called 'American-style independent directors' were in fact defined in such a way that they were not actually required to be independent from either management or significant shareholders. In reality, these directors were only required to not work for the company or its subsidiaries (i.e., to be 'outside directors').[63] Most importantly, these so-called 'independent directors' were legally permitted to have personal connections with management and/or to be employed by significant shareholders (i.e., they did not even need to satisfy the American concept of the independent director in its thinnest form).[64] Starting in the late 2000s, the definition of independence was gradually tightened by successive amendments to the Tokyo Stock Exchange listing rules, which required independent directors to be independent from management *and* significant large-block shareholders.[65] Finally, Japan's recently amended Companies Act expanded the definition of 'outside directors' to require them to be independent from corporate management *and* large block-shareholders.[66]

Singapore stands out among Asia's leading economies as the only jurisdiction that has enthusiastically embraced the American concept of the independent director, at least in its thinnest form.[67] In 2001, Singapore explicitly designed its independent director to be independent from management, but not from significant shareholders.[68] In 2005, the Singapore government considered seriously a proposal to amend its definition of independence to require independence from management *and* significant shareholders, but this proposal was ultimately

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Consequences of Independence and Accountability', *Georgetown Law Journal*, 89 (2001), 797-832, 798; see also Chapter 9 (Singapore) at II.

[60] See Chapter 4 (Japan) at at II.1.a, II.1.b and II.1.c; W. Tanaka, 会社法 [Company Law] (2016), 212-216; Chapter 5 (South Korea) at III.2.b; Chapter 6 (China) at III.3; Chapter 7 (Taiwan) at II.1; Chapter 8 (Hong Kong) at II.2; Chapter 9 (Singapore) at II.3; Chapter 10 (India) at III.

[61] See Chapter 5 (South Korea) at III.2.b; Chapter 6 (China) at III.3; Chapter 7 (Taiwan) at II.1; Chapter 8 (Hong Kong) at II.2; Chapter 10 (India) at III.

[62] D.W. Puchniak, 'The 2002 Reform of the Management of Large Corporations in Japan: A Race to Somewhere?', *Australian Journal of Asian Law*, 5 (2003), 49 – 66; R. J. Gilson and C. J. Milhaupt, 'Choice as Regulatory Reform: The Case of Japanese Corporate Governance', *American Journal of Comparative Law*, 53(2) (2005), 343-377; P. Lawley, 'Panacea or Placebo? An Empirical Analysis of the Effect of the Japanese Committee System Corporate Governance Law Reform', 9 (2007), *Asian-Pacific Law and Policy Journal*, 105, 135.

[63] See Chapter 4 (Japan) at II.1.a.

[64] See Chapter 4 (Japan) at II.1.a.

[65] See Chapter 4 (Japan) at II.1.b.

[66] See Chapter 4 (Japan) at II.1.c.

[67] See Chapter 9 (Singapore) at II.4 and III.1.

[68] Corporate Governance Committee, *Consultation Paper* (2000), 5, available at www.mas.gov.sg; Corporate Governance Committee, *Report of the Committee and Code of Corporate Governance* (2001), 8, available at www.acra.gov.sg; see also Chapter 9 (Singapore) at III.1.

rejected.[69] It was not until the latest version of Singapore's Corporate Governance Code went into force in 2015, that its definition of independence was expanded to ostensibly require independence from management *and* significant shareholders.[70] This recent shift in Singapore's approach has moved Asia's most enthusiastic adopter of the American form of the independent director away from it.

A thicker conception of the form that 'independent directors' may take would include the position that 'independent directors' occupy within a jurisdiction's corporate governance architecture and the legal nature of such a position. According to the American concept, 'independent directors' hold positions as directors on one-tier boards with nomination, audit and remuneration committees. These positions are secured by mandatory law, which currently requires independent directors to compose a majority of board members and all board-committee members in listed companies.[71]

An examination of the positions that 'independent directors' occupy in the diverse corporate governance architectures of Asia's leading economies reveals a significant departure from this thicker conception of the form of the American independent director—with China arguably providing the clearest example. All listed companies in China have a 'double board'[72] structure (i.e., a 'management board' composed of shareholder representatives who make management decisions and a 'supervisory board' composed of shareholder and employee representatives who supervise the management board and senior managers).[73] This 'double board' structure has no equivalent in American corporate governance.[74] In turn, the nature of the positions held by 'independent directors' in listed companies in China and the US are different, which is problematic for comparative analyses. Some comparative research considers all of the directors on the supervisory board of a Chinese listed company to be 'independent directors';[75] other comparative research only considers directors on the management board of a Chinese listed company who meet the Chinese definition for independence to be 'independent directors'.[76] This confusion is understandable as the Chinese and American board structures differ substantially and, therefore, the positions that 'independent directors' adopt in each jurisdiction are distinct—with no formal (or functional)[77] equivalence. This makes comparisons difficult

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[69] The Council on Corporate Disclosure and Governance, *Consultation Paper on Proposed Revisions to the Code of Corporate Governance* (2004) 7–9, available at www.acga-asia.org.
[70] Code of Corporate Governance, Art. 2.3(e)–(f), 4 n.2 (defining '10% shareholder'), 5 n.6 (defining 'directly associated'); see also Chapter 9 (Singapore) at IV.1.
[71] See Chapter 1 at III.4.
[72] For clarity, we refer to the two-tier board in China and Taiwan as a 'double board'. The 'double board' is distinct from the German two-tier board for a number of reasons, especially since China and Taiwan do not permit the supervisory board to appoint the management board. See Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II.1.
[73] Chapter 6 (China) at II.2.
[74] The 'double board' structure is derived from the German corporate governance system. See Chapter 1 at IV.3; Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II.1.
[75] This assumption appears to have been made in a report issued by ISS: Gopal, 'Japan: A Closer Look at Governance Reforms'. It is unclear if supervisory board members were deemed to be independent directors for jurisdictions with two-tier boards in 'Exhibit 3: Global Comparison of Board Independence' provided in the report. A distinction should be made between supervisory board members and independent directors, especially in the case of China, where independent directors were introduced to perform the monitoring functions that supervisory board members were unable to provide. See Chapter 6 (China) at II.2. Email clarification was sought from the author of the report on 2 June 2016, but no response was forthcoming as of the publication of this book.
[76] Clarke, 'The Independent Director in Chinese Corporate Governance', 150–151; Z. Yuan, 'Independent Directors in China: The Path in Which Direction?', *International Company and Commercial Law Review*, 22 (2011), 352, 354 – 357.
[77] See II.4 below.

and potentially misleading when it is assumed—which is often the case—that the nature of the positions that Chinese and American independent directors occupy are equivalent.[78]

Comparisons of independent directors in Japan and the US confront a similar problem.[79] Japan's new Companies Act allows listed companies to adopt a one-tier board, 'double board'[80] or hybrid board—each having distinct types of directorial positions and roles for independent directors.[81] As the vast majority of listed companies in Japan have adopted a 'double board', which is staffed by *kansayaku* (statutory auditors), the independent directors in Japan and the US occupy different types of positions. An influential school of thought suggests that members of Japan's 'supervisory board' (i.e., *kansayaku*) are essentially similar to American independent directors and, therefore, should be counted as such in multijurisdictional comparisons.[82] The more common view, however, is that only members of the 'management board' who meet the Japanese definition for independence should be considered to be 'independent directors'.[83] However, directors on the 'management board' are monitored by the 'supervisory board' staffed by *kansayaku*, which by definition makes their position and responsibilities distinct in form from American independent directors.[84]

In Taiwan, the company law has recently been amended to require large companies to abandon the 'double board' and adopt a one-tier board by the end of 2017.[85] As such, from 2018, the nature of the position held by independent directors in Taiwan will be broadly comparable to American independent directors, at least in this one aspect. Similarly, listed companies in Hong Kong, India, Singapore and South Korea have one-tier board structures, making independent directors in these jurisdictions also comparable to American independent directors, at least in this one aspect of their forms.

[78] See note 75 above.
[79] An ISS report on Japan's 2014 reform of its independent director regime directly compares the average percentage of board independence in Japan and the US without further elaboration on the material difference between the two regimes: Gopal, 'Japan: A Closer Look at Governance Reforms'.
[80] Japan's 'double board' is distinct from the German two-tier board system, as the board of statutory auditors is not allowed to appoint or dismiss directors. A shareholder resolution is required to elect and dismiss directors (and statutory auditors): Arts. 329 and 339, Companies Act; see also Gilson and Milhaupt, 'Choice as Regulatory Reform', 343, 348.
[81] Goto, 'The Outline for the Companies Act Reform in Japan and Its Implications', 17 – 19; Chapter 4 (Japan) at II.1; Chapter 12 at IV.1.
[82] B. E. Aronson, 'Japanese Corporate Governance Reform: A Comparative Perspective', *Hastings Business Law Journal*, 11 (2015), 85, 98 – 102. That foreign investors fail to understand this is a frequent lament amongst Japan insiders. In a provocative article, Matsunaka argues that the *kansayaku* have evolved over time to resemble directors so much that they have effectively lost their independent identity, leading to an 'identity crisis'. M. Matsunaka, '監査役のアイデンティティ・クライシス' [The Kansayaku's Identity Crisis], 商事法務, 1957 (2012), 4. See also シンポジウム　監査役制度の正しい理解のために [Panel Discussion on Correctly Understanding the *Kansayaku* Regime], '各界から見た日本のコーポレート・ガバナンスと監査役制度' [The *Kansayaku* Regime and Corporate Governance in Japan from the Perspectives of Different Interest Groups], 月刊監査役, 613 (2013), 4, which featured representatives from the University of Tokyo, *Keidanren*, ISS, Tokyo Stock Exchange, Toyota and the professional association representing *kansayaku*. However, *kansayaku* are distinct from American independent directors for multiple reasons, including their inability to vote at board meetings and participate in decisions regarding the appointment and removal of managers. See Chapter 4 (Japan) at III.2.a.
[83] See Chapter 4 (Japan) generally, which adopts the conventional approach that statutory auditors are *not* independent directors.
[84] See Chapter 4 (Japan) at II.1.a.
[85] See Chapter 7 (Taiwan) at II.3.

A second aspect of this thicker conception of the form of independent directors is the legal nature of their positions. In the US, mandatory law requires independent directors to compose a majority of board members and all board-committee members in listed companies.[86] In Asia's leading economies, Japan represents the other extreme as it is the only leading Asian economy in which mandatory law does not require *any* independent directors in listed companies.[87] In contrast, South Korean company law mandates that all large listed companies have a majority of independent directors on their boards.[88] India and Taiwan's regulatory approaches have evolved in a similar way over time: they both first introduced the independent director on a 'comply or explain' basis; and later implemented mandatory law for a minimum number/proportion of 'independent directors' after optional law did not achieve the level of independence the government desired.[89] Singapore evolved in the opposite direction: it first introduced minimal mandatory requirements for the number of independent directors; and later implemented a UK-style 'comply or explain' code to increase the number of 'independent directors' to a level that the government desired. [90]

Finally, the thickest conception of the form of the independent director may include the personal characteristics that the typical independent director in a jurisdiction brings to the position. Again, there appears to be significant differences between independent directors in the US and Asia's leading economies based on this thickest conception of form. In the US, the vast majority of independent directors are corporate executives from other companies.[91] In China, however, historically almost half of all directors on the boards of listed companies have been university professors—a trend which is also prevalent, but less pronounced, in South Korea, Taiwan and India.[92] For China, Singapore and South Korea, the formal and informal connections that independent directors have with the government tend to be more pronounced than in other jurisdictions, but for different reasons in each jurisdiction.[93] In Japan, independent directors tend to be lifetime employees and to have connections with other companies in *keiretsu*-affiliated firms.[94] In Singapore, informal connections that independent directors in family firms have with family controllers tend to be a defining characteristic in such firms—which also likely plays an important role in most other leading Asian economies as family controlled corporations make up a large portion of listed firms in most jurisdictions (with the notable exception of Japan).[95]

The proportion of the board of listed companies that is composed of independent directors is also a critically important aspect of the thickest conception of the form of independent directors. Today, the typical board of a listed company in the US is composed entirely of

[86] § 303A.01, § 303A.04 – 06 NYSE Listed Company Manual; §IM-5605-1, §IM-5605-4, §IM-5605-5, §IM-5605-6, §IM-5605-7 NASDAQ Stock Market Rules.
[87] However, Japan recently strengthened its promotion of independent directors by changing its purely optional regulation of independent directors to a UK-style 'comply or explain' regime, which requires companies to explain if they have no independent directors. See Chapter 4 (Japan) at II.1.c.
[88] See Chapter 5 (South Korea) at III.2.a.
[89] See Chapter 7 (Taiwan) at II.1; Chapter 10 (India) at V.3.
[90] See Chapter 9 (Singapore) at II.4 and IV.2.
[91] R. J. Gilson and R. Kraakman, 'Reinventing the Outside Director: An Agenda for Institutional Investors', *Stanford Law Review*, 43 (1991), 863, 872; Ferris et al., 'Too Busy to Mind the Business? Monitoring by Directors with Multiple Board Appointments', *Journal of Finance*, 58 (2003), 1087.
[92] See Chapter 5 (South Korea) at IV.4; Chapter 7 (Taiwan) at II.2.b; Chapter 10 (India) at IV.2.
[93] See Chapter 6 (China) at II.3; Chapter 9 (Singapore) at III.3; Chapter 5 (South Korea) at IV.4.
[94] Lawley, 'Panacea or Placebo?', 105, 135.
[95] S. Claessens et al., 'The Separation of Ownership and Control in East Asian Corporations', *Journal of Financial Economics*, 58 (2000), 81, 102 – 103; Chapter 9 (Singapore) at III.2.

'independent directors', except for the CEO.[96] As suggested above, due to the diversity in definitions for independence and varieties of positions held by directors who may be considered to be 'independent directors', statistics reporting the number of 'independent directors' in Asia's leading economies vary considerably depending on the criteria used by the surveyor for identifying which directors should be counted as being 'independent directors'. For example, in China, the ISS survey, which appears to have counted supervisory board members as independent directors, reported that almost 70 per cent of boards in China had a majority of independent directors;[97] another survey by the Asian Corporate Governance Association, which appears to only count members of the management board designated as independent directors, reported that approximately 20 per cent of boards in China had a majority of independent directors.[98] Even in the face of this uncertainty, however, there are no statistics suggesting that any of Asia's leading economies have approached US-levels of having (or even labelling) the entire board, except for the CEO, as independent directors.

At least on a self-reporting basis (i.e., without definitional differences being scrutinised) and if the supervisory board members are not considered to be 'independent directors', it appears that the level of board independence varies widely across Asia's leading economies. On this basis, the typical board of a large listed company in India, Singapore and South Korea tends to report having a majority of 'independent directors'; in China and Hong Kong the typical board reports having one-third to half 'independent directors'; and in Japan and Taiwan the typical board reports having one or two 'independent directors'.[99]

In sum, there is a significant difference in the forms that 'independent directors' take in the US and Asia's leading economies. This difference is seen in the thinnest conception of form, as the American form focuses on independence from management; whereas, the form that has emerged in Asia's leading economies focuses on independence from management *and* significant shareholders. Magnifying this difference is the fact that the very nature of the positions that independent directors in Asia's leading economies occupy are in some jurisdictions fundamentally different than in the US. Moreover, the use of (or even complete reliance on, in the case of Japan) non-mandatory regulation of independent directors in many of Asia's leading economies is distinct from the reliance on mandatory regulation in the US. Finally, the unique and diverse characteristics and skills of independent directors and the smaller proportion of independent directors on boards further distinguish the form (and, as explained below, also the function) of the 'independent director' in Asia's leading economies from the US.

Perhaps more interesting is that there are important similarities and differences in the forms of the 'independent director' *within* Asia. The most salient intra-Asia similarity is that all of Asia's leading economies have gravitated towards a concept of the independent director designed to be independent from management *and* significant shareholders—which is clearly distinct from the American concept.[100] Despite this core similarity, what has been almost entirely overlooked are the diverse varieties of forms of the 'independent director' in Asia, at least based on a thicker conception of form. In jurisdictions that mandate one-tier boards (i.e., Hong Kong, India, Singapore and South Korea) the positions occupied by independent directors are broadly

[96] Velikonja, 'The Political Economy of Board Independence', 857.
[97] Gopal, 'Japan: A Closer Look at Governance Reforms'.
[98] ACGA and KPMG, *Balancing Rules and Flexibility* (2014), available at www.accaglobal.com
[99] *Ibid*.; Gopal, 'Japan: A Closer Look at Governance Reforms' (ISS 2015), available at www.issgovernance.com.
[100] As Puchniak and Lan confirm empirically in Chapter 9 (Singapore) at II.2, the trend towards an 'un-American' form of the independent director is a global phenomenon that has been largely overlooked.

comparable to the American form, at least in this aspect. However, in jurisdictions that permit non-one-tier boards (Japan, China, and Taiwan until 2018) the distinct nature of these positions complicates any direct comparison. There is also intra-Asia diversity in the non-mandatory (Japan), mandatory (China and South Korea) and hybrid mandatory/non-mandatory (Hong Kong, India, Singapore and Taiwan) approaches that exist in terms of implementing and regulating independent directors. Finally, there are similarities in the prominent characteristics and skills of independent directors among some of Asia's leading jurisdictions (e.g., in China, India, South Korea and Taiwan academics make up a sizable portion of independent directors), but not others—further highlighting varieties in the thicker conception of the form of independent directors in Asia's leading economies.

4 The Functions of Independent Directors in Asia: Diverse Expectations Revealed

There is an obvious link between the form that independent directors take and the function that they perform. As such, the significant differences between the forms of independent directors in Asia's leading economies and the US suggest that there are likely to be differences in their functions. Similarly, the diversity in the forms of independent directors among Asia's leading economies suggests that there is also likely to be functional diversity among independent directors within Asia. It cannot be assumed, however, that merely because independent directors have the same form that they will perform the same function, or that independent directors that have different forms will perform different functions. Indeed, as explained below, the unique and diverse contexts in each of Asia's leading economies suggest that the relationship between form and function is complex and highly jurisdiction-specific.

It is also important to remain cognisant of the difference between the function that independent directors are *expected* to perform and how independent directors *actually* function in practice. Although these two aspects of functionality are distinct, they are also interrelated. How independent directors are expected to function, may influence how they actually function and vice versa. For analytical purposes, however, it makes sense to bifurcate our comparative analysis by first examining the expected functions and then the actual functions of independent directors in Asia's leading economies and the US.

As explained above, since the genesis of the American independent director in the 1970s, the primary expected function of independent directors in the US has been clear: to monitor management on behalf of dispersed shareholders, who are hindered by collective action problems from monitoring management themselves.[101] By contrast, the primary expected function of independent directors in most of Asia's leading economies is to monitor controlling shareholders on behalf of minority shareholders, in order to mitigate the risk of the former extracting private benefits of control from the company.[102]

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[101] See Chapter 1 at III.2.

[102] 'Private benefits of control (i.e., benefits that the controlling shareholder receives as a result of their controlling power, which are not provided to the minority shareholders). A common example of private benefits of control is when a controlling shareholder causes the company to sell a piece of its property, at below market value, to a company the controlling shareholder wholly owns. In such a case, the private benefit that the controlling shareholder receives increases proportionally as the percentage of the controlling shareholder's equity stake in the company decreases. In this common example, the controlling shareholder can be seen to have used her controlling power to extract a financial benefit from the company that was greater than the proportion of her equity stake.'

In China, India, Hong Kong, South Korea and Taiwan, the expectation that independent directors would primarily act as monitors of controlling shareholders is evident in the policy discussions and academic commentaries surrounding the adoption of independent directors in each jurisdiction.[103] This expectation is also evident in the inaugural definitions that these jurisdictions adopted for 'independence' which, as explained above, all generally provide that independent directors should be independent from significant shareholders.[104] Thus, although there are claims that some of these jurisdictions were inspired by the US concept of the independent director,[105] this inspiration appears to have had little or no influence on the actual details of the policy discussions and/or legislative drafting in terms of the function that independent directors were (and are) expected to actually perform in these jurisdictions.

In this context, Japan and Singapore are outliers among Asia's leading economies as independent directors in both countries have *not* historically been expected to play almost any role in monitoring controlling shareholders. This is clear in the policy discussions and academic commentaries surrounding the adoption of independent directors in both countries.[106] Also, as explained above, notably in both countries the inaugural definitions for 'independence' did *not* require independence from significant shareholders.[107] In fact, in Singapore, the policy committee and regulatory authority made it explicitly clear that the primary expected function of independent directors was to act as managerial-monitors—but not monitors of controlling shareholders.[108]

The policy debates surrounding the adoption of independent directors in Singapore suggest that another important reason for their adoption was to send a signal to international investors that Singapore has 'good' corporate governance.[109] It appears that in several of Asia's leading economies there was (and still is) an expectation among government officials and companies that the adoption of independent directors will function as an important signal of 'good' corporate governance to domestic and international investors.[110] For reasons explained in section III below, however, it appears that this function of independent directors was likely of greater importance in Singapore and lesser importance in Japan, at least in comparison to other leading Asian economies.

Further, some civil law jurisdictions adopted independent directors to address the specific shortcomings of the supervisory board or its local equivalent under their respective corporate law regimes. In China and Taiwan, where double boards are permitted, the primary motivation for the adoption of independent directors was to address the perceived failure of their

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Puchniak, 'Multiple Faces of Shareholder Power in Asia', 527. See also R. J. Gilson and J. N. Gordon, 'Controlling Controlling Shareholders', *University of Pennsylvania Law Review*, 152 (2004), 785.

[103] See Chapter 5 (South Korea) at III.1 and III.2.b; Chapter 6 (China) at II.1; Chapter 7 (Taiwan) at III.3.a; Chapter 8 (Hong Kong) at II.2 and II.4; Chapter 10 (India) at V.1 and V.2.

[104] See Chapter 5 (South Korea) at III.2.b; Chapter 6 (China) at III.3; Chapter 7 (Taiwan) at II.1; Chapter 8 (Hong Kong) at II.2; Chapter 10 (India) at V.2.

[105] See Chapter 7 (Taiwan) at I.

[106] See Chapter 4 (Japan) at III.1; Chapter 9 (Singapore) at II.3 and II.4.

[107] See Chapter 4 (Japan) at III.1; Chapter 9 (Singapore) at II.3 and II.4.

[108] See Chapter 9 (Singapore) at II.4.

[109] See Chapter 9 (Singapore) at II.4.

[110] See Chapter 4 (Japan) at III.1; Chapter 5 (South Korea) at III.1; Chapter 8 (Hong Kong) at II.4; Chapter 10 (India) at V.1.

supervisory boards.[111] In South Korea, the inaugural mandatory independent regime replaced the traditional statutory auditors with an audit committee composed primarily of independent directors in large listed companies.[112] In Japan, independent directors were expected to address the perceived failure of the board of statutory auditors to effectively monitor traditional lifetime employee dominated 'management boards' in large Japanese companies. Japan's inaugural independent director system encouraged companies to adopt an 'American-style' one-tier board with sub-committees, under which a board of statutory auditors was not (and is still not) permitted.[113] By contrast, in China, independent directors are expected to function as members of the management board who act as complementary monitors (and not substitute monitors) to the supervisory board—with the supervisory board still monitoring the independent directors and the other members of the management board.[114]

Another important driver of the adoption and reforms of Japan's independent director system has been the government's desire to signal its effective management of Japan's economic malaise.[115] There is considerable evidence in other leading Asian economies (and the US and EU) that governments—especially in the wake of poor economic performance and/or a financial crisis—often implement legislation with the aim of encouraging independent directors to signal effective political governance.[116] Although governments in several of Asia's leading economies (and the US and EU) have implemented and reformed their independent director regimes with the expectation that they will function as a signal of effective political governance, for reasons explained below, this expected function appears to have been particularly salient in the evolution of Japan's independent director system.[117]

Finally, it is important to note that Japan and Singapore have recently reformed their independent director systems with the expectation that one of the functions of their independent directors will be to monitor controlling shareholders.[118] Although the reforms in both countries have been cautious and limited,[119] they suggest a movement towards Asia's other leading economies (and away from the US) as independent directors are increasingly being seen as a corporate governance mechanism which is expected to monitor controlling shareholders.[120]

In sum, it appears that the expected functions of independent directors in Asia's leading economies differ significantly from the US. The main point of divergence is that in most of

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[111] See Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II.1.

[112] See Chapter 5 (South Korea) at III.1.b; K.S. Kim, 'Transplanting Audit Committees to Korean Soil: A Window into the Evolution of Korean Corporate Governance', *Asian-Pacific Law and Policy Journal*, 9 (2007), 163, 164.

[113] See Chapter 4 (Japan) at II.1; Puchniak, 'The 2002 Reform of the Management of Large Corporations in Japan', 49 – 56; Gilson and Milhaupt, 'Choice as Regulatory Reform', 352 – 353.

[114] See Chapter 6 (China) at II.2 and III.4.d; J. Zhao, 'Comparative Study of U.S. and German Corporate Governance: Suggestions on the Relationship between Independent Directors and the Supervisory Board of Listed Companies in China', *Michigan State Journal of International Law*, 18 (2010), 495, 506-507, 507 n. 76 (observing that the functions of independent directors in this context are more operable and direct').

[115] See Chapter 4 (Japan) at III.2.

[116] See Chapter 2 at II; Chapter 5 (South Korea) at III.1; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.4.

[117] See Chapter 4 (Japan) at III.2.

[118] See Chapter 4 (Japan) at II.1.c and Chapter 9 (Singapore) at IV.2.

[119] See Chapter 9 (Singapore) at IV.2 (observing that the Singapore's definition of 'independence' is likely to bring about a functional rather than substantive change).

[120] See Chapter 9 (Singapore) at V.

Asia's leading economies the primary expected function of independent directors is to monitor controlling shareholders, whereas in the US this is not the case. Within Asia, jurisdictions that currently allow or previously allowed double boards, have expected independent directors to either complement or substitute for ineffective supervisory boards—distinguishing them from common law jurisdictions which historically have had one-tier board structures. Finally, although the expectation that independent directors will function as a signal of 'good' corporate governance and/or political effectiveness appears to exist in many of Asia's leading economies, the importance of these functions appears to vary from jurisdiction to jurisdiction in Asia (and, we suspect, elsewhere).

5 The Actual Functions of Independent Directors in Asia: Empirical Ambiguity and Contextual Idiosyncrasy

Determining whether the expected functions of independent directors are actually put into practice is extremely difficult and complex. At the most general level, the question that is often asked to determine whether independent directors have fulfilled their expected functions has been similar in most jurisdictions: do independent directors improve corporate performance? Despite the widespread adoption of 'independent directors' and a litany of empirical studies, there is a surprising absence of clear empirical evidence in the United States, the EU and Asia that independent directors actually improve corporate performance.[121]

In Asia, on balance, most of the empirical evidence has failed to find a definitive link between independent directors and corporate performance.[122] However, there are a few empirical studies in Japan,[123] Hong Kong[124] and South Korea[125] that suggest that independent directors, in certain situations, may improve corporate performance.[126] Considering that the extensive empirical research on independent directors in the US has been unable to produce clear evidence that independent directors improve corporate performance, it is unsurprising that such evidence remains elusive in Asia. Moreover, as explained above, the diversity in the form and function of 'independent directors' within Asia suggests that any interjurisdictional attempt to

[121] See, for example, Chapter 1 at V; Chapter 2 at II.2 and IV.2; Velikonja, 'The Political Economy of Board Independence', 855, 859 – 860, 868 – 872; S. Bhagat and B. S. Black, 'The Non-Correlation between Board Independence and Long-Term Firm Performance', *Journal of Corporation Law*, 27 (2002), 231, 239; Y. Miwa and J. M. Ramseyer, 'Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan', *Journal of Economics and Management Strategy*, 14 (2005), 299.

[122] See Chapter 9 (Singapore) at II.1; Chapter 10 (India) at IV.1; see also A. K. Garg, 'Influence of Board Size and Independence on Firm Performance: A Study of Indian Companies', *Vikalpa*, 32 (2007) 39; Ibrahim and Samad, 'Corporate Governance Mechanisms and Performance of Public-Listed Family-Ownership in Malaysia'; Prabowo and Simpson, 'Independent Directors and Firm Performance in Family Controlled Firms: Evidence from Indonesia'.

[123] See Chapter 4 (Japan) at III.1.

[124] See Chapter 8 (Hong Kong) at III.4; A. Lei and D. Deng, 'Do Multiple Directorships Increase Firm Value? Evidence from Independent Directors in Hong Kong', *Journal of International Financial Management and Accounting*, 25(2) (2014), 121; see also F. Cheng, 'Corporate Governance in Hong Kong: An Empirical Study of the Effects of Independent Non-Executive Directors on Voluntary Corporate Disclosures and Adoption of Best Corporate Governance Practices' (City University of Hong Kong Institutional Repository, 2011) available at http://dspace.cityu.edu.hk; B. Jaggi and J. Tsui, 'Insider trading earnings management and corporate governance: Empirical evidence based on Hong Kong Firms', *Journal of International Financial Management and Accounting* 18(3) (2007), 192.

[125] B. S. Black et al., 'Methods for multicountry studies of corporate governance: Evidence from the BRIKT countries', *Journal of Econometrics* 183 (2014), 230.

[126] See Chapter 4 (Japan) at III.1; Chapter 5 (South Korea) at IV.1.

evaluate the impact of independent directors across Asia will be fraught with methodical problems and compromised by the interjurisdictional diversity in the form and function of independent directors.[127]

It should be noted that most of the research that considers the effectiveness of independent directors has examined their impact at the firm level—but not the jurisdictional level.[128] There has been little empirical analysis on whether adopting independent directors, which may improve the image of a jurisdiction's corporate governance, has a positive macroeconomic impact. In addition, there has been limited analysis on whether the use of regulations promoting independent directors as a signal of good political governance is actually an effective political strategy.[129]

Perhaps even more interesting are the idiosyncratic and unanticipated functions that independent directors have come to perform in Asia's leading economies. Partially as a result of pressure from the IMF following the Asian Financial Crisis, South Korea adopted mandatory legislation, which now requires the boards of all large listed companies to have a majority of independent directors.[130] There has been an increasing trend to fill these mandatory independent director positions with ex-government officials so that they can function as government lobbyists.[131] It is suggested that a reason that independent directors may be increasingly fulfilling this function in South Korea is because Korean law strictly prohibits companies from retaining professional government lobbyists—driving companies to fill the mandated 'independent director' positions with clandestine government lobbyists.[132]

In Japan, there is evidence that when the inaugural independent director system was adopted that the loose definition for independence allowed companies in *keiretsu* groups to fill 'independent director' positions with senior management from other *keiretsu*-affiliated companies. The reason suggested for this behaviour was that it allowed *keiretsu*-affiliated companies to signal 'good' corporate governance, while at the same time reinforcing their corporate group links.[133] This is the direct opposite of the role that scholars and policymakers in other jurisdictions expect independent directors to play in group companies.[134]

In Singapore, there is empirical evidence that its inaugural American-style definition of independence allowed family-controlled firms (Family Firms) to systematically appoint family friends as independent directors. This allowed Family Firms to signal their compliance with

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[127] See II.3 and II.4 above.

[128] See, for example, Bhagat and Black, 'The Non-Correlation between Board Independence and Long-Term Firm Performance', 231-274 (surveying 934 of the largest US firms from 1985 to 1995); Gordon, 'The Rise of Independent Directors in the United States', 1465-1568 (reviewing overall trends in board composition in US public companies from 1950 to 2005).

[129] See, for example, Chapter 2 at II.3; Chapter 4 (Japan) at III.2; Velikonja, 'The Political Economy of Board Independence', 855, 892 – 915 (arguing that reforms directed at improving board independence has displaced substantive reform following corporate crises or scandals).

[130] See Chapter 5 (South Korea) at III.2.

[131] See Chapter 5 (South Korea) at IV.4.

[132] See Chapter 5 (South Korea) at IV.4.

[133] Lawley, 'Panacea or Placebo?', 117 – 119, 135.

[134] This was precisely the intended role for independent directors in respect of South Korea's *chaebols* (i.e. corporate groups): Chapter 5 (South Korea) at III.1.a and III.1.b; A.C. Pritchard, 'Monitoring of Corporate Groups by Independent Directors', *Journal of Korean Law*, 9 (2009), 1, 18–19 (opining that independent directors should constrain the power of controlling shareholders in South Korea's *chaebols*).

'good' corporate governance, while effectively preserving the status quo of family controllers dominating the corporate governance in such firms.[135] However, there is qualitative evidence that suggests that these family-friendly directors have in some cases served a valuable function in Family Firms by acting as trusted mediators between family member block shareholders in family-shareholder disputes.[136] Conversely, in Singapore's Government Linked Companies, independent directors appear to play a purely managerial-monitoring role as Singapore's unique institutional architecture has purposefully limited the ability of the government to exercise its full powers as a controlling shareholder.[137] This demonstrates that even within a single jurisdiction independent directors may function differently in companies with different types of shareholders—something which there is also evidence of in India.[138]

There are more examples in this book of unique, jurisdiction-specific, functions that independent directors have come to play in each of Asia's leading economies. What these examples make clear, is that there is a litany of diverse, idiosyncratic, jurisdiction-specific functions that are carried out by 'independent directors' in Asia's leading economies. These functions would have been beyond the wildest dreams of Professor Eisenberg, the 'founding father' of the (American) independent director in the 1970s.[139] Interestingly, the actual functions that 'independent directors' in Asia's leading economies now perform are a far cry from Eisenberg's conception of independent directors as monitors of management on behalf of dispersed shareholders.[140]

III Understanding the Diverse Varieties of Independent Directors in Asia: A Taxonomy

1 Building the Foundation for a Loose Taxonomy of Independent Directors in Asia

The revelation that *none* of Asia's leading economies have adopted the American concept of the independent director in form and function calls into question some of the most influential comparative corporate governance indices and research, which assume the opposite to be true.[141] An awareness of the varieties in the forms and functions of independent directors *within* Asia is an important reminder that local context is central to corporate governance, which undermines a prominent movement in comparative corporate governance to develop universal theories.[142] However, it is easier to demonstrate that an American-centric (universal)

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[135] See Chapter 9 (Singapore) at III.2; Y. T. Mak and T. Ng, 'Independent Directors: A well-functioning market', *Business Times*, 16 September 2010.
[136] See Chapter 9 (Singapore) at III.2; W. Ng and J. Roberts, '"Helping the Family": The Mediating Role of Outside Directors in Ethnic Chinese Family Firms', *Human Relations*, 60 (2007), 285.
[137] See Chapter 9 (Singapore) at III.3.
[138] See Chapter 10 (India) at II.
[139] M. A. Eisenberg, *The Structure of the Corporation: A Legal Analysis* (Little, Brown & Co., 1976).
[140] See Chapter 1 at III.2; Chapter 9 (Singapore) at II.1.
[141] See note 27 above.
[142] See, for example, Chapter 13 at II (explaining how the development of independent directors in Asia challenges the 'convergence in corporate governance' theory); D. W. Puchniak, 'The Complexity of Derivative Actions in Asia: An Inconvenient Truth' in D. W. Puchniak et al. (eds.) *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 124 – 127; D. W. Puchniak, The Derivative Action in Asia: A Complex Reality, *Berkeley Business Law Journal*, 9 (2013), 1, 24 – 28. See also, P. Legrand, 'Noted Publications: Puchniak, Dan W., Harald Baum and Michael Ewing-Chow (eds.). The

understanding of the ‘independent director’ in Asia is flawed, than to explain why diverse (un-American) varieties of independent directors have developed. Nevertheless, understanding this development is important as it provides an avenue for improving comparative analyses of independent directors in Asia which, as explained below, has significant practical and theoretical value.

An in-depth comparative analysis of the jurisdiction-specific chapters in this book reveals that there are six principal factors that help explain the evolution of independent directors in Asia (which are ranked generally in their approximate order of importance): (1) shareholder ownership structures; (2) legal origins; (3) types of shareholders; (4) functional substitutes; (5) political economy; and (6) cultural norms. Understanding how each of these factors has shaped the development of independent directors in Asia illuminates the similarities among certain aspects in the forms and functions of independent directors in Asia, and provides meaningful avenues for comparative analyses. Conversely, examining these six factors also highlights the distinct nature of the varieties of independent directors in Asia; this helps to explain why comparisons between independent directors in the US and Asia often have limited value, and why nuanced comparisons between independent directors among certain Asian jurisdictions on particular issues may produce useful insights.

These six factors provide an explanation for the evolution of varieties of independent directors in Asia and the foundation for developing a loose taxonomy of independent directors in Asia. This taxonomy, which is described in more detail below, allows for tailored interjurisdictional comparisons, which focus on categories (or subcategories) of the different varieties of independent directors in multiple Asian jurisdictions that share similar forms and/or functions—thus lending themselves to more meaningful comparative analyses. Ultimately, as illustrated below, systematic identification of comparable varieties of independent directors in Asia results in comparative research that produces more accurate and insightful results, which is one of the goals of this book.

2 The Six Principal Factors Driving the Varieties of Independent Directors in Asia

The first factor, which appears to have played the strongest role in the un-American evolution of independent directors in Asia, is the difference in the shareholder ownership structures between listed companies in the US and Asia’s leading economies.[143] As explained above, the managerial-monitoring model of the independent director in the US was created to address the collective action problems which are inherent in companies with dispersed shareholders.[144] In the context of American corporate governance, the evolution of the managerial-monitoring

Derivative Action in Asia. Cambridge, Cambridge University Press, 2012’, *Journal of Comparative Law*, 7 (2012), 347.

[143] Most of the jurisdictions surveyed in this book are dominated by companies with concentrated ownership. See Chapter 5 (South Korea) at II.3; Chapter 6 (China) at I and II.1; Chapter 7 (Taiwan) at II.4; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at I; Chapter 10 (India) at II.3.

[144] See II.2 above.

model of the independent director makes perfect sense as public companies with dispersed shareholders have traditionally predominated in the US.[145]

However, in all of Asia's leading economies—with the notable exception of Japan[146]—most companies have a concentrated shareholder structure.[147] This reorients the primary agency problem in listed companies from managerial rent seeking to block shareholders extracting private benefits of control.[148] Most policymakers in Asia's leading economies appear to be acutely aware of this difference between corporate governance in the US and Asia, and have clearly recognised the function of the independent director as a monitor of controlling shareholders in their respective jurisdictions.[149]

The US independent director was neither intended nor designed to address agency problems arising from concentrated shareholder ownership.[150] This raises a critical question: are independent directors well-suited to function as a mechanism for monitoring significant shareholders to mitigate private benefits of control? It is difficult for an independent director to be an independent monitor of the very shareholders who can appoint and remove her. Ensuring that independent directors are actually independent from majority and/or controlling shareholders is a common issue raised in most of the jurisdiction-specific chapters[151]—illustrating the value of interjurisdictional comparisons of independent directors *within* Asia as a method for identifying and analysing critical issues that may improve their effectiveness.

Taiwan is the only Asian jurisdiction examined in this book that has attempted to address this problem directly by requiring mandatory cumulative voting, but it appears that this has been largely ineffective in creating meaningful independence from the controlling shareholders.[152] Given the flaws inherent in majority shareholder rule, it is curious that Taiwan has been the only jurisdiction to make a serious attempt at finding an alternative mechanism for appointing independent directors.[153] Unfortunately, the reasons behind Taiwan's failure to effectively reform its shareholder voting system are still unclear—suggesting that future comparative research on this issue would be valuable.[154]

The second factor that appears to have driven the evolution of varieties of independent directors in Asia is the legal origins of Asia's leading economies and, perhaps more importantly, the origins of the specific provisions regulating each jurisdiction's particular independent director

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[145] However, the increased involvement of institutional investors complicates this characterisation: R. J. Gilson and J. N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights', *Columbia Law Review*, 113 (2013), 863.
[146] See Chapter 4 (Japan) at II.3.
[147] See Chapter 5 (South Korea) at II.3; Chapter 6 (China) at II.1; Chapter 7 (Taiwan) at II.4; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at I; Chapter 10 (India) at II.
[148] Kraakman et al., *The Anatomy of Corporate Law*, 307 – 309.
[149] See note 103 above.
[150] See Chapter 1 at V.
[151] See Chapter 6 (China) at III; Chapter 7 (Taiwan) at IV; Chapter 8 (Hong Kong) at III.2; Chapter 10 (India) at II.
[152] See Chapter 7 (Taiwan) at II.3.
[153] The corporate statutes of South Korea do require cumulative voting, but allow a firm to opt out of it by putting a provision in the articles of incorporation (Korean Commercial Code Art. 382-2(1)). An overwhelming majority of listed firms have opted out of cumulative voting.
[154] One possible solution would be to grant a third-party *locus standi* to nominate directors: Tan, 'Corporate Governance and Independent Directors', 355, 385-386.

regime (which often appear to be distinct from the jurisdiction's general legal origin or 'legal family'). As explained above, board structure impacts significantly the forms that independent directors take and functions that they perform.[155] All of Asia's leading economies with civil law origins (i.e., China, Japan, South Korea and Taiwan) have historically permitted non-one-tier boards; whereas, all of Asia's leading economies with common law origins (i.e., Hong Kong, India and Singapore) have traditionally required (and still require) one-tier boards.[156] At first blush, this suggests that it may make sense to bifurcate comparative analyses according to the jurisdiction's civil law and common law origins.

However, a more in-depth analysis suggests that such an approach would be flawed. The importance of the *general* origins of a jurisdiction's legal system and/or company law are often usurped by the legal origin of the *specific* corporate governance provision and/or reform being examined. US law had a clear influence on reforms to implement one-tier boards in Japan (optional, from 2003),[157] South Korea (mandatory, from 2000)[158] and Taiwan (mandatory, from 2018).[159] Post-reform, the form and function of independent directors in these historically civil law jurisdictions became more comparable with independent directors in historically common law jurisdictions.[160] In a similar vein, as might be expected, the use of a UK-style code of corporate governance, which employs an optional 'comply or explain' approach, was first adopted in Asia's leading economies with Commonwealth origins (i.e., Hong Kong (from 2005) and Singapore (from 2001)).[161] However, in 2015, Japan—a country with a civil law legal origin and no strong historical connection to the Commonwealth—adopted a code of corporate governance based on the UK 'comply or explain' model.[162]

In sum, although the civil law and common law legal origins of Asia's leading economies are not irrelevant, classifying independent director regimes for the purpose of comparison solely along these lines would be misguided. However, it appears that there is value in tracing the origins of a *specific* provision back to its source. Such a tailored approach may provide useful grounds for comparison with the source provision (e.g., comparing the effectiveness of 'comply or explain' codes for promoting independent directors in Japan and the UK) and/or with other jurisdictions that also trace the origin of a specific provision to the same source (e.g., comparing the effectiveness of 'comply or explain' codes for promoting independent directors in Hong Kong, India, Singapore and, now, Japan).

The third factor that appears to have driven the evolution of varieties of independent directors in Asia are the different types of shareholders that exist in Asia's leading economies.[163] In all of Asia's leading economies—with the notable exception of Japan—a significant portion of listed companies are Family Firms, where family members are the controlling shareholders.[164]

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[155] See II.3 above.
[156] See Chapter 8 (Hong Kong) at I; S. Mehrotra, 'Corporate Board Structure in the United States and India: A Comparative View, *Indian Journal of Corporate Governance*, 8 (2015) 166, 167.
[157] See Chapter 4 (Japan) at II.1.a.
[158] See Chapter 5 (South Korea) at III.1.b.
[159] See Chapter 7 (Taiwan) at II.1.
[160] See Chapter 4 (Japan) at II.1.a; Chapter 5 (South Korea) at II.1 and II.4; Chapter 7 (Taiwan) at IV.1.
[161] See Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.4.
[162] See Chapter 4 (Japan) at II.1.c.
[163] Puchniak, 'Multiple Faces of Shareholder Power in Asia', 514.
[164] See Chapter 5 (South Korea) at II.3; Chapter 7 (Taiwan) at II.4; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at III.2; Chapter 10 (India) at II.

There is empirical evidence from Singapore that independent directors in Family Firms tend to be family friends.[165] However, qualitative evidence suggests that these family friends often use their unique position as trusted non-family members to play a valuable role mediating intra-family shareholder disputes.[166] The uniqueness of the expected and/or actual function of independent directors in Family Firms may be amplified by the sometimes different incentives for family-member controlling shareholders compared to other controlling shareholders (e.g., family-controllers may want to pass on a successful business to future generations—something often particularly prized in Asian cultures—which may mitigate the risk of excessive private benefits of control).[167] This suggests that further research on the role of independent directors in Family Firms may be particularly valuable for Asia's leading economies.

A prominent feature in China, Hong Kong, India and Singapore, which distinguishes these jurisdictions from the US and other leading Asian economies, is the importance of listed companies that have the government as their controlling shareholder (Government Controlled Companies – GCCs).[168] In GCCs, there is the additional agency problem of the state trying to use its controlling shareholder power for political gain. This creates the conundrum of how 'independence' should be defined in GCCs, as excluding otherwise competent independent directors on the basis of their political affiliations would seem unworkable, and may often be undesirable (as shown in the Singapore chapter).[169] There is no evidence that China, Hong Kong, India or Singapore have attempted to *directly* address this unique agency problem or even consider whether independent directors should (or could) play an effective role in limiting political meddling in board decisions in GCCs. Singapore appears to have successfully addressed this agency problem indirectly by creating an institutional architecture that limits the government's power as a controlling shareholder—a model which China has considered transplanting.[170] This suggests that further comparative research on the function that independent directors should (or could) play in jurisdictions with GCCs may produce valuable insights for several of Asia's leading economies.

Foreign shareholders are another type of shareholder that has influenced the evolution of the independent director in Asia's leading economies. Several jurisdiction-specific chapters note the desire to attract foreign investors as an impetus for adopting independent directors to signal 'good' corporate governance.[171] The influence of foreign shareholders appears to be at least

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[165] See Chapter 9 (Singapore) at III.2.
[166] See note 136 above.
[167] W. Ng and J. Roberts, '"Helping the Family": The Mediating Role of Outside Directors in Ethnic Chinese Family Firms', 285, 287, 307; Puchniak, 'Multiple Faces of Shareholder Power in Asia', 530 – 531. It should be noted that in many non-Asian cultures there is a strong cultural norm to pass businesses onto children. However, increasingly there are prominent examples in the US where the opposite norm seems to be emerging—with the efforts by Warren Buffett and Bill Gates to encourage wealthy individuals to pass on most of their wealth to charity (and not their children) as perhaps the most prominent example. The question is whether this cultural norm is stronger in Asia's leading economies with Family Firms and, if so, what the implications may be.
[168] See Chapter 6 (China) at II.1; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at III.3; Chapter 10 (India) at II.3.
[169] See Chapter 9 (Singapore) at III.3.
[170] C. H. Tan et al., 'State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform', *Columbia Journal of Asian Law*, 28 (2015) 61, 62-63.
[171] See Chapter 4 (Japan) at II.1.c; Chapter 5 (South Korea) at III; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.4 and IV.1

partially contingent on the size and developmental state of the respective economy—with the smaller and less developed economies appearing to respond more to their influence.[172]

Finally, the use of cross-shareholding and pyramid structures appears to have a significant impact on the function of independent directors in Japan and South Korea respectively—adding an important and unique element to their respective independent director regimes. Based on a purely empirical analysis, the shareholding structure of Japan's large public companies is as dispersed as the UK and US.[173] However, as a result of stable/cross-shareholding networks, lifetime employee manager-directors who have indirect control over large blocks of shares, have dominated the governance of most public listed companies in post-war Japan.[174] This has created a unique corporate governance environment, which suggests that the role of independent directors in Japan's empirically dispersed shareholder environment is not only clearly different from the US, but also likely distinct from Asia's other leading economies.[175] The use of pyramid shareholding structures in South Korea has created a situation where cash flow and control rights are perhaps more unbalanced than in any of Asia's other leading economies.[176] This type of shareholding may also present unique challenges for its independent directors—something that could benefit from comparative analysis with other jurisdictions that have pyramidal ownership structures.[177]

The fourth factor that has driven the evolution of the varieties of independent directors in Asia is the functional substitutes for independent directors that vary across Asia's leading economies and distinguish them from the US and UK. Perhaps the most discussed functional substitute in Asia's leading economies is the board of statutory auditors (*kansayaku*) in Japan. As mentioned above, it has been argued that *kansayaku* essentially fulfil the same function as independent directors—a point that has been made with some success by various interest groups as a rationale for resisting mandatory requirements for independent directors in Japan.[178] A similar argument could be made in Asia's other leading economies, which have historically permitted or required non-one-tier boards (i.e., China, South Korea and Taiwan).[179] However, for various reasons, this argument has been less persuasive in these other jurisdictions: in China, mandatory legislation requiring independent directors was implemented in 2001, despite companies having supervisory boards; [180] in South Korea, strict mandatory independent director requirements were implemented in 2000 for large listed companies, replacing statutory auditors which could have been maintained as a possible functional substitute for independent

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[172] Compare Singapore's embrace of independent directors to signal compliance with global corporate governance norms, with Japan's considerably more gradual acceptance of independent directors: Chapter 4 (Japan); Chapter 9 (Singapore).
[173] Kraakman et al., *The Anatomy of Corporate Law*, 29; Puchniak, 'Multiple Faces of Shareholder Power in Asia', 523-524.
[174] Lawley, 'Panacea or Placebo?', 135.
[175]Gilson and Milhaupt, 'Choice as Regulatory Reform', 360 – 362.
[176] See Chapter 5 (South Korea) at II.3; K. Kim, 'Dynamics of Shareholder Power in Korea' in J. Hill and R. Thomas (eds.), *Research Handbook on Shareholder Power* (Edward Elgar, 2015), 536-540 (a short description of unique aspects of ownership structure in South Korea).
[177] Claessens et al., 'The Separation of Ownership and Control in East Asian Corporations', 81-112 (comparing shareholding structures in South Korea to other Asian jurisdictions).
[178] See note 82 above.
[179] See Chapter 5 (South Korea) at II.4; Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II.1.
[180] See Chapter 6 (China) at II.2.

directors;[181] and in Taiwan, one-tier boards with independent directors will be mandatory for listed companies from 2018, extinguishing the option for companies to have boards of statutory auditors as a functional substitute for independent directors.[182]

Another interesting functional substitute, which was mentioned above, is Singapore's institutional architecture that is designed to constrain the government's power as a controlling shareholder in GCCs. This institutional architecture has largely succeeded in preventing the government from using its controlling shareholder power to extract private benefits or influence GCCs for short-term political gain.[183] This success helped Singapore justify its use of the American definition of independence (i.e., requiring independence from management, but not significant shareholders) despite having a highly concentrated shareholder environment—while simultaneously increasing its reputation for 'good' corporate governance.[184]

It is clear that the *existence* of functional substitutes has had jurisdiction-specific effects, which magnify the diversity among the varieties of independent directors in Asia. In addition, the *absence* of well-recognised functional substitutes and complements for independent directors also distinguishes independent director regimes in Asia from the US and UK. According to the (Anglo)American-cum-global norms of 'good' corporate governance, the existence of hostile takeovers, shareholder litigation and proxy contests are commonly seen as corporate governance mechanisms that complement independent directors.[185] The relative weakness or absence of these complementary corporate governance mechanisms in Asia's leading economies suggests that independent directors may be even more crucial to attain 'good' corporate governance in Asia than in the US or UK.[186]

However, evidence from this chapter demonstrates that such reasoning is likely misguided, as it erroneously assumes that the functions of independent directors in Asia and the UK-US are the same—when, as demonstrated in this chapter, they are clearly not. Although hostile takeovers, shareholder litigation and proxy contests may be seen to complement the managerial-monitoring function, which is of paramount importance for independent directors in the US and UK, the importance of managerial-monitoring in Asia's controlling-shareholder dominated corporate governance environment is not as acute. This suggests that while there may be meaningful comparative lessons to draw from certain functional substitutes based on targeted comparisons within Asia, comparing functional substitutes between Asia and the UK-US may be of limited value or even misleading.

The fifth factor that has driven the evolution of varieties of independent directors in Asia is the unique and diverse political economies that exist in Asia's leading economies. In South Korea, strict mandatory legislation requiring half of the boards of large companies to be independent

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[181] See Chapter 5 (South Korea) at III.1.
[182] See Chapter 7 (Taiwan) at II.1 (stating that all listed companies must appoint at least two independent directors by 31 December 2017).
[183] See Chapter 9 (Singapore) at III.3. It should be noted that the classic explanation of 'private benefits of control' arguably does not fit well in the context of GCCs. For a detailed explanation of this issue see, Puchniak, 'Multiple Faces of Shareholder Power in Asia', 526-532.
[184] See Chapter 9 (Singapore) at III.2.
[185] Puchniak, 'Multiple Faces of Shareholder Power in Asia', 512, 516.
[186] *Ibid.*, 515-520.

was a condition of an IMF bailout—which, in the 1990s, South Korea desperately required as a result of the Asian Financial Crisis.[187] Interestingly, however, it is suggested in the Korean chapter that the Korean government was more supportive of the strict mandatory requirement 'imposed' by the IMF than what may have been assumed. Indeed, it appears that there 'were factions in the government that may have wanted to use the political capital provided by the IMF to curtail the power of the *chaebol*, which would have been unthinkable prior to the financial crisis'.[188]

In several of Asia's leading economies, there appear to be political struggles between the government, corporate lobbyists and sometimes other interest groups, situations which often have unique jurisdiction-specific effects on how each jurisdiction's independent director regime evolves.[189] Perhaps one of the most interesting and complex examples is the domestic politics which uniquely shaped the independent director's evolution in Japan. As described in the Japan chapter, the ambitions of political operatives and parties, the informal custom of requiring consensus on government committees and powerful business lobbies resulted in a battle over whether to require a single independent director on the boards of listed companies.[190] In the end, Japan's political economy provides valuable insight into why mandatory legislation requiring even a single independent director was unattainable and a watered-down 'comply or explain' code of corporate governance was eventually adopted.[191]

Although the effects of each jurisdiction's political economy vary, there are interesting common trends that can be distilled from the jurisdiction-specific chapters. It appears that in most of Asia's leading jurisdictions (with the notable exception of South Korea), stock exchanges have been heavily involved in lobbying the government to implement more stringent independent director requirements.[192] This makes sense as exchanges may benefit from signalling to the world that they are in compliance with (Anglo)American-cum-global norms of 'good' corporate governance.[193] In addition, it appears that incumbent political parties often initiate or support proposals to strengthen independent director legislation, especially in the wake of a financial crisis.[194] This may be motivated by the fact that implementing 'independent director' requirements is normally a relatively inexpensive and straightforward way for the government to signal that it is taking action to strengthen the economy without actually fundamentally changing the system.[195] Conversely, it appears that business lobbyists in most jurisdictions tend to oppose strengthening independent director regulation as they may remove

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[187] See Chapter 5 (South Korea) at III.1.a.
[188] See Chapter 5 (South Korea) at III.1.b.
[189] See Chapter 4 (Japan) at II.1 and III.2; Chapter 5 (South Korea) at III.1; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.4.
[190] See Chapter 4 (Japan) at III.2.
[191] See Chapter 4 (Japan) at III.2.b.
[192] See Chapter 4 (Japan) at II.1.b; Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II; Chapter 8 (Hong Kong) at II.4; Chapter 10 (India) at III.
[193] See Chapter 4 (Japan) at II.1.b; Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II; Chapter 8 (Hong Kong) at II.4; Chapter 10 (India) at III.
[194] Velikonja, 'The Political Economy of Board Independence', 855, 892-892, 899.
[195] See Chapter 4 (Japan) at II.1.d; Chapter 6 (China) at II.2; Chapter 7 (Taiwan) at II; Chapter 8 (Hong Kong) at II.4; Chapter 9 (Singapore) at II.4; Chapter 10 (India) at III.

power from the corporate management and/or controlling shareholders, which are the groups represented by the lobbyists.[196]

The sixth factor that has driven the evolution of the varieties of independent directors in Asia is cultural norms. In Japan, the post-war insider-dominated lifetime employee corporate culture has likely played an important role in its outlier position as the only jurisdiction with no mandatory law regulating independent directors, and in corporate Japan's long resistance to having any independent directors on corporate boards.[197] In Singapore, the cultural norm in the ethnic Chinese business community of preserving wealth for future generations appears to limit family controllers' extraction of private benefits of control—potentially providing a functional substitute for or complement to the monitoring function of independent directors in Family Firms.[198] In China, India, South Korea and Taiwan, the deep culture of respect for teachers may provide some explanation for the high percentage of professors among independent directors on corporate boards.[199]

These examples suggest that cultural norms have played a role in the evolution of independent directors in Asia and that their impact may vary across jurisdictions—making the varieties of independent directors in Asia even more diverse. There are, however, at least two cultural norms that appear to be present in all of the diverse cultures of Asia's leading economies, which may present challenges for the effectiveness of independent directors: the centrality of informal relationships in business which makes finding and identifying truly independent directors particularly difficult in Asia; and the avoidance of direct confrontation, especially with people in positions of authority and in public, which may limit the effectiveness of independent directors on boards.[200] A more systematic examination of these and other potential cultural norms on the function of independent directors in Asia appears to be a particularly rich and understudied area for future research.

3 Operationalising the Six Principal Factors to Create a Loose Taxonomy

The six principal factors discussed above provide valuable insights into why varieties of independent directors exist in Asia and what has caused them to adopt their forms and functions. In addition, an understanding of these six factors provides the foundation for developing a 'loose taxonomy' of the varieties of independent directors in Asia. Such a taxonomy allows us to classify Asia's leading economies into subsets of comparable jurisdictions with respect to particular issues and then systematically examine these issues through targeted comparative analysis. Ultimately, we suggest that this approach will improve our understanding of independent directors in Asia and illuminate new areas for meaningful comparative research.

A few brief examples illustrate how the six factors can be operationalised under our 'loose taxonomy'. To start, let us consider how the first factor, shareholder structure, can be used to

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[196] See Chapter 4 (Japan) at III.2.b; Chapter 5 (South Korea) at III.1.b (observing that, under the cover of the IMF, the Korean government was able to push through reforms that might have met with resistance from the *chaebol*). For a short description of the political environment surrounding corporate governance in Korea, see, e.g., K. Kim, 'Corporate Law and Corporate Law Scholarship in Korea: A Comparative Essay' in J. O. Haley and T. Takenaka (eds), *Legal Innovations in Asia* (Edward Elgar, 2014), 257-258.

[197] See Chapter 4 (Japan) at III.2.a, IV and V (examples of resistance to independent directors).

[198] See Chapter 9 (Singapore) at III.2.

[199] See Chapter 5 (South Korea) at IV.4; Chapter 6 (China) at II.3; Chapter 7 (Taiwan) at II.2.b; Chapter 10 (India) at IV.2.

[200] See Chapter 7 (Taiwan) at III.2.b; Chapter 8 (Hong Kong) at III.3 and IV.

classify a subset of Asia's leading economies and illuminate useful areas for comparison within this subset. In all of Asia's leading economies, except for Japan, listed companies generally have a controlling shareholder structure. This highlights a key issue for comparison: how do independent directors, which were invented to solve the dispersed shareholding problem in the US, function in controlling shareholder dominated jurisdictions? One interesting observation is that all of the jurisdictions in this subset have departed from the American concept of the independent director by requiring independence from significant shareholders in their definitions of independence. However, all jurisdictions in this subset, except for Taiwan, still allow independent directors to be elected by majority shareholder vote. This raises intriguing questions for future research: why would these jurisdictions mandate independence from majority shareholders in their definitions of independence, but then implicitly allow majority shareholders to control the appointment and removal of these 'independent directors'? On this note, why was Taiwan unsuccessful in its attempt to remedy this apparent problem by mandating cumulative voting?

Another illustration of our 'loose taxonomy' can be found in our examination of legal origins. As explained above, Asia's leading civil law economies (i.e., China, Japan, South Korea and Taiwan) comprise a subset of jurisdictions which have allowed companies to adopt a non-one-tier board. An interesting question that arises in these jurisdictions is how independent directors, which were invented in the US to operate in a one-tier board environment, fit into non-one-tier board regimes. In addition, all of the jurisdictions in this subset have or had corporate organs (i.e., statutory auditors or supervisory boards) that perform similar functions to independent directors.[201] This raises the issue of how these jurisdictions will coordinate the functions of these two overlapping mechanisms. A more targeted use of the legal origins factor may classify subsets of jurisdictions for comparison based on the historically traceable origins of a *particular* feature within a jurisdiction's independent director regime. For example, as explained above, the fact that Japan's 'comply or explain' regime was modelled on the UK's Code provides a rational basis for comparing Japan on this issue with the UK and also with Hong Kong and Singapore (which are the two other leading Asian jurisdictions that also currently have a UK 'comply or explain' model). This example illustrates how tracing the legal origins of particular provisions in a jurisdiction's independent director regime can reveal subsets of jurisdictions for a meaningful comparative analysis of an important issue.

Yet another example can be found in our examination of specific types of shareholders. In China, India and Singapore, the government is the controlling shareholder in a substantial portion of companies. As suggested above, a potential issue for future research is whether such jurisdictions should require independent directors in government-controlled companies to be independent from the government or ruling party. A strict policy of excluding independent directors based on political affiliation may significantly reduce the talent pool for independent directors without necessarily avoiding many meaningful conflicts of interest.[202] In all of Asia's leading economies, with the notable exception of Japan, similar issues arise as to how independence should be defined with respect to Family Firms. This subset of jurisdictions could benefit from further research on this issue as there is evidence that friends of the controlling family can perform a valuable mediating role as independent directors in Family Firms.[203]

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[201] Large listed firms in South Korea historically had statutory auditors, but now have an audit committee instead of statutory auditors.
[202] See Chapter 9 (Singapore) at III.3.
[203] See note 136 above.

These examples merely scratch the surface of the potential uses of the six principal factors as a way to identify salient issues for comparison in particular subsets of jurisdictions, which share common characteristics among their independent directors on particular issues. This methodological approach for comparison is diametrically opposed to the prevailing approach of assuming that independent directors are universally similar and thus universally comparable in all aspects for every issue across all jurisdictions.[204] The fact that independent directors possess unique attributes in different jurisdictions should be cause for inspiration rather than resignation: indeed, the varieties of independent directors in this book have revealed fertile areas for further study.

IV Conclusion: Implications of Varieties of Independent Directors in Asia

If there is one main point that emerges from this chapter and book, it is this: there is no single concept of the independent director in Asia. There are varieties of independent directors in Asia that take on different forms and perform different functions. This discovery has important practical and theoretical implications for at least three reasons.

First, corporate governance indices, which influence the allocation of trillions of dollars of investment capital and define entire sub-fields of corporate governance research, implicitly assume that independent directors around the world take the same form and perform the same function. [205] An in-depth comparison of the jurisdiction-specific chapters in this book demonstrates that this assumption is false. Indeed, it does not hold true even within Asia.

Second, it is misleading to point to the rise of the independent director in Asia as evidence of corporate governance convergence towards the American (or Anglo-American) corporate governance model. This chapter demonstrates that much of the 'convergence' that has occurred with the independent director in Asia is often only skin deep. The body of comparative evidence in the jurisdiction-specific chapters reveals the significant divergence in form and function within Asia—and even more so between Asian jurisdictions and the US-UK. This should not surprise as recent developments even suggest divergence of the concept of the independent director between the US and UK.

Third, the discovery of varieties of independent directors in Asia highlights the importance of drilling-down in comparative corporate governance research beyond common labels—which may be increasingly more abundant in our internet age. This presents a serious challenge to interjurisdictional empirical research, which tends to rely heavily on labels or law on the books for its primary data. The importance of 'labels' also raises an interesting question about their strategic value as signalling devices. The fact that 'mere' labels have been able to influence important corporate governance indices and influential research suggests that more research should be devoted to why this is the case and how this may be used or abused.

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[204] See II.1 above.

[205] See, for example, Katelouzou and Siems, 'Disappearing Paradigms'; Black et al., 'Does Corporate Governance Predict Firms' Market Values'; A. O. Santos, 'Integrated Ownership and Control in the GCC Corporate Sector' (International Monetary Fund Working Paper, 2015), available at www.imf.org; C. Aoyagi and G. Ganelli, 'Unstash the Cash! Corporate Governance Reform in Japan' (International Monetary Fund Working Paper, 2014), available at www.imf.org; Technical Committee of the International Organisation of Securities Commissions, 'Board Independence of Listed Companies: Final Report' (2007), available at www.iosco.org; Emerging Markets Committee of the International Organisation of Securities Commissions, 'Corporate Governance Practices in Emerging Markets' (2007), available at www.iosco.org; OECD, 'Corporate Governance: A Survey of OECD Countries' (OECD, 2004), available at www.oecd.org.

If there is a second main point that emerges from this chapter and book it is that although corporate governance is jurisdiction-specific and complex, targeted and nuanced comparative analysis can produce valuable practical and theoretical results. Producing such results, however, requires the type of in-depth jurisdiction-specific analysis that is contained in the jurisdiction-specific chapters of this book—which is diametrically opposed to the macro-empirical analysis that has increasingly driven policymakers and the academic literature in the field of comparative corporate governance.[206] A specific example of this is how we demonstrate in this chapter that legal origins do in fact matter—but in a localised way that focuses on the *specific* historically verifiable origins of *particular* legal provisions in *each specific* jurisdiction, rather than vague (and often inaccurate) notions of legal origins of an entire system examined at the jurisdictional level.[207] Perhaps, most importantly, the loose taxonomy of the independent director in Asia that we have created lays a foundation for exploring this critical issue more accurately and systematically in the future.

Admittedly, this chapter raises more questions for future research than definitive answers. However, hopefully the loose taxonomy of the forms, functions and issues that together define the varieties of independent directors in Asia will provide a path for further exploration of this fascinating issue for years to come.

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[206] See, for example, Gopal, 'Japan: A Closer Look at Governance Reforms'; OECD, 'Corporate Governance Factbook 2015' (OECD Publishing, 2015), available at www.oecd.org; Puchniak, 'Multiple Faces of Shareholder Power in Asia', 520 (describing GovernanceMetric International's global corporate governance ratings); M. Siems, 'Shareholder Protection Around the World ('Leximetric II')', *Delaware Journal of Corporate Law,* 33 (2008), 111; Technical Committee of the International Organisation of Securities Commissions, 'Board Independence'.

[207] See Part III.2 above.