

Faux Convergence in Asian Corporate Governance: Unmasking the Illusion of Anglo-American Transplants

Law Working Paper N° 811/2024

December 2024

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ECGI Working Paper Series in Law

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Keywords: comparative corporate law and governance, faux convergence, formal convergence, functional divergence, independent director, derivative action, stewardship code

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The chapter emphasizes the value of inter-Asian comparisons, which reveal local factors shaping governance outcomes that might be overlooked in broader East-West comparisons. By examining how different Asian jurisdictions have adapted similar governance mechanisms, we uncover insights into the dynamics of formal legal transplants and functional jurisdiction-specific practices in comparative corporate law and governance. We contend that embracing the complexity revealed through inter-Asian comparisons and the faux convergence framework can significantly advance the field of comparative corporate law.

Ultimately, we argue for moving beyond simplistic global convergence theories towards more contextual, pluralistic frameworks that better reflect the complexities of corporate governance in a globalized-cum-regionalized world. We conclude that the future of comparative corporate law lies in careful, contextual analysis and recognition of faux convergence, with inter-Asian comparisons offering a powerful tool for achieving this goal.

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[±] A revised version of this working paper will be a chapter in *Inter-Asian Law*, eds. Matthew S. Erie & Ching-Fu Lin, Forthcoming in *American Society of Comparative Law's Studies in Comparative Law* under Cambridge University Press.

I. Introduction

Over the past few decades, corporate governance in Asia has undergone dramatic changes. On the surface, many Asian jurisdictions appear to have converged towards Anglo-American corporate governance laws and practices. Independent directors, a corporate governance mechanism invented in the United States in the 1970s, are now ubiquitous in boardrooms across the region.¹ Stewardship codes, a UK corporate governance solution to the 2008 Global Financial Crisis, exhort institutional investors to be active owners in most of Asia's important economies.² Derivative actions, a historical hallmark of US and UK company law, are now enshrined in company laws across Asia – ironically being more consequential in Japan than almost anywhere else in the world, despite Japan's civil law roots and ostensible culture of non-litigiousness.³ To a casual observer, it may seem that corporate governance in Asia has converged on the Anglo-American-cum-global corporate governance model. From this perspective, as predicted by two of the most prominent corporate law scholars in the United States, maybe we have reached, or at least are very close to, “The End of History for Corporate Law”.⁴

However, this superficial convergence masks a far more complex reality. As this chapter will demonstrate, the adoption of Anglo-American corporate governance laws and mechanisms in Asia often amounts to “faux convergence” – a phenomenon where jurisdictions implement foreign laws and corporate governance mechanisms in name and form, but not in substance or function.⁵ By closely examining three key areas – independent directors, derivative actions, and stewardship – we can see how Asian jurisdictions have selectively borrowed and adapted Anglo-American corporate governance concepts to fit their own unique jurisdiction-specific contexts, producing outcomes that often diverge significantly from Anglo-American corporate governance practices.

Crucially, this chapter goes beyond merely highlighting the divergence between Asian and Anglo-American practices. It emphasizes the rich diversity within Asia itself, advocating for the power of inter-Asian comparisons in advancing our understanding of comparative corporate

¹ Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 89, 89-93 (Dan W. Puchniak, Harald Baum, & Luke Nottage (eds.), 2017).

² Gen Goto, Alan K. Koh & Dan W. Puchniak, *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 Vanderbilt Journal of Transnational Law 829, 832-833 (2020); Alan K. Koh, Dan W. Puchniak & Gen Goto, *Shareholder Stewardship in Asia: Functional Diversity Within Superficial Formal Convergence*, in GLOBAL SHAREHOLDER STEWARDSHIP 613, 614 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022); Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit*, 72 American Journal of Comparative Law 109, 127-132 (2024).

³ Harald Baum & Dan W. Puchniak, ‘The Derivative Action: An Economic, Historical and Practice Oriented Approach’ in, THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH, 1-89 (Dan W. Puchniak, Harald Baum, and Michael Ewing-Chow (eds.), CAMBRIDGE UNIVERSITY PRESS, 2012), 1, 1-2; Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY BUSINESS LAW JOURNAL, 1, 2-5 (2012); Dan W. Puchniak & Masafumi Nakahigashi, *Japan's Love for Derivative Actions: Irrational Behavior and Non-Economic Motives as Rational Explanations for Shareholder Litigation*, 45 Vanderbilt Journal of Transnational Law 1, 4-8 (2012).

⁴ Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L. J. 439 (2001).

⁵ Goto, Koh & Puchniak, *supra* note 2 at 876.

law.⁶ By examining how different Asian jurisdictions have adapted and implemented similar governance mechanisms, we can uncover nuanced insights into the dynamics of formal legal transplants and functional jurisdiction-specific practices in comparative corporate law and governance that are often overlooked in broader East-West comparisons.⁷

The theory of faux convergence, coupled with a focus on inter-Asian comparisons, provides a powerful lens for understanding the true nature of corporate governance reforms and practices in Asia. It reveals how policymakers and companies in the region have responded to global pressures for governance reform, while maintaining systems that reflect deep-seated local norms, power structures and institutional logics. Faux convergence allows Asian jurisdictions to signal compliance with international standards, while preserving space for locally-appropriate governance models. Meanwhile, inter-Asian comparisons illuminate the diverse strategies employed by different jurisdictions in this process of adaptation and localization.

This chapter develops the theory of faux convergence and demonstrates its explanatory power through an in-depth examination of independent directors, derivative actions, and stewardship codes across major Asian jurisdictions.⁸ It builds on our previous work analysing the complex reality of these mechanisms in Asia,⁹ which challenged oversimplified notions of legal transplants and convergence. By synthesizing insights across these areas and emphasizing inter-Asian variations, we can construct a more nuanced understanding of how corporate governance actually functions in Asian contexts.

The faux convergence framework, combined with inter-Asian comparative analysis, makes several important contributions. First, it provides a more accurate picture of the state of corporate governance in Asia, moving beyond surface-level observations to uncover the underlying dynamics and diversity within the region. Second, it offers a new theoretical perspective that transcends the traditional convergence-divergence debate in comparative corporate governance. Third, it yields practical insights for policymakers, investors, and companies seeking to navigate Asia's complex and varied corporate governance landscape.

⁶ See generally, Matthew Steven Erie and Ching-Fu Lin, 'Inter-Asian Law', in Matthew S. Erie & Ching-Fu Lin (eds.), *Inter-Asian Law* (Cambridge University Press, forthcoming), also available at <https://ssrn.com/abstract=4821151> (May 8, 2024).

⁷ Using Erie and Lin's taxonomy of analytical frameworks for inter-Asian law, the theory of faux convergence could be seen as an attempt to carve out an overlooked form of "types and methods of interactions" among Asian jurisdictions and between them and Western jurisdictions by analyzing the superficial nature of convergence achieved as "effects, consequences, and conflicts" caused by such interactions. See Erie and Lin, *supra* note 6 at p.12-13.

⁸ The authors first coined the term "faux convergence" in their article with Alan K.Koh (see, Goto, Koh & Puchniak, *supra* note 2 and Koh, Puchniak & Goto, *supra* note 2). This chapter significantly develops the theory of "faux convergence" by providing a more detailed explanation of the concept and applying it to multiple areas of corporate law in Asia.

⁹ See generally, Puchniak, *supra* note 3; Puchniak & Nakahigashi, *supra* note 3; Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed* in, *The Research Handbook on Shareholder Power* 511 (Randall Thomas & Jennifer Hill eds., Edward Elgar, 2015); Puchniak & Kim, *supra* note 1; Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, 15 *BERKELEY BUSINESS LAW JOURNAL* 365 (2019); Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 *Berkeley Business Law Journal* 1 (2020); Goto, Koh & Puchniak, *supra* note 2; Koh, Puchniak & Goto, *supra* note 2; Puchniak, *supra* note 2.

Ultimately, embracing the reality of faux convergence and the value of inter-Asian comparisons pushes us to rethink fundamental assumptions about the evolution of corporate law and governance around the world. It highlights the persistent diversity and path-dependence of national systems, even as globalization drives superficial harmonization. And it underscores the need for nuanced, contextual analysis rather than universalist theories in the field of comparative corporate governance.

The rest of this chapter proceeds as follows. Section II elaborates on the theory of faux convergence, explaining its core elements and how it differs from existing frameworks. Section III examines independent directors, derivative actions, and stewardship codes in Asia through the lens of faux convergence, with a particular emphasis on inter-Asian variations. Section IV concludes by synthesizing key insights from these case studies, highlighting the power of inter-Asian comparisons, and discussing broader implications for comparative corporate law and governance scholarship.

II. The Theory of Faux Convergence

Faux convergence refers to the phenomenon where jurisdictions adopt the outward form of foreign corporate governance practices, without implementing their substance or intended function.¹⁰ It involves the selective borrowing and adaptation of governance mechanisms to fit local jurisdiction-specific contexts, often producing outcomes that diverge significantly from the source model.¹¹ Faux convergence allows jurisdictions to signal compliance with global norms, while maintaining governance systems that reflect deep-seated local power structures, norms, and institutional logics.¹²

Several key elements characterize faux convergence. To begin, there is superficial adoption, where jurisdictions implement the basic form or structure of a foreign governance mechanism, but not its underlying substance. For instance, independent directors may be mandated, but lack true independence.¹³ This is often accompanied by functional divergence, where the adopted mechanism serves different purposes or functions than in its jurisdiction of origin. For example, stewardship codes may aim to entrench rather than challenge corporate insiders.¹⁴

¹⁰ Goto, Koh & Puchniak, *supra* note 2 at 876.

¹¹ This can be seen in Asian jurisdictions selectively adopting prominent Anglo-American-cum-global corporate governance mechanisms – such as independent directors and stewardship codes – and then using them for their own purposes. See, Goto, Koh & Puchniak, *supra* note 2 at 877; Puchniak & Kim, *supra* note 1 at 90-93.

¹² Goto, Koh & Puchniak, *supra* note 2 at 877.

¹³ For example in Indonesia, see Royhan Akbar, Nathaniel Mangunsong, and Dan W. Puchniak, *The Abolition of Independent Directors in Indonesia: Rationally Autochthonous or Foolishly Idiosyncratic?*, European Corporate Governance Institute - Law Working Paper No. 802/2024, available at <https://ssrn.com/abstract=4941189> (2024), 20, 32.

¹⁴ Dan W. Puchniak and Samantha S. Tang, ‘Singapore’s Embrace of Shareholder Stewardship: A Puzzling Success’, in Dionysia Katelouzou and Dan W. Puchniak (eds.) *Global Shareholder Stewardship* (Cambridge University Press, 2022), 297, 298-300.

Contextual adaptation is another hallmark of faux convergence.¹⁵ Foreign practices are modified to fit local jurisdiction-specific contexts, power structures, and cultural norms. This reshaping fundamentally alters how the mechanism operates in practice. A key driver of adoption is often the motivation to signal adherence to global governance standards, rather than a genuine desire for reform. This signaling function allows jurisdictions to gain legitimacy in international markets.¹⁶

Importantly, faux convergence involves the preservation of local practices. Core features of the local governance system are often maintained beneath a veneer of foreign practices. This allows jurisdictions to balance external pressures for reform with internal resistance to fundamental change.¹⁷

Faux convergence differs from several existing theoretical perspectives on comparative corporate governance. Unlike traditional convergence theory, which posits movement towards a single optimal model (usually Anglo-American shareholder primacy),¹⁸ faux convergence recognizes persistent functional diversity in governance outcomes. It goes beyond the notion of “divergence within convergence”¹⁹ by highlighting how adopted practices may serve entirely different functions than in their source jurisdictions.²⁰

The concept of faux convergence also moves past simplistic cultural or legal origins explanations for governance differences. Instead, it emphasizes how local actors strategically adapt foreign practices to serve their interests within jurisdiction-specific contexts..²¹ This produces complex hybrid models rather than wholesale transplantation or rejection of foreign approaches. The faux convergence framework builds on institutional approaches to comparative corporate governance, which emphasize how governance practices are shaped by their broader institutional environment.²² However, it particularly highlights the agency and strategic behavior of local actors in selectively implementing and reshaping governance mechanisms to work within their local jurisdiction-specific contexts.

Crucially, the theory of faux convergence builds upon, but importantly differs from, Ronald Gilson’s influential distinction between formal and functional convergence in corporate governance.²³ Gilson posited that while formal convergence of corporate law rules might be

¹⁵ Goto, Koh & Puchniak, *supra* note 2 at 880.

¹⁶ Puchniak, *supra* note 2 at 143-147.

¹⁷ See Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 *American Journal of Comparative Law* 97, 98-99 (2002) (noting the tendency of domestic players to resist against imposed rules from outside).

¹⁸ Hansmann & Kraakman, *supra* note 4.

¹⁹ Jeffrey N. Gordon, ‘Convergence and Persistence in Corporate Law and Governance’, in Jeffrey N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance*, *Oxford Handbooks* (Oxford University Press, 2018), 28, 41-44.

²⁰ Goto, Koh & Puchniak, *supra* note 2 at 876.

²¹ Goto, Koh & Puchniak, *supra* note 2 at 877-878.

²² See for example, Masahiko Aoki, *Information, Incentives, and Bargaining in the Japanese Economy* (Cambridge University Press, 1988); Curtis J. Milhaupt & Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World* (University of Chicago Press, 2008).

²³ Ronald J. Gilson, ‘Globalizing Corporate Governance: Convergence of Form or Function’, 49 *American Journal of Comparative Law* 329 (2001).

impeded by path dependence, jurisdictions could achieve functional convergence by developing substitutes that fulfil similar economic functions.²⁴ However, the concept of faux convergence turns Gilson's theory on its head in several crucial ways.

First, faux convergence suggests that even when there is apparent formal convergence in corporate governance rules or structures, this may mask significant functional divergence. Unlike in Gilson's framework, where functional convergence could occur without formal similarity,²⁵ faux convergence highlights cases where there is surface-level formal adoption without true functional alignment.²⁶

Second, while Gilson's theory assumes that functional convergence is driven by efficiency imperatives and will ultimately lead jurisdictions to similar economic outcomes,²⁷ faux convergence recognizes that adopted mechanisms may be repurposed to serve entirely different economic or political functions than in their jurisdictions of origin. The motivations behind faux convergence often have more to do with signaling conformity to the global norm than with achieving functionally similar governance outcomes.²⁸

Third, faux convergence goes beyond Gilson's binary of formal versus functional convergence, coined in the subtitle of his seminal paper,²⁹ by illuminating the complex ways in which governance mechanisms are strategically adapted and reconfigured as they move across borders. It emphasizes how local actors may deliberately subvert the intended functions of adopted practices to serve their own interests, rather than simply finding alternate means to achieve similar functional ends.³⁰

Finally, whereas Gilson's theory suggests that functional convergence might be a pathway towards more fundamental formal convergence over time,³¹ the concept of faux convergence highlights how superficial formal adoption may actually serve to prevent deeper functional changes.³² By creating the illusion of convergence, faux convergence can relieve pressure for more substantive reforms while allowing core features of local governance systems to persist.³³

Ultimately, faux convergence provides a more nuanced and realistic account of how corporate governance evolves in the face of global and local pressures. It moves beyond simplistic narratives of convergence or resistance to foreign models. Instead, it illuminates the complex

²⁴ Gilson, *supra* note 23 at 334-340.

²⁵ Gilson, *supra* note 23 at 336-337, 337-340.

²⁶ See Goto, Koh & Puchniak, *supra* note 2 at 879-880 (See Figure 1 describing differences of formal, functional, and faux convergences).

²⁷ Gilson, *supra* note 23 at 338.

²⁸ Puchniak, *supra* note 2 at 140-141, 143-147.

²⁹ Gilson, *supra* note 23.

³⁰ Puchniak, *supra* note 2 at 149.

³¹ Gilson, *supra* note 23 at 338 ("Functional convergence is likely the first response to competitive pressure because changing the form of existing institutions is costly.").

³² Puchniak, *supra* note 2 at 149, 158-159.

³³ Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 *American Journal of Comparative Law* 265, 274 (2017). See also Puchniak, *supra* note 2 at 156-157.

processes through which governance practices are negotiated, contested, and reconfigured as they move across borders.

The concept of faux convergence is particularly valuable for understanding corporate governance developments in Asia. As we will see in Part III, the adoption of independent directors, derivative actions, and stewardship codes across Asian jurisdictions exemplifies the dynamics of faux convergence. While these mechanisms may superficially resemble their Anglo-American counterparts, their actual implementation and impact often diverge dramatically from Anglo-American models. The faux convergence lens reveals how Asian jurisdictions have strategically responded to global governance pressures while maintaining systems that reflect local jurisdiction-specific realities. Moreover, the faux convergence framework helps explain why decades of governance reforms modelled on Anglo-American practices have often failed to fundamentally reshape corporate behaviour in many Asian markets.³⁴ By recognizing how adopted mechanisms are reconfigured to serve local purposes, we can better anticipate their actual impact and limitations.

In the next Part, we will examine how faux convergence dynamics have played out in the implementation of independent directors, derivative actions, and stewardship codes across major Asian jurisdictions. This analysis will demonstrate the explanatory power of the faux convergence concept and yield insights into the true nature of corporate governance in Asia.

Part III: The Complex Reality of Corporate Governance in Asia: Independent Directors, Derivative Actions, and Stewardship Codes

As briefly highlighted in Part I, corporate governance mechanisms that originated in Anglo-America have been widely adopted across Asia, often with the encouragement of international organizations and experts advocating for “global best practices.”³⁵ At first glance, this trend appears to provide evidence of formal convergence in corporate governance. However, a closer examination reveals a much more complex reality.

This Part will explore three key corporate governance mechanisms that have been widely adopted across Asia – independent directors, derivative actions, and stewardship codes – to demonstrate how their implementation and function often diverge significantly from their Anglo-American origins. This analysis reveals that while there may be superficial convergence in the formal adoption of these mechanisms, there is substantial divergence in how they actually operate within Asia’s unique jurisdiction-specific contexts. Understanding this “faux convergence” is critical for developing a more nuanced view of comparative corporate law and governance.

A. Independent Directors

³⁴ Puchniak, *supra* note 9 at 512-515.

³⁵ For the increasing influence of international organizations in the global corporate governance discussion, see Mariana Pargendler, ‘The Rise of International Corporate Law’, 98 *Washington University Law Review* 1765 (2021).

The independent director, a corporate governance mechanism with roots in the United States,³⁶ has become ubiquitous across Asia's leading economies over the past few decades.³⁷ On the surface, this appears to be a clear example of corporate governance convergence, with Asian jurisdictions adopting a key feature of the Anglo-American model. Indeed, most Asian jurisdictions now mandate that public companies have a certain number or percentage of independent directors on their boards.³⁸ However, a closer examination reveals that the form and function of independent directors in Asia often diverge significantly from the US model.

While the original US concept of the independent director focuses primarily on independence from management, most Asian jurisdictions have adopted definitions that require independence from both management and significant shareholders.³⁹ This reflects the prevalence of concentrated ownership structures in Asia, where controlling shareholders rather than management often dominate corporate governance.⁴⁰ The position of independent directors within corporate governance structures also varies widely. While some jurisdictions like Hong Kong and Singapore have adopted one-tier board structures similar to the US, others like Japan and China have unique board structures that create different roles for independent directors.⁴¹

In many Asian jurisdictions, controlling shareholders retain significant influence over the selection and removal of ostensibly "independent" directors, potentially compromising their true independence in their intended role as monitors of controlling shareholders on behalf of minority shareholders.⁴² In addition to the powerful role played by controlling shareholders in most of Asia's leading economies, independent directors in Asia are driven by unique local factors, which often have resulted in them serving significantly different purposes than their US counterparts. For example, in China, many independent directors are academics who may lack business expertise to be effective independent directors, but provide legitimacy and government connections.⁴³ In Singapore's family-controlled firms, independent directors often act as mediators in family disputes rather than as monitors of management.⁴⁴ In Japan, which is one of the latest among Asian jurisdictions to promote or require independent directors, independent directors are now expected to champion investors' interests in the boardroom, which has been traditionally dominated by managerial directors.⁴⁵ This might sound similar to the role of independent directors in the US, but the difference is that independent directors are

³⁶ For the development of independent directors in the US, see Jeffrey N. Gordon, 'The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices', 59 *Stanford Law Review* 1465 (2007).

³⁷ Puchniak & Kim, *supra* note 1 at 89.

³⁸ Puchniak & Kim, *supra* note 1 at 90-93.

³⁹ Puchniak & Kim, *supra* note 1 at 97-99, 102-104.

⁴⁰ Puchniak, *supra* note 2 at 132-134.

⁴¹ Puchniak & Kim, *supra* note 1 at 104-107.

⁴² For Indonesian example, see Akbar, Mangunsong, and Puchniak, *supra* note 13. See also Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 *University of Pennsylvania Law Review* 1271 (2017).

⁴³ Puchniak & Kim, *supra* note 1 at 107-108.

⁴⁴ Puchniak & Kim, *supra* note 1 at 117.

⁴⁵ Gen Goto, 'Recent Boardroom Reforms in Japan and the Roles of Outside/Independent Directors', in Hiroshi Oda (ed.), *Comparative Corporate Governance: The Case of Japan, Journal of Japanese Law Special Issue No. 12* (Carl Heymanns/Wolters Kluwer, 2018), 33, 45-53.

promoted by the Japanese government as a part of its policy to overcome Japan's long-time economic malaise.⁴⁶

Equally as important as illuminating the distinction between independent directors in Asia from the original US concept of the independent director, is the insight that the “faux convergence” lens provides into the functional diversity of independent directors *within* Asia. As one of us observes in a summary chapter in a book on independent directors in Asia:

“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 differences in the form and function of 'independent directors' within Asia must also be recognised and accounted for in comparative analyses.”⁴⁷

This diversity in the actual implementation and function of independent directors across Asia demonstrates how a corporate governance mechanism can be formally adopted while being adapted to serve very different purposes across jurisdictions and cautions against assuming that the mere presence of independent directors indicates convergence towards an Anglo-American model of corporate governance.⁴⁸

B. Derivative Actions

The derivative action, which allows shareholders to pursue a lawsuit for and on behalf of the company, is another corporate governance mechanism that has been widely adopted across Asia. Again, this appears on the surface to demonstrate convergence towards Anglo-American corporate governance norms. However, a closer examination reveals significant divergences in both the legal frameworks and practical utilization of derivative actions across Asian jurisdictions.

While common law jurisdictions in Asia inherited the restrictive English rule in *Foss v. Harbottle*, many have since adopted statutory derivative actions to facilitate minority shareholder's utilization of the derivative action.⁴⁹ Meanwhile, civil law jurisdictions have often created derivative action mechanisms without this historical baggage. Jurisdictions vary widely in who can bring derivative actions.⁵⁰ Some impose minimum shareholding requirements, while others allow any shareholder to sue.⁵¹ This significantly impacts the practical availability of the mechanism. The specific procedures for initiating and maintaining derivative actions differ substantially across jurisdictions, affecting their accessibility and effectiveness.⁵²

⁴⁶ Hideaki Miyajima and Takuji Saito, ‘Corporate Governance Reforms under Abenomics: The Economic Consequences of Two Codes’, in Takeo Hoshi and Phillip Y. Lipscy (eds.) *The Political Economy of the Abe Government and Abenomics Reforms* (Cambridge University Press, 2021), 357, 363–366.

⁴⁷ Puchniak & Kim, *supra* note 1 at 96–97.

⁴⁸ Puchniak & Kim, *supra* note 1 at 131.

⁴⁹ Puchniak, *supra* note 3 at 14–15.

⁵⁰ Puchniak, *supra* note 3 at 14.

⁵¹ Puchniak, *supra* note 3 at 18.

⁵² See, for example, Meng Seng Wee and Dan W. Puchniak, ‘Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth’, in Dan W. Puchniak, Harald

The allocation of legal costs and availability of contingency fees greatly influence the economic incentives for shareholders to pursue derivative litigation. These factors vary significantly across Asia.⁵³ The types of corporate wrongdoing that can be addressed through derivative actions and the available remedies differ across jurisdictions.⁵⁴

Despite similar formal rules in some cases, the actual use of derivative actions varies dramatically. Japan and Korea saw a significant spike in derivative actions after they lay moribund for decades,⁵⁵ while the derivative action has remained rare in listed companies in many other Asian jurisdictions throughout its history.⁵⁶ As one of us notes in an article on the derivative action in Asia:

“The point is simple. There are a myriad of complex factors which result in varying levels of derivative litigation in Asia's leading economies. Ironically, the one factor that is conspicuously absent as a defining force of derivative litigation in all of Asia's leading economies is Asia's ostensibly non-litigious culture.”⁵⁷

This diversity in the implementation and use of derivative actions across Asia demonstrates how transplanted legal mechanisms can evolve in unexpected ways when introduced into different jurisdiction-specific contexts.⁵⁸ It also highlights the danger of making broad generalizations about “Asian” approaches to corporate governance or litigation.

C. Stewardship Codes

The rapid adoption of stewardship codes across Asia since 2014 appears, at first glance, to be a clear example of corporate governance convergence. These codes, inspired by the UK Stewardship Code of 2010, ostensibly aim to promote active ownership by institutional investors.⁵⁹ Their widespread adoption has been hailed by some as evidence that Asian jurisdictions are embracing a more shareholder-centric model of corporate governance with a

Baum, and Michael Ewing-Chow (eds.) *The Derivative Action in Asia: A Comparative and Functional Approach*. (Cambridge University Press, 2012), 323, 341-346 and Gen Goto, ‘Legally “Strong” Shareholders of Japan, Michigan Journal of Private Equity & Venture Capital Law, Vol.3, p.125, 138-139 (2014).

⁵³ Puchniak, supra note 3 at 17-18.

⁵⁴ For example, the liability of controlling shareholders cannot be exercised by shareholders’ derivative suits in Japan. See Goto, supra note 52 at 138.

⁵⁵ Japan is also known for having court decisions imposing a substantial monetary liability on defendant directors from time to time. For a recent case where former directors of Tokyo Electric Power Company were held liable for more than 13 trillion Japanese Yen, see Gen Goto, *ESG, Externalities, and the Limits of the Business Judgment Rule: TEPCO Derivative Suit on Fukushima Nuclear Accident and the Expansion of Caremark*, ECGI Law Working Paper No. 780/2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881098.

⁵⁶ Puchniak, supra note 3 at 4-5, 18-19. It is astounding that as of 2020 in Singapore there was no record of even a single derivative action ever being filed in a listed company. Puchniak & Varottil, supra note 7 at 39. Since 2020, Singapore has had only two reported decisions involving attempted derivative actions in listed companies – both were dismissed at the leave application stage. As such, in the entire history of Singapore there has never been a successful reported derivative action in a listed company. Alan K Koh, Dan W Puchniak & Cheng Han Tan, *Company Law*, 21 Singapore Academy of Law: Annual Review of Cases 2020 (2021) at 231-248; Alan K Koh, Dan W Puchniak & Cheng Han Tan, *Company Law*, 24 Singapore Academy of Law: Annual Review of Cases 2023 (forthcoming).

⁵⁷ Puchniak, supra note 3 at 5.

⁵⁸ Puchniak, supra note 3 at 24-28.

⁵⁹ Goto, Koh & Puchniak, supra note 2 at 842.

focus on less managerial risk-taking and maximizing long-term shareholder value.⁶⁰ However, a closer examination reveals that the adoption of UK-style stewardship codes in Asia often represents a form of “faux convergence.” While the codes may be similar in form,⁶¹ their intended and actual functions often diverge significantly from the UK model, the purpose of which is to motivate institutional investors to monitor corporate management to prevent them from engaging in the type of excessive risk-taking and short-termism that led to the Global Financial Crisis and, more recently, to promote an Environmental, Social, and Governance (ESG) agenda.⁶²

Unlike the UK, most Asian jurisdictions do not have dispersed ownership structures dominated by institutional investors. Many listed companies have controlling shareholders, fundamentally altering the context in which stewardship operates.⁶³ The types of investors targeted by stewardship codes also vary within. While most focus narrowly on traditional institutional investors, Singapore stands out for its code that focuses on controlling families – a unique attempt to make the UK’s idea of stewardship “fit” Singapore’s (and most of Asia’s) local context.⁶⁴

The goals driving the adoption of stewardship codes differ widely across Asian jurisdictions. In Japan, the stewardship code was part of a broader economic growth strategy aimed at making companies take *more* risk to use capital more efficiently.⁶⁵ In Korea, the code was seen as a tool to address governance issues in family-controlled conglomerates (chaebols).⁶⁶ In Singapore and Hong Kong, the adoption of stewardship codes appears driven more by a desire to signal compliance with global governance norms – a form of “halo signaling” than to address specific domestic issues.⁶⁷

The concept of “halo signaling” as a driver for adopting stewardship codes has now received empirical support. Nguyen and Wang find evidence consistent with stewardship codes acting as a “halo” signal that attracts broader equity ownership by US institutional investors in adopting countries, particularly in firms that previously had less US investor presence.⁶⁸

⁶⁰ See Goto, Koh & Puchniak, *supra* note 2 at 844-846 (citing perceptions of OECD, Ernst & Young, and Institutional Shareholder Services).

⁶¹ Dionysia Katelouzou and Mathias Siems, ‘The Global Diffusion of Stewardship Codes’, in Dionysia Katelouzou and Dan W. Puchniak (eds.), *Global Shareholder Stewardship* (Cambridge University Press, 2022), 631.

⁶² Goto, Koh & Puchniak, *supra* note 2 at 833-836, 840-841.

⁶³ Puchniak, *supra* note 2 at 111-112.

⁶⁴ Puchniak and Tang, *supra* note 14 at 310-314.

⁶⁵ Goto, *supra* note 9 at 396-97.

⁶⁶ Sang Yop Kang and Kyung-Hoon Chun, ‘Korea’s Stewardship Code and the Rise of Shareholder Activism: Agency Problems and Government Stewardship Revealed’, in Dionysia Katelouzou and Dan W. Puchniak (eds.), *Global Shareholder Stewardship* (Cambridge University Press, 2022), 239, 241-244. From an inter-Asian law perspective, it is also noteworthy that Korea did not just copy the UK Stewardship Code but deliberately took in some aspects of the Japanese Stewardship Code upon drafting its code. *Ibid.* at 243 and 247.

⁶⁷ Puchniak, *supra* note 2 at 143-146.

⁶⁸ Trang T. Nguyen & Charles C.Y. Wang, *Stewardship Codes and Shareholder Voting on Contested Ballot Measures*, Harvard Business School Working Paper, October 2024, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986759.

While all Asian stewardship codes are technically voluntary, the level of regulatory pressure for adoption varies. Some jurisdictions have used soft governmental pressure to encourage compliance,⁶⁹ while others have left it entirely to market forces.⁷⁰ The actual impact of stewardship codes on investor behavior and corporate governance practices varies widely across jurisdictions, often differing significantly from their stated ambitions.⁷¹ As we observe elsewhere:

“It appears that a variety of jurisdiction-specific factors – including market signalling, politics, and ESG considerations – drove governments in Asia to adopt UK-style stewardship codes. As a result, the intended and actual functions of UK-style stewardship codes in Asia have significantly departed from – and in some cases run counter to – the intended and actual functions of the UK Code.”⁷²

This divergence in the function of stewardship codes across Asia, despite their similar form, highlights the importance of understanding the specific jurisdiction-specific contexts in which corporate governance mechanisms operate. It also demonstrates how jurisdictions can use the adoption of “global standards” strategically to serve local purposes, a phenomenon that extends beyond stewardship codes to other areas of corporate governance.

The above examination of independent directors, derivative actions, and stewardship codes in Asia reveals a common pattern: formal adoption of corporate governance mechanisms originating in Anglo-America, followed by significant divergence in their implementation and function. This pattern of “faux convergence” – superficial similarity in form masking significant diversity in function – creates challenges for both academics and policymakers in accurately assessing corporate governance practices globally. As we argue elsewhere:

“Faux convergence turns this assumption on its head. As the Asian jurisdiction case studies canvassed in this chapter have demonstrated, mechanisms originally intended as tools of 'good' corporate governance can be subverted by elites for their own ends. A superficially adopted corporate governance tool can be simultaneously wielded to maintain or reinforce a jurisdiction's existing corporate governance system, to further the jurisdictional elites' own agendas and to signal to the world – notwithstanding little to no commitment to real change – that the jurisdiction's elites have adopted 'good corporate governance'.”⁷³

For scholars of comparative corporate governance, these findings emphasize the need for nuanced, context-specific analysis that goes beyond surface-level comparisons. As Asian jurisdictions often adapt and repurpose corporate governance mechanisms to serve local needs and goals, including “halo signaling”, rather than simply emulating Anglo-American models, significant diversity in corporate governance practices persists both between Asia and Anglo-America, and within Asia itself. Local contexts, including ownership structures, legal systems, and domestic and international political economies, significantly shape how these mechanisms

⁶⁹ Gen Goto, ‘The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code’, in Dionysia Katelouzou and Dan W. Puchniak (eds.), *Global Shareholder Stewardship* (Cambridge University Press, 2022), 222, 232, 234.

⁷⁰ Puchniak and Tang, *supra* note 14 at 306-309.

⁷¹ See generally, Goto, Koh & Puchniak, *supra* note 2, Koh, Puchniak & Goto, *supra* note 2, and Puchniak, *supra* note 2.

⁷² Koh, Puchniak & Goto, *supra* note 2 at 623.

⁷³ Koh, Puchniak & Goto, *supra* note 2 at 629-630.

operate in practice. Surface-level comparisons based solely on the presence or absence of certain mechanisms without knowledge of such local jurisdiction-specific contexts can be misleading. For policymakers and international organizations promoting corporate governance reform, they highlight the limitations of one-size-fits-all approaches and the importance of understanding local dynamics.

Ultimately, the experience of corporate governance reform in Asia suggests that while globalization has led to some convergence in form, the substance of corporate governance remains deeply embedded in local contexts. Understanding this complex reality is crucial for developing more effective approaches to corporate governance both within Asia and globally.⁷⁴ This is especially the case as globalization appears to be moving towards a more regional approach to corporate governance around the world.⁷⁵

Part IV: The Power of Inter-Asian Comparisons and Faux Convergence in Reshaping Comparative Corporate Law

Our examination of independent directors, derivative actions, and stewardship codes across Asia demonstrates the explanatory power of the faux convergence framework and the untapped potential of inter-Asian comparisons for enriching comparative corporate law scholarship more broadly.

The concept of faux convergence, as introduced earlier, provides a powerful lens through which to understand the complex reality of corporate governance in Asia. It explains how Asian jurisdictions have adopted the outward form of Anglo-American governance mechanisms while strategically adapting their substance and function in various ways to serve local purposes. Notably, the adoption of globally recognized corporate governance mechanisms can serve important signaling functions, allowing jurisdictions to demonstrate compliance with international norms, which may sometimes be more important than the actual function of the mechanism. This phenomenon results in superficial similarity masking significant functional diversity, challenging simplistic narratives of global convergence.

The diverse implementation and functions of these governance mechanisms within Asia provide a unique laboratory for understanding how similar legal transplants evolve in different yet related contexts, exemplifying faux convergence in action. For instance, while both Japan and Korea had derivative actions that lay dormant for decades and then suddenly saw a spike in activity, the driving forces behind this trend differed significantly,⁷⁶ illustrating how seemingly similar legal mechanisms can serve distinct purposes in different local contexts.

⁷⁴ See also Puchniak & Kim, *supra* note 1 at 131-32.

⁷⁵ See Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?*, European Corporate Governance Institute - Law Working Paper No. 744/2023 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=46520129, Vanderbilt Journal of Transnational Law (Forthcoming 2024)) at 57 (“Amid clearly global institutional efforts to tackle sustainability concerns, there has been a rise in the power and ambition of regional organizations to create models of corporate governance that are bespoke for a region – particularly in Asia.”). See also, Puchniak *supra* note 2 at 156; Curtis J. Milhaupt, *Corporate Governance in an Era of Geoeconomics*, European Corporate Governance Institute - Law Working Paper No. 790/2024 (available at <https://ssrn.com/abstract=4888623>).

⁷⁶ See *supra* Part III, B.

Inter-Asian comparisons also reveal the diverse strategies jurisdictions employ when adapting foreign governance concepts, further highlighting the dynamics of faux convergence. The case of independent directors is particularly illustrative.⁷⁷ While most Asian jurisdictions have formally adopted independent director requirements, their roles vary significantly across the region. In Japan, independent directors are expected to champion investors' interests in the boardroom as a part of the government's policy to overcome the long-time economic malaise, while in Singapore's family-controlled firms, they frequently act as mediators in family disputes. These functional variations within Asia demonstrate the creative ways in which jurisdictions can repurpose governance mechanisms to serve local needs, often diverging significantly from their original intended functions.

Furthermore, the adoption of stewardship codes across Asia showcases how seemingly similar reforms can serve vastly different purposes in different jurisdictions, epitomizing faux convergence.⁷⁸ While Japan's stewardship code aims to promote shareholder-centric governance to promote more risk-taking as part of a broader economic strategy, Korea's code was seen as a tool to address governance issues in family-controlled conglomerates (*chaebols*). These inter-Asian differences provide rich insights into how global governance norms are negotiated and reconfigured within diverse jurisdiction-specific contexts.

By focusing on these inter-Asian variations through the lens of faux convergence, scholars can move beyond simplistic East-West comparisons and develop a more sophisticated taxonomy of convergence for understanding legal transplants and governance evolution.⁷⁹ This approach, which aligns with broader trends in comparative law towards more contextual, pluralistic frameworks,⁸⁰ allows us to identify local factors that shape corporate governance outcomes, which might be overlooked in broader global comparisons.

Moreover, inter-Asian comparisons offer valuable lessons for other regions grappling with similar challenges. As many Asian jurisdictions navigate the tension between global pressures and local institutional logic, their experiences with faux convergence provide a roadmap for other emerging economies seeking to reform their corporate governance systems while maintaining local relevance. This may be especially relevant as globalization appears to be moving towards a more regional approach to corporate governance around the world.

Ultimately, embracing the complexity revealed through inter-Asian comparisons and the faux convergence framework can significantly advance the field of comparative corporate law. It pushes us to develop more robust and nuanced taxonomies that capture the true state of convergence and diversity of global corporate governance practices. The time has come to recognize the reality of "faux convergence" as an important lens for understanding corporate law and governance within Asia and beyond.

⁷⁷ See *supra* Part III, A.

⁷⁸ See *supra* Part III, C.

⁷⁹ See also *supra* note 7.

⁸⁰ Ralf Michaels, The Functional Method of Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006). [This source is relevant because it critiques the traditional functional method in comparative law and argues for a more nuanced approach that uses functionalist comparisons as "critical tools" to challenge assumptions and reveal alternatives, aligning with the chapter's advocacy for more contextual, pluralistic frameworks in comparative corporate governance.]

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