CAPITALIST VARIATIONS IN “SAY ON PAY”: A LOOK AT CORPORATE GOVERNANCE CONTRADICTIONS IN SINGAPORE AND HONG KONG

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Abstract

“Say on pay” reforms have been advocated and implemented in many major jurisdictions over the last decade, including the US and UK. Singapore and Hong Kong, however, which are recognized by the World Bank to have the second- and fourth-best regulatory systems in the world for investors to do business in respectively, have bucked the international trend of allowing shareholders a binding or advisory vote on the remuneration of corporate managers. “Say on pay” has either been rejected or ignored in the latest round of reforms to the corporate governance codes in Singapore and Hong Kong despite studies which have found that they have the highest executive pay in Asia, with base salaries for top executives rising to more than 25% higher than their US counterparts. Could this be the curious case of “Asian values”?

While Singapore and Hong Kong share the same common law legal traditions with the US and UK within the same bucket of liberal market economies (LMEs), as the “Varieties of Capitalism” framework would suggest, they may be said to practice a different form of “regulatory capitalism” from their Anglo-American counterparts under their corporate governance regimes. This article looks at the institutions of political economy within Singapore and Hong Kong, and how they may explain this variance in “say on pay” regulation between jurisdictions. It argues that this may be attributed to a complex combination of institutional factors such as Singapore and Hong Kong’s distinctive patterns of corporate ownership, the

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relative restraint of institutional investors, the role of the state and ultimately the socio-political culture and ethos within a non-Western liberal democratic framework. It concludes with what the implications of this variance may be for future legal reforms on “say on pay” and theories of corporate governance in the broader context—namely, why are certain legal reforms not adopted in certain jurisdictions, and if adopted, how effective are such reforms likely to be?

I. INTRODUCTION.............................................................................. 224
II. “SAY ON PAY” REFORMS AND THE CAPITALIST CONUNDRUM FOR CORPORATE GOVERNANCE........................................ 229
   A. “Say On Pay” and the Disruption of the Traditional Corporate Governance Model................................................. 232
      1. “Say on pay” and Shareholder Empowerment ................... 233
      2. “Say on pay” and Stakeholder Influence ....................... 236
   B. Varieties of Capitalism and Regulatory Choices.................. 240
III. OVERVIEW OF “SAY ON PAY” REFORMS.......................... 244
   A. United States .................................................................... 244
   B. United Kingdom ............................................................... 245
   C. Australia ........................................................................... 247
   D. European Union............................................................... 247
   E. Singapore ......................................................................... 249
   F. Hong Kong......................................................................... 251
IV. CAPITALIST VARIATIONS IN INSTITUTIONS OF POLITICAL ECONOMY ................................................................. 253
   A. Managerial Power and Shareholding Patterns .......... 253
   B. Institutional Shareholder Activism ............................... 258
   C. Socio-Political Culture and Role of the State ................. 263
   D. Corporate Culture and Confucian Capitalism .............. 268
V. POLICY RESPONSES FOR SINGAPORE AND HONG KONG ...... 272
   A. Institutional Complementarities and Path Dependence . 273
   B. Executive Compensation, Controlling Shareholders and Tunneling ........................................................................ 277
VI. CONCLUSION.............................................................................. 280
I. INTRODUCTION

Executive remuneration lies at the heart of current discussions on corporate governance reforms, which have driven the regulatory diffusion of “say on pay” reforms in many major jurisdictions over the last decade, including the US and UK.1 Excessive payments to corporate executives have repeatedly been cited as reasons for many corporate failures and remain a highly controversial and politicized issue in many countries. “Say on pay” may be defined broadly as a regular mandatory binding or advisory shareholders’ vote on the remuneration of the company’s executive directors and/or managers as required by law.2 This departs from the established position in corporate law, which has generally assigned decision-making power on executive remuneration to the board of directors as part of their management authority. As states restructure from the period of neo-liberalism preceding the global financial crisis in 2008 and take on a more interventionist and progressive agenda,3 “say on pay” reforms have altered the corporate balance of power under the implicit corporate contract between shareholders and managers by according shareholders greater say over such remuneration matters.4 Populist pressures over executive compensation, which were deemed either excessive or misaligned with corporate performance, have further transformed this from a corporate governance issue to a broader issue on social policy.5 From this vantage point, society and not just shareholders have a stake on the regulation of executive remuneration.

2 Thomas & van der Elst, supra note 1, at 658.
Singapore and Hong Kong, however, have bucked the international trend of allowing shareholders a binding or advisory vote on the remuneration of corporate executives. In Singapore and Hong Kong, “say on pay” has either been rejected or ignored in the latest round of reforms to the corporate governance codes. Nonetheless, studies have found that Singapore and Hong Kong have the highest executive pay in Asia, with total guaranteed cash (base salaries and total fixed allowances) for top executives in 2016 rising to more than 25% higher than their US counterparts. In 2016, for every US$100 that top executives in the US earned in base salary, their counterparts in Singapore and Hong Kong made US$132 and US$128 respectively. Despite their recognition by the World Bank to have the second- and fourth-best regulatory systems in the world for investors to do business in respectively, along with a higher score on the shareholder rights index as compared with the US, the conspicuous absence of “say on pay” reforms in Singapore and Hong Kong in comparison with the leading Western jurisdictions presents an interesting anomaly for examination. One may recall the earlier debate on “Asian values” as the supposed antithesis to Western norms, when “Confucian capitalism” became the rallying call in many East Asian economies in the late twentieth century. Singapore was one of the most forceful proponents of “Asian values”.

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9 See Humphrey Hawksley, Asian Values, YALEGLOBAL ONLINE (Sept. 27, 2018), https://yaleglobal.yale.edu/content/Asian-values [https://perma.cc/Q9CZ-G4QE].

10 See Thomas & van der Elst, supra note 1.

and argued that they were preferable to “Western” norms and were essential to achieve economic growth.\(^{12}\)

Yet, Asia, notwithstanding the variances amongst themselves, may be said to be home to a set of institutions of political economy distinct from the West, in particular the US and the UK.\(^{13}\) These differences include distinct patterns of corporate ownership and the common use of pyramidal or conglomerate holding structures amongst group companies, as well as cultural variances within a diverse range of economic, legal, and political systems at different levels of market development.\(^{14}\) They may be said to practice a different form of “regulatory capitalism”\(^ {15}\) from their Anglo-American counterparts under their corporate governance regimes, despite being ostensibly in the same bucket of liberal market economies (LMEs), as the “Varieties of Capitalism” framework would suggest.\(^ {16}\)

Following North’s definition as a starting point, “[i]nstitutions are the humanly devised constraints that structure political, economic, and social interaction.”\(^ {17}\) Institutions, therefore, are devised by rule-makers to impose constraints on and shape the incentives of rule-takers. Regulatory capitalism theory posits that governance and regulation are manifestations of the underlying institutions of political economy and how they determine policy outcomes in the capitalist order.\(^ {18}\) This implies different regulatory outcomes for societies with different structures of political economy. Governance, as defined by the World Bank, is “the process through

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\(^{15}\) Levi-Faur, Regulatory State and Regulatory Capitalism, supra note 3, at 668–69.

\(^{16}\) Peter A. Hall & David Soskice, An Introduction to Varieties of Capitalism, in Varieties of Capitalism: The Institutional Foundations of Comparative Advantage 1, 8–9 (Peter A. Hall & David Soskice eds., 2003).

\(^{17}\) Douglass C. North, Institutions, 5 J. Econ. Persp. 97, 97 (1991).

which state and non-state actors interact to design and implement policies within a given set of formal and informal rules that shape and are shaped by power.”\textsuperscript{19} This suggests that corporate governance is not homogeneous across time and space, as corporate governance systems need to be understood as institutionalized relationships amongst the spectrum of social, economic and political actors, the different varieties of which informs our search for suitable regulatory design and alternatives.\textsuperscript{20}

In this light, this article adopts an institutional approach and explores how the variances in “say on pay” regulations between Singapore and Hong Kong on one hand, and the US and UK, on the other, may be explained by the differences in the political and economic institutions amongst each polity. Singapore and Hong Kong present complex phenomena—both are small entrepôt Asian city-states sharing similar colonial common law institutions with the US and the UK as hybrids of Chinese and Western cultures. Yet, they are not liberal democracies in the Western sense. They have nevertheless achieved unprecedented success in their institutional reforms to benefit from the preceding decades of economic globalization.\textsuperscript{21} Incidentally, despite their strong rule of law and low corruption,\textsuperscript{22} they have been highlighted in The Economist’s crony capitalism ranking, which purports to measure the extent economic elites with close relations with the government seek to profit by rent-seeking.\textsuperscript{23} Nevertheless, any apparent shortcomings have not impeded the sustained economic growth miracles, which have rapidly transformed two of Asia’s four “tiger” economies (along with South


\textsuperscript{21} See generally Gordon Redding et al., Hong Kong: Hybrid Capitalism as Catalyst, in The Oxford Handbook of Asian Business Systems 34, 50 (Michael A. Witt & Gordon Redding, 2014).

\textsuperscript{22} See World Justice Project, Rule Of Law Index 2019 16 (2019), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced.pdf [https://perma.cc/G9VS-WCHG] (noting that Singapore and Hong Kong are ranked 13\textsuperscript{th} and 16\textsuperscript{th} in their rule of law, respectively, behind the UK but ahead of the US).

Korea and Taiwan) over the last fifty years. As of 2017, the Hong Kong Stock Exchange (HKEX) is the world’s largest stock exchange in terms of total value traded as a percentage of GDP and sixth largest in terms of market capitalization, with the Singapore Exchange (SGX) as the largest amongst medium exchanges in terms of the number of IPOs and listed entities. In 2018, the HKEX attracted more shareholder capital than either the New York Stock Exchange or London Stock Exchange, and led the world in IPO fund-raising. Singapore’s GDP per capita is now higher than that of the United States, and it recently topped the US as the world’s most competitive economy, with Hong Kong close behind in third place. This makes Singapore and Hong Kong fascinating subjects of study in corporate governance to ascertain the possible reasons for different regulatory approaches for apparently common corporate governance problems faced in different jurisdictions.

In this connection, this article critiques the “Varieties of Capitalism” theory and other similar orthodox corporate governance theories in respect of their applicability to the Asian corporate context, which remains understudied despite the growing economic impact of Asian companies in the fastest-growing region in the world. The analysis reveals that further refinement to the existing orthodox theories and metrics of corporate governance is needed. In doing so, the author seeks to contribute to the increasing interest in Asian models of corporate governance and joins an emerging group of corporate law scholars by providing an integrated and contextual view of corporate governance on a comparative basis. It argues that

24 OECD Factbook 2019, supra note 1, at 19, 21.
28 See generally Klaus J. Hopt, Comparative Corporate Governance: The State of the Art and International Regulation, in COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 3, 3-101 (Andreas M. Fleckner & Klaus J. Hopt,}
the underlying capitalist institutions of political economy matter, and divergence in these institutions can lead to fundamental differences in the adoption, trajectory and ultimately, the success of regulatory reforms. It concludes that these insights are critical to understanding why “say on pay” reforms are, and are likely to remain, contentious issues in Singapore and Hong Kong, and if eventually adopted, are unlikely to function in a similar manner as compared to other common law jurisdictions. Such insights may form the basis of evaluating other types of corporate governance issues and reforms on a comparative basis, and may also yield important insights for other Asian jurisdictions.

This paper proceeds as follows. Part II sets out the theoretical framework of comparative corporate governance, while Part III provides an overview of the various “say on pay” reforms in the US and UK, along with other jurisdictions. Part IV examines the institutions of political economy within Singapore and Hong Kong and how they may explain this variance in “say on pay” regulation between jurisdictions. Part V discusses what the policy implications are for Singapore and Hong Kong, and Part VI concludes.

II. “Say On Pay” Reforms and the Capitalist Conundrum For Corporate Governance

The universality of the corporate form, as the fundamental pillar of modern capitalism across a variety of jurisdictions, suggests that business corporations “face a fundamentally similar set of legal problems— in all jurisdictions.”29 From a functionalist perspective, economic rationality and efficiency dictate that corporate laws should face similar economic pressures for reform towards the same objective.30 “Global governance” standards set by organizations such as the Organisation for Economic Co-operation and Development (OECD) have further played an influential role towards harmonizing corporate governance reforms at an international level, especially

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29 John Armour et al., *What is Corporate Law?*, in *The Anatomy Of Corporate Law—A Comparative And Functional Approach* 1, 1 (Reinier Kraakman et al. eds., 2017). These “five basic legal characteristics of the business corporation” are “legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership.”

30 *Id.* at 4–5.
after the Asian Financial Crisis in 1997-1998 and the Global Financial Crisis in 2007-2008. The G20/OECD Principles of Corporate Governance (2015), for example, prescribes “say on pay” as follows: “Shareholders should be able to make their views known, including through votes at shareholder meetings, on the remuneration of board members and/or key executives, as applicable. The equity component of compensation schemes for board members and employees should be subject to shareholder approval.”

Since “say on pay” was first introduced in the UK in 2002, there has been a remarkable diffusion of such reforms in countries including the US, Belgium, Sweden, and Switzerland. Although the trend might, at first sight, suggest regulatory convergence, there are in fact a range of different forms of “say on pay” providing for varying levels of stringency and shareholder power. Regulatory variances demonstrate “partial convergence” and “divergence-within-convergence” and adoption appears to be more prevalent in the US and EU member states, compared to emerging market economies. According to the OECD’s 2019 survey, 51% of 49 countries surveyed have adopted “say on pay” on remuneration policy, but there are wide variations amongst them, including whether the shareholders’ vote is binding or advisory and the scope of such approval. Countries are also divided on whether to require or only recommend “say on pay,” even though there is a continued trend toward increased disclosure of company remuneration policy and remuneration levels.

Singapore and Hong Kong represent two such anomalies, where high compensation is often justified as a commercial decision to attract talent to the company notwithstanding controversies arising from time to time due to directors being rewarded with excessive remuneration despite poor corporate performance.

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33 Thomas & van der Elst, *supra* note 1, at 655, 658.

34 Gordon, *supra* note 31, at 43–44.


OECD considers “say on pay” to have been adopted in other Asian countries such as China, Japan, and South Korea, the exact forms in which such regulations take and are implemented in practice require more detailed examination. In South Korea, for example, shareholders can set the aggregate amount available for board remuneration, but decisions concerning the remuneration of individual directors and senior management are often delegated to the board in practice.\textsuperscript{37} In Japan, shareholder approval is only required when there is a change in aggregate board compensation and shareholders routinely approve such requests.\textsuperscript{38} In China, aggregate board remuneration is approved by the shareholders but they are not able to propose remuneration structures or policies, and shareholder voting is in any event perfunctory in the presence of prevalent concentrated ownership structures.\textsuperscript{39}

These international regulatory developments may be better understood when evaluated in the broader context of the respective corporate governance framework and the wider environment beyond the corporation—which together encompass different varieties of capitalism. In this regard, North adds that, “[i]nstitutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules.”\textsuperscript{40} In this sense, regulatory reform requires a political consensus between the state and its key stakeholders, in particular political and corporate elites, with the former concerned about political accountability and economic growth and the latter concerned about their stakes in and success of


\textsuperscript{38} Kaisha-hō [Companies Act], Law No. 86 of 2005, art. 316 (Japan); Sean McGinty & David Green, What Shareholders in Japan Say about Director Pay: Does Article 361 of Japan’s Companies Act Matter?, 13 \textsc{Asian J. Comp. L.} 87, 88–89 (2018).


\textsuperscript{40} DOUGLASS C. NORTH, \textsc{Institutions, Institutional Change And Economic Performance} 16 (1990).
their firms. The distribution of power within the firm amongst the principal players within the corporation—shareholders, managers and employees—are thus affected by their interaction with the state’s political economy though political institutions, ideologies and interest groups. How each capitalist economy’s institutions of political economy negotiate these contradictions within the existing predilections of its corporate governance framework determines the regulatory outcome.

A. “Say On Pay” and the Disruption of the Traditional Corporate Governance Model

The economic disruption brought by the period of neo-liberal globalization leading to the global financial crisis and its fallout has led to the disruption of the traditional corporate governance model. “Say on pay” has come at a time when a fundamental reconfiguration of the corporate governance model is under way in many jurisdictions, largely as a reaction to the alleged failure of corporate governance at financial institutions in the run-up to the global financial crisis and partly due to political overreaction from populist pressures in the aftermath. Many aspects of these reforms remain contentious, and their efficacy and implications are not completely understood. As Bainbridge states, “say on pay” is “part of the ‘disintegrating erosion’ of particular exceptions,” by which “director primacy is slowly being undermined.” The board’s traditional prerogative to decide on executive remuneration is a consequence of what is a de jure “shareholder primary” model but a de facto “director primacy” model that exists in many common law jurisdictions, including the US, Singapore and Hong Kong, insofar as the board is charged with the default responsibility of managing the business and operations of the company. This primacy accorded to managerial power had

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41 Mark J. Roe & Jeffrey N. Gordon, Introduction, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 1, 2–3 (Jeffrey N. Gordon & Mark J Roe eds., 2004).
44 For example, Section 141(a) of the Delaware General Corporation Law states that the “business and affairs of every corporation . . . shall be managed by or under the board of directors, except as may be otherwise provided in this chapter or in its certificate of
coincided with the expansion of globalization and the retreat of the state in its involvement with private markets and economic governance in the preceding decades. Competition for increasingly mobile capital has forced the state to create an attractive pro-investor environment through pro-business labor laws and a permissible tax and regulatory system.45

1. “Say on pay” and Shareholder Empowerment

Modern corporate governance theory credits Berle and Means with tracing the problem of the risk of corporate opportunism arising from the ceding of control by shareholders to professional managers over the operations of public corporations. This “produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear.”46 In this context, the shift towards shareholder power through the spate of “say on pay” reforms are representative of the broader movement toward greater shareholder democracy, which shareholder activists in the US have long lobbied for to ensure better alignment between shareholder and managerial interests.47 The OECD Principles, thus, state:

Shareholders also have an interest in how remuneration and company performance are linked when they assess the capability of the board and the

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46 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6 (1933). See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 574–575 (1776) (noting that “[t]he directors of such companies, however, being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private co-partnership frequently watch over their own”).

qualities they should seek in nominees for the board. The different forms of say-on-pay (binding or advisory vote, ex ante and/or ex post, board members and/or key executives covered, individual and/or aggregate compensation, compensation policy and/or actual remuneration) play an important role in conveying the strength and tone of shareholder sentiment to the board.48

Apart from the adoption of “say on pay,” recent US developments include the controversial reforms of proxy access to give shareholders stronger rights in the nomination of directors in contested board elections and the increasing use by institutional investors of private ordering as a “self-help” mechanism to attain stronger participatory rights. This has shifted the dynamic between boards and shareholders, which are increasingly engaged in what Hill labels “private ordering combat.”49 Prior to the advent of “say on pay,” executive compensation had previously been viewed as a fiduciary duty problem, but was reinterpreted as an issue of misalignment of managerial and shareholder interests. Under this paradigm, pay-for-performance became a self-executing corporate governance solution to a corporate governance problem to incentivize management to align its interests with those of shareholders and to maximize shareholder value.50 The US—which has traditionally accorded shareholders with the weakest decision rights amongst common law jurisdictions—thus became the forerunner in actively encouraging incentive compensation plans such as stock option plans.51 While this was considered to be an economically efficient solution under an “optimal contracting approach,” Bebchuk and Fried

48 OECD PRINCIPLES 2015, supra note 32, at 22.
49 Jennifer G. Hill, The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat, 2019 U. Ill. L. Rev. 507, 509, 530 (2019). Cheffins argues, however, that while shareholder passivity may be less common than before, it is important not to overstate the extent to which managerial discretion will continue to be circumscribed in the foreseeable future: BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 344–46 (2018).
51 John Armour et al., The Basic Governance Structure: The Interests of Shareholders as a Class, in THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 50, 66 (Reinier Kraakman et al. eds., 2017).
subsequently argued that such an approach was untenable as managerial power and rent extraction are likely to have an important influence on the design of compensation arrangements and the dilution of shareholder value, not least because of the risk of board capture which militates against the chances of arm’s length bargaining. On this basis, executive compensation is a manifestation of, rather than a solution to, the agency problem. This view was relied upon by the House of Representatives in 2007 in enacting the Dodd-Frank Act, which introduced “say on pay” in the US in 2011. The structuring of executive compensation was thus reconceptualized post-financial crisis, when it was recognized that there were inherent problems with pay-for-performance as a means of aligning managers with the longer-term interests of shareholders. Share options were deemed to have an asymmetrical risk profile, with the incentives created by share-based payments varying significantly depending on factors such as the vesting periods and prices, which could lead to either excessive risk taking or risk aversion. In an empirical study by Geiler and Renneboog, many remuneration agreements were found to be ineffective and promoted managerial self-dealing and profit skimming. Singapore, amongst other jurisdictions, was cited as subject to a high risk of skimming and less efficient remuneration contracting due to the high levels of variable pay and comparably weak disclosure standards.

However, a conflicting image of shareholders pervades much of contemporary US corporate law scholarship on “say on pay,” which remains highly controversial. Bainbridge, for example, argues that “say on pay” reforms are counterproductive as effective corporate governance requires that decision-making authority be

53 Ferri, Say on Pay, supra note 47, at 330.
57 Id. at 125.
vested in a small, discrete central board rather than in a large, diffuse shareholder electorate, given the information asymmetries and collective action problems that lead most shareholders to be rationally apathetic.\textsuperscript{58} Gordon also cautions that the burden of scrutinizing executive pay at thousands of corporations particularly by institutional investors would lead to outsourcing of voting decisions to proxy advisors, which in turn would promote “one size fits all” standardized guidelines that would hurt firm value.\textsuperscript{59} Consistent with the concern of investor short-termism, former Chief Justice of the Supreme Court of Delaware Strine states that increasing shareholder power would leave boards increasingly subject to the “immediate whims of stockholders.”\textsuperscript{60} “Say on pay” may also serve as a shareholder vote on the company’s short-term share performance rather than on its long-term value.\textsuperscript{61} Such concerns still persist as the effects of “say on pay” reforms still remain inconclusive to date.

2. “Say on pay” and Stakeholder Influence

Perhaps the biggest shift in the corporate governance model, in which “say on pay” may be placed in the broader context, is not the shift from “managerial capitalism” to “shareholder capitalism,” but the growing trend toward a form of “accountable,” “collective” or “enlightened” capitalism insofar as broader non-shareholder stakeholder interests are increasingly taken into account in corporate decision-making.\textsuperscript{62} In 2015, the Securities and Exchange Commission (SEC) adopted a final rule pushed by labor unions pursuant to section 953(b) of the Dodd-Frank Act, which requires public companies to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Stephen M. Bainbridge, “Say on Pay” Justified?, 32 REGULATION 42, 47 (2009).
\item \textsuperscript{59} Jeffrey N. Gordon, Say On Pay: Cautionary Notes On The U.K. Experience And The Case For Shareholder Opt-In, 46 HARV. J. LEGIS. 323, 325, 353 (2009).
\item \textsuperscript{60} Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 WAKE FOREST L. REV. 761,787–88, 792 (2015).
\item \textsuperscript{61} Jill Fisch et al., Is Say on Pay All About Pay? The Impact of Firm Performance, 8 HARV. BUS. L. REV. 101 (2018).
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from 2018 unless excluded. This shift towards a more stakeholder-oriented approach has arisen as the pursuit of shareholder value is increasingly perceived to have produced negative economic outcomes, including the surge in income inequality, depressing wages and a fall in workers’ share in firm value, which have contributed to a decline in social mobility. In this regard, the SEC noted that, the pay ratio disclosure “provides an informational benefit to shareholders in their say-on-pay voting.” The rule may also be understood as an attempt to assist workers in their bargaining positions in wage negotiations rather than as a strict metric for measuring corporate performance. Such developments challenge the traditional de jure “shareholder primary” model characteristic of companies in common law jurisdictions such as the US and the UK, as opposed to the stakeholder model more prevalent in civil law jurisdictions in continental Europe.

Previously, corporate governance was viewed predominantly as the mechanism of the ordering of private interests through the “legal fiction” of the corporation, “which serves as a nexus for a set of contracting relationships” through corporate hierarchies, as argued by neo-institutional economists, that was structured in a

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64 Id. at 178.
65 Id. at 175–76.
66 John Armour et al., The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies, in THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 80, 89, 94 (Reinier Kraakman et al. eds., 2017).
67 Marina Martynova & Luc Renneboog, An International Corporate Governance Index, in THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 97, 114 (Douglas Michael Wright et al. eds., 2013). The “shareholder primacy” model posits that as shareholders are the primary beneficiaries of the company, directors should exercise their duties in the shareholders’ interest to maximize shareholder value. In contrast, the stakeholder model requires directors to take into account not only shareholders’ interests, but the interests of other stakeholders which may affect or be affected by the company, including employees, creditors, customers, suppliers and the wider community. See Shelley Marshall & Ian Ramsay, Corporate Purpose, in THE OXFORD HANDBOOK OF THE CORPORATION 168, 169 (Thomas Clarke, et al. eds., 2019) (discussing the “shareholder primacy” model and the stakeholder model as an alternative).
preferably “non-interventionist” framework of legal rules. The financial crisis, however, upended such assumptions that underpinned corporate governance as critics argued that shareholder value in the limited sense and private ordering might not in fact be the best means of promoting efficiency and corporate responsibility, and the mechanisms used to ensure management accountability might not have been effective as previously thought. The steep rises in executive compensation and income inequality witnessed during the earlier winner-takes-all capitalist culture have been well-documented. Entity shielding, coupled with the separation of ownership and control, in a limited liability corporation were understood to have produced agency costs by increasing conflicts, not simply between shareholders and managers, but also between shareholders and broader stakeholders, by providing a vehicle for externalizing the costs of corporate plundering to involuntary creditors. The risk of opportunism and rent-seeking by managers though excessive executive compensation thus came at the expense of not just shareholders but creditors and employees as well, affecting social welfare as a whole. In the wake of the financial crisis, there was broad concern that by tying executive compensation to short-term returns, remuneration packages in financial institutions had contributed to the system’s collapse by encouraging managers to take excessive risks from a social standpoint, which contributed to the moral hazard of the state bailout of failing banks. Bebchuk has thus of the firm is “the supersession of the price mechanism” which is replaced with “vertical” integration or the power of the “entrepreneur-coordinator,” who directs the allocation of corporate resources).


argued that enhanced regulation of remuneration in financial institutions is justified on the basis of moral hazard considerations, not least because systemic failure of such institutions imposes substantial costs on taxpayers.75

Others like Lipton, however, argue that it was shareholder pressure that led to short-termism in the first place.76 Shareholders were blamed in the Walker Review in the UK for acquiescing in or encouraging poor board practices to boost returns on equity, which “was not necessarily irrational from the standpoint of the immediate interests of shareholders who, in the leveraged limited liability business of a bank, receive all of the potential upside whereas their downside is limited to their equity stake, however much the bank loses overall in a catastrophe.”77 As Coffee argues, institutional shareholders, being diversified and having limited liability, are less risk adverse than managers about corporate insolvency. To “correct” the managerial tendency toward risk aversion, shareholders might have been willing to accept even imperfect compensation structures to induce managers into accepting greater risk.78

Corporate governance reforms post-crisis have therefore been premised on the need to align managerial preferences with not simply the interests of shareholders but broader stakeholders. This, however, creates a potential tension between this broader, public approach and the focus on shareholder power under the “say on pay” reforms.79 Consequently, the regulation of executive remuneration and corporate governance in general has evolved to a focal point of public interest through increasing political pressure exerted on the

78 Coffee, The Political Economy Of Dodd-Frank, supra note 70, at 1052–53.
corporation from broader corporate stakeholders (or “outsiders”) through the invocation of broader societal interests.\textsuperscript{80}

\textbf{B. Varieties of Capitalism and Regulatory Choices}

This brings into question whether overpaid managers are a distinctly American or Western problem. While CEO pay levels in the US notoriously outpace the rest of the world, this is arguably a common corporate governance problem faced by many advanced economies, including Singapore and Hong Kong. According to the Bloomberg Global CEO Index 2017, the highest paid CEOs may be found in the following countries and regions in the following order: US, Switzerland, Netherlands, UK, Canada, Germany, Australia, Spain, Hong Kong and Singapore. According to data compiled by Bloomberg, the return on equity for Singapore shareholders from 2009 to 2016 at large companies for every thousand dollars paid to a director is just 0.5%, which trailed the US and UK (at 0.8% and 1.5% respectively).\textsuperscript{81} A study of the annual reports of 541 listed companies on the SGX observed weak pay-for-performance sensitivity between Singapore CEOs’ remuneration and corporate profitability, with 21% paying bonuses despite incurring losses and 32% paying larger bonuses when the firm’s profits had declined. The same study also found that unlike US companies, only 11% of the companies surveyed utilized long-term incentive plans as part of total executive compensation.\textsuperscript{82} A similar study of the annual reports of 233 Hong Kong listed firms also found weak pay-for-performance alignment, with only 15% of the companies surveyed utilizing long-term incentive plans to incentivize CEOs to act in the firm’s long-term

\textsuperscript{80} See BUSINESS ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf \[https://perma.cc/LQB2-5RCP\]. Moving away from shareholder primacy, the “corporate purpose” has been redefined by the influential Business Roundtable in its new Statement on the Purpose of a Corporation signed by 181 CEOs, who have committed to deliver value for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders.

\textsuperscript{81} Andy Mukherjee, Singapore Boards Are Killing Value, BLOOMBERG (Apr. 8, 2016, 12:00 AM) https://www.bloomberg.com/opinion/articles/2016-04-08/singapore-boards-are-killing-value \[https://perma.cc/56BX-ACKM\].

According to the Hong Kong Confederation of Trade Unions, income inequality between corporate managers and frontline employees is also widening. One would argue from conventional theory that the liberalization of capital markets should serve as a force for regulatory convergence. On this premise, regulators in Singapore and Hong Kong—as developed financial hubs competing for listings—should support robust financial markets by taking heed of shareholder interests and ensuring that the corporate and securities legal framework minimizes the inefficient allocation of corporate resources through misaligned executive remuneration. Yet, notwithstanding the broad similarities in the corporate governance frameworks with listed companies in the US and the UK, the apparent regulatory inertia in adopting “say on pay” reforms in Singapore and Hong Kong calls for a deeper examination of their underlying institutional factors. It also calls into question the often-criticized “law matters” hypothesis that argued that common law jurisdictions provide stronger shareholder protection than civil law countries, which contributed to more developed capital markets and strong economic growth, in view of the spate of “say on pay” reforms in the latter particularly the amended Shareholder Rights Directive II introduced in the European Union.

In this regard, the “Varieties of Capitalism” theory sets out a broad framework within which different models of corporate governance may be analyzed. Firms may be seen as manifestations of their managers behind the corporate veil seeking to exploit “dynamic capabilities” and overcome coordination problems through the firm’s relationships with its primary financiers—shareholders—and broader stakeholders, particularly employees. In liberal market economies (LMEs), firms coordinate their endeavors primarily

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85 MATTHIAS M. SIEMS, CONVERGENCE IN SHAREHOLDER LAW 327–335 (2008).
through hierarchies and competitive market arrangements, while in coordinated market economies (CMEs), firms rely more heavily on non-market relations supported by public and private regulatory arrangements. This broadly corresponds with the Anglo-American common law shareholder primacy model and the continental European civil law stakeholder-oriented model. A further important leitmotif in the “Varieties of Capitalism” literature is the influence of path dependent complementarities in each capitalist model. Each model’s institutions evolve from the initial status quo in a path dependent manner to a “coordinated structure of complementary institutions driven by choices based on supernormodularity and complementarities,” which shape the likelihood and nature of change for future institutions.

A key characteristic of corporate governance, as observed by Bebchuk and Roe, is its embeddedness in domestic legal systems, in particular, in patterns of corporate ownership and interest group dynamics. In consequence, notwithstanding the internationalization of “global governance” standards, the rate and extent of convergence of legal reforms are constrained by the forces of path dependency along two distinct dimensions which are mutually reinforcing. First, from an efficiency perspective, initial conditions or “institutional complementarities” in a particular system, along with sunk adaptive costs, network externalities, endowment effects, and multiple optima, can lead the system of political economy and its corporate structures down a specific path. Second, the initial rules and corporate structures would have had distributional effects affecting the resources of incumbents in the political process. Existing corporate structures and institutional complementarities, which have developed to adapt to these structures, determine the relative efficiency of the

87 HALL & SOSKICE, supra note 16, at 8.
89 Ronald J. Gilson, From Corporate Law to Corporate Governance, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 13 (Jeffery N. Gordon & Wolf-Georg Ringe eds., 2018).
91 Id. at 153.
92 Id. at 157–59; Roe & Gordon, supra note 41, at 13.
set of rules to be adopted and maintained.\textsuperscript{93} This favors the status quo, creating rents that incumbents would fight to preserve, making it difficult to reform existing institutions to conform to the “international” model by increasing the transition costs of doing so.\textsuperscript{94} In this regard, an empirical study suggests that managers were not merely passive rule-takers of regulatory reforms and had previously lobbied rule-makers to avoid fuller disclosure of their compensation through the mandatory expensing of stock option compensation due to concerns about public scrutiny of their compensation.\textsuperscript{95}

The structural differences in the institutional political economy between LMEs and CMEs would suggest different regulatory strategies to resolve the issue of overpaid executives and the market failure of social inequality. In this respect, one would think that LMEs would rely more heavily on market forces to regulate executive remuneration. This, however, would not adequately explain the adoption of “say on pay” reforms by the US and UK (LMEs) and continental European states such as Germany and France (CMEs). At the same time, “say on pay” is consistent with a shareholder-centric approach toward corporate governance that is prevalent in LMEs. The thrust of “say on pay” reforms is less of direct government intervention in executive compensation than to reinforce market discipline by enabling better coordination between private actors insofar as shareholders, as opposed to the state, will have a say on the company’s executive remuneration.\textsuperscript{96}

At face value, Singapore and Hong Kong are arguably LMEs. In international rankings, Hong Kong and Singapore are ranked the highest in terms of economic freedom\textsuperscript{97} and the lowest in terms of the burden of government regulation, and they are among the highest in pay and productivity and flexibility of wage determination in the labor market, ahead of the US and the UK.\textsuperscript{98} Yet, there exists a wide

\textsuperscript{93} Bebchuk & Roe, supra note 90, at 131, 166.
\textsuperscript{94} Gilson, supra note 89, at 9–14.
\textsuperscript{95} Patricia M. Dechow et al., Economic Consequences of Accounting for Stock-Based Compensation, 34 J. ACCT. RES. 1, 18–19 (1996).
\textsuperscript{96} See JONATHAN MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 202–04, 275–76 (2008). Despite his criticism of shareholder democracy, “say on pay” may be seen to be a market-based mechanism, which serves to encourage executives to keep their promises to shareholders as Macey advocates.
\textsuperscript{98} WORLD ECONOMIC FORUM, supra note 26, at 266–68, 506–08.
spectrum of regulatory states and classifying them as either LMEs or CMEs does not provide us with sufficient granularity and precision in evaluating their institutional landscape and the patterns of interaction amongst actors in the political economy. It is necessary to regard the regulatory state as a dynamic as opposed to a static construct; failure to do so risks oversimplifying regulation, which is often a context-dependent socio-political phenomena as much as it is a legal one.\textsuperscript{99} Other scholars have subsequently developed and refined the “Varieties of Capitalism” theory with different typologies.\textsuperscript{100} The “Varieties of Capitalism” theory, thus, only takes us halfway—it explains how different regulatory states came to their present form but does not fully address how different regulatory states may respond to similar challenges differently,\textsuperscript{101} nor does not account for new governance patterns particularly in Asia.\textsuperscript{102} For example, is Singapore’s state-driven capitalism or Hong Kong’s close-knit corporate community an LME or CME (or a hybrid)?

III. OVERVIEW OF “SAY ON PAY” REFORMS

A. United States

In response to public concerns about the financial crisis in 2008, the US Congress placed “say on pay” on its legislative agenda and passed the Emergency Economic Stabilization Act of 2008. It required bailout recipients under the Troubled Asset Relief Program (TARP) to provide their shareholders with an advisory vote on the remuneration of the corporation’s executives in exchange for financial assistance. It also provided for limitations on remuneration, a prohibition on golden parachute payments, and claw-backs for

\textsuperscript{99} See Karen Yeung, The Regulatory State, in THE OXFORD HANDBOOK OF REGULATION 64, 75–6 (Robert Baldwin et al. eds., 2010).

\textsuperscript{100} See e.g. ALAN DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE 45–46 (2009); PETER A. GOUREVITCH AND JAMES SHINN, POLITICAL POWER AND CORPORATE CONTROL 54–56 (2007) (both discussing the “Varieties of Capitalism” theory).

\textsuperscript{101} Gilson, supra note 89, at 13–14.

senior executive officers of TARP recipients. This was extended and made mandatory for public companies by the Dodd–Frank Wall Street Reform and Consumer Protection Act, which was implemented in January 2011 by the SEC. Specifically, the SEC required public companies to conduct a shareholder advisory vote to approve the remuneration of the company’s named executive officers at least once every three years, and conduct a separate shareholder advisory vote at least once every six years to determine how regularly the “say on pay” vote should be held. In addition, companies soliciting votes to approve merger or acquisition transactions are required to disclose certain “golden parachute” compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the arrangements. The Dodd-Frank Act also provided for the independence of compensation committees and compensation consultants; the recovery of excess incentive-based compensation following the material non-compliance with any financial reporting requirement; and enhanced disclosure requirements in respect of employee or director hedging, the relationship between executive compensation and the issuer’s financial performance, and the ratio of CEO compensation to the median compensation of employees, as discussed earlier.

B. United Kingdom

The UK has historically had the most rigorous set of governance requirements with respect to executive compensation. Since 2002, listed companies have been required to submit a Directors’ Remuneration Report to the advisory vote of

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shareholders. In 2013, the Enterprise and Regulatory Reform Act 2013 was passed, under which shareholders of quoted companies must approve the directors’ remuneration policy by ordinary resolution at least once every three years and all director payments, including payment for loss of office, must be consistent with the policy or approved by shareholders if otherwise.

In a further shift towards a more stakeholder-oriented model, the Companies (Miscellaneous Reporting) Regulations 2018 was introduced, under which UK quoted companies with more than 250 UK employees would be required to publish the ratio of their CEO’s total remuneration to the median (50th), the 25th and 75th quartile pay remuneration of their UK employees in their directors’ remuneration reports. Such companies would also have to disclose supporting information, including whether the median ratio is consistent with the company’s wider employment policies. The revised Code of Corporate Governance 2018 further provides for additional responsibilities for remuneration committees to review workforce remuneration and the alignment of incentives and rewards with culture, and take these factors into account when setting the policy for executive director remuneration. Most notably, to encourage engagement with the workforce, it prescribes that the company should either have a director appointed from the workforce, a formal workforce advisory panel or a designated non-executive director (or otherwise explain what alternative arrangements it has in place and why it considers them to be effective). Most recently, the Companies (Directors’ Remuneration Policy and Directors’ Remuneration Report) Regulations 2019 extended the scope of the

108 Thomas & van der Elst, supra note 1, at 668.
112 Id. at § 5.
UK’s existing executive pay framework to cover unquoted traded companies as well as quoted companies.113

C. Australia

A non-binding shareholder vote on the directors’ remuneration report was introduced in 2004 in Australia.114 Following concerns that this did not provide shareholders with sufficient power or incentives for companies to respond to shareholder concerns, the Corporations Act 2001 (Cth) was amended after the financial crisis to provide for a new “two-strikes and re-election” process.115 The “two-strikes” occur when a company’s remuneration report receives a “no” vote twice in a row of 25% or more of the shareholder votes cast on a resolution that the remuneration report be adopted. This triggers a “spill resolution” to be put to shareholders and if shareholders vote in favor of the spill resolution, the company’s directors (other than the managing director) would be required to stand for re-election within 90 days.116

D. European Union

“Say on pay” reforms have also been passed across Europe, including France, the Netherlands, Germany, Sweden and Belgium.117 The amended Shareholder Rights Directive II, which came into force in 2017, strengthens shareholder power over management and seeks to facilitate long-term shareholder engagement and encourage greater involvement of and oversight by all stakeholders, in particular employees, as part of the company’s

117 THOMAS & VAN DER ELST, supra note 1, at 658.
corporate governance. In its preceding Green Paper consultation, the European Commission made the case for greater shareholder oversight of corporate remuneration policies by highlighting that “[p]oor remuneration policies and/or incentive structures lead to unjustified transfers of value from companies, their shareholders and other stakeholders to executives.”

Under the amended Directive, each listed company in the European Union (EU) would be required to put its remuneration policy for directors to a binding *ex ante* shareholder vote at every material change and in any case at least every four years, but member states may provide for the vote on remuneration policy to be advisory. Companies would be allowed to implement a remuneration policy which has been rejected by shareholders, but would be required to submit a revised policy at the subsequent general meeting. The amended Directive also enhanced company disclosure requirements to increase firm transparency and director accountability, and to facilitate better shareholder oversight over directors’ compensation. The remuneration policy must set out, inter alia, “how the pay and employment conditions of employees of the company were taken into account” in establishing the remuneration policy, how it contributes to the “company’s business strategy and long-term interests and sustainability,” and “criteria relating to corporate social responsibility” for the award of variable compensation. Companies are also required to hold an advisory vote on its remuneration report, which must set out the remuneration awarded in the past financial year to individual directors, as well as a comparison with the “average remuneration on a full-time equivalent basis of employees of the company other than directors over at least the five most recent

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120 *Id.*

121 *Id.*
financial years”. Where the shareholders vote against the remuneration report, boards would need to explain in their next remuneration report how they have taken into account the shareholder vote. As an alternative to a vote, member states may permit small and medium-sized companies to submit the remuneration report only for discussion in the annual general meeting instead.

E. Singapore

In its review of the Singapore Code of Corporate Governance last year, the Corporate Governance Council noted that the US, UK and Australia had introduced “say on pay” reforms. It decided, however, that “say on pay” was “not necessary in the Singapore context at this point” and that the primary responsibility to decide on compensation should rest with the Remuneration Committee and board of directors, despite proponents arguing that it would facilitate greater shareholder engagement. Instead, it considered that “it is more important for companies to provide meaningful disclosures so that stakeholders can understand the alignment in the level and structure of remuneration to the companies’ long-term objectives, business strategy and performance.” Curiously, the OECD lists Singapore as a jurisdiction with at least one “flexibility” mechanism for “say on pay,” and in its 2019 Factbook, as having a requirement for shareholder approval on remuneration policy under its listing rules.

In this regard, the SGX Mainboard Rules only requires listed companies to disclose in its annual report the remuneration of directors and key executives as recommended in the Code of Corporate Governance, or otherwise disclose and explain any

122 Id.
123 Id.
125 Id.
deviation from the recommendation. 127 The Code of Corporate Governance itself is not binding but applies on a comply-or-explain basis. It provides that the board should develop director and executive remuneration packages that are “appropriate and proportionate to the sustained performance and value creation of the company,” based on the recommendations of the Remuneration Committee, the majority of whom are independent directors. The company is also required to disclose in its annual report the names, amounts and breakdown of remuneration of each director and the CEO, and at least the top five key management personnel in bands no wider than S$250,000 and in aggregate. 128 These disclosure requirements were not made mandatory pursuant to the 2018 revision of the code notwithstanding several studies which have shown that these disclosure requirements are usually among the most poorly complied provisions of the code. 129 The revision, however, enhanced the disclosure requirements and provided for the company to set out in its annual report the names, relationship and remuneration in bands no wider than S$100,000 of employees who are substantial shareholders, or are immediate family members of a director, the CEO or a substantial shareholder, and whose remuneration exceeds S$100,000 during the year. 130

Singapore, however, has a minimal form of “say on pay”: director fees must be approved by an ordinary shareholder vote but the salary paid to an executive director is usually left by the constitution to the board to decide. 131 Compensation for loss of office or retirement by a director must also be approved by a shareholder vote, but this does not include payments that are part of the director’s remuneration package. 132 In view of these requirements, the Steering Committee, in its review of the Singapore Companies Act in 2011, took the view that the then-existing requirement for a directors’ report, including the requirement to disclose directors’ benefits therein was of little value and unnecessary, and recommended its abolishment.

127 SGX, Mainboard Rules, § 1207(12) (Sing.).
128 Code of Corporate Governance (6 August 2018), Principles 6–8 (Sing.).
130 Code of Corporate Governance (6 August 2018), Provision 8.2 (Sing.).
131 Companies Act (Cap. 50, Rev. Ed. 2006), § 169 (Sing.).
132 Companies Act (Cap. 50, Rev. Ed. 2006), § 168 (Sing.).

F. Hong Kong

Hong Kong is listed by the OECD in its 2019 Factbook as a jurisdiction that does not require shareholder approval on board and key executive remuneration.\footnote{OECD F ACTBOOK 2019, supra note 1, at 164. Cf. REFORM PRIORITIES IN ASIA, supra note 14, at 117 (in which Hong Kong was previously incorrectly listed by the OECD in 2013 as a jurisdiction in which “the law or regulations provide for the approval of executive directors’ compensation by shareholders”).} Listed companies are instead required to establish a Remuneration Committee, a majority of which must be independent directors.\footnote{HKEX, Main Board Listing Rules, (2019) § 3.25 (H.K.).} Under the Corporate Governance Code, which applies on a comply-or-explain basis, the Remuneration Committee is responsible for determining the remuneration packages of individual executive directors and senior management, or making recommendations to the board on their remuneration packages.\footnote{Id. at Appendix 14, Principle B.} Unlike Singapore, however, Hong Kong provides for a stronger form of “say on pay” and shareholder approval is required under the Listing Rules for director service contracts exceeding three years, or which require the company to give notice of more than one year or to pay compensation or other payments exceeding one year’s emoluments to terminate the contract. The Remuneration Committee (or an independent board committee) is required to advise shareholders on how to vote, and whether the terms are fair and reasonable and in the interests of the shareholders.\footnote{Id. at § 13.68.} This rule was introduced by the HKEX in 2004 in view of concerns about the lack of scrutiny of excessive director remuneration that was not sufficiently tied to corporate performance. At the same time, the HKEX considered that it was inappropriate to impose a shareholder approval requirement for the quantum of director remuneration per
A disclosure-based approach instead was considered preferable on the basis that “directors’ remuneration is essentially a commercial decision of the issuer”, which “should have the flexibility to attract, reward and motivate its directors and employees by compensation packages that the board considers appropriate.”

While this rule may have the effect as an indirect check on excessive managerial compensation (in particular golden parachute payments), it does not provide for the manner in which the director’s remuneration itself is to be determined and approved under the service contract, nor does it serve as a regular shareholder appraisal of the director’s remuneration unlike a “say on pay” vote. In this regard, pursuant to the Model Articles, the director’s remuneration under the service contract is determined by the board, while his remuneration in respect of this office as director is determined by the company at the annual general meeting even though it is common for boards in Hong Kong to obtain a shareholders’ mandate to authorize the board to decide on the latter. Under the disclosure-based approach, the Listing Rules require that a listed company disclose in its financial statements details of its directors’ remuneration on a named basis, along with the remuneration of the five highest paid individuals in the company for the financial year.

The Companies Ordinance also requires a company to disclose in its financial statements details regarding directors’ pay on a collective basis, as well as to obtain shareholders’ approval for certain payments for loss of office, and unlike Singapore, for directors’ service contracts that may exceed three years as well. The issue of “say on pay” on executive compensation was not considered during the consultations prior to the new Companies Ordinance passed in 2012.

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139 Id.
143 Id. at §§ 521–523, 534.
IV. CAPITALIST VARIATIONS IN INSTITUTIONS OF POLITICAL ECONOMY

This article argues that regulatory variances in the “say on pay” reforms adopted by various jurisdictions must be understood against the backdrop of the distinctive institutional contexts from which they emerged. Here, the basic features of the corporate model in listed companies in Singapore and Hong Kong resemble those in the US and UK—these include a one-tier board made up of executive and non-executive, and independent directors elected by shareholders and responsible for monitoring the management in the best interests of the shareholders, and the presence of remuneration, nomination and audit committees. There, however, the similarities end. It is argued that the absence of “say on pay” reforms in Singapore and Hong Kong may be attributed to broader institutional factors such as their distinctive patterns of corporate ownership, the relative reticence of institutional investors, the role of the state and ultimately the socio-political culture and ethos within a non-Western liberal democratic framework.

A. Managerial Power and Shareholding Patterns

As of 2019, the Anglo-American model of the diffusely-owned firm is not prevalent in Asia even with improvements in minority shareholder protection. Instead, there is a proliferation of different forms of ownership concentration, in particular family ownership through cross-shareholdings and pyramidal structures, and state ownership. In contrast with the prevalence of dispersed shareholdings in the US and the UK, whereby no single shareholder, or affiliated group of shareholders, is capable of exercising control, companies in Singapore and Hong Kong have a large concentration of ownership. “Say on pay” is consequently less important as a means of mobilizing shareholder opposition against high executive


remuneration in Singapore and Hong Kong. As de facto control is concentrated in the hands of block shareholders, which can effectively monitor and discipline self-serving managers, agency costs are lessened with less of a separation of firm ownership and control.\textsuperscript{147} Legal controls on executive remuneration are, in turn, less important and executive pay levels may be constrained more effectively.\textsuperscript{148}

In contrast, shareholder monitoring of executive remuneration is less effective where shareholdings are dispersed in a Berle-Means corporation as shareholders suffer from the collective action problem with information and coordination costs, and are unlikely to see substantial individual gains from a potential reduction in executive pay.\textsuperscript{149} In this regard, dispersed ownership is traditionally cited as the reason why performance pay was implemented in the first place in order to promote alignment between managerial and shareholder interests (at least in theory). However, the economic inefficiency of setting executive remuneration arising from board capture in practice in a dispersed ownership context is itself why “say on pay” was subsequently introduced, as well as to resolve the collective action problem faced by dispersed shareholders.\textsuperscript{150}

One may have a better understanding of the significance of the introduction of “say on pay” reforms in the US when they are seen in the historical context of US corporate governance. The historical dispersed nature of ownership in US corporations and ambivalence toward shareholder participation rights contributed to the primacy accorded to managers in corporate decision-making. In comparison with the more shareholder-centric UK and other common law models, including Singapore and Hong Kong’s, US shareholders have traditionally possessed far fewer corporate governance rights than their foreign counterparts, where such rights are often guaranteed by legislation.\textsuperscript{151} Under Delaware law, for example, shareholders have restricted rights on calling special meetings, removing directors and

\textsuperscript{147} Mark J. Roe, Modern Politics and Ownership Separation, in Convergence and Persistence in Corporate Governance 252, 253 (Jeffrey N. Gordon & Mark J Roe eds., 2004).
\textsuperscript{149} Ferrarini & Ungureanu, supra note 5, at 344.
\textsuperscript{150} See Bebchuk & Fried, supra note 52, at 23–52.
\textsuperscript{151} Hill, supra note 49, at 509.
initiating charter amendments, which suggest that shareholder interests are not equated with corporate interests in the way that they are in the UK (or Singapore or Hong Kong).152 US federal proxy rules were historically less concerned with managerial agency costs than the risk that a group of shareholders would gain control to the detriment of the firm’s shareholders in general, which led to rules that restrained coordination attempts amongst shareholders and insurgents seeking to gain control through proxy contests.153 The traditionally dispersed retail-oriented pattern of shareholdings in US corporations, Roe argues, is a product of its history of populist politics, which led to policies purporting to fragment institutional control of industrial enterprise.154 This insulated much of board activity from shareholder interference, rendering shareholders “spectators” rather than “participants.”155 Consequently, “say on pay” was introduced to correct this imbalance between strong managerial power and weak shareholder power and the consequent perceived agency costs which led to excessive executive compensation. At the same time, the historical nature and path dependence of “director primacy” in the US also explains why such reforms are likely to remain contentious in the US, along with broader reforms toward shareholder empowerment and participation in corporate governance.156

Singapore and Hong Kong challenge the presumption of the dispersedly-held Berle-Means corporation as the zenith of efficiency and the end of history.157 The power which block shareholders hold is greater than what “say on pay” and other shareholder protection regulation in the US and UK purport to confer on dispersed shareholders, which are designed to overcome their collective action

153 SEC Rule 13d-5, 17 C.F.R. § 240.13d-5 (2008) (This includes SEC registration and disclosure requirements for any 5% “group” of shareholders which agree to coordinate their votes). See Armour et al., The Basic Governance Structure: The Interests of Shareholders as a Class, supra note 51, at 61.
154 MARK J. ROE, STRONG MANAGERS, WEAK OWNERS 48-49 (1994); Armour et al., What is Corporate Law?, supra note 29, at 28.
155 BRUNER, supra note 152, at 38.
156 Id. See also Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 NW. U. L. REV. 547, 550–52 (2003).
problem.\textsuperscript{158} This arguably accounts for the lack of traction of “say on pay,” as with other American mechanisms for shareholder power. Singapore and Hong Kong are similar insofar as public companies are dominated by families and the state as controlling shareholders. Both share a common recent trend towards greater shareholder concentration than dispersal,\textsuperscript{159} with the recent introduction of dual-class share structures possibly perpetuating this further.\textsuperscript{160} About 75\% of listed companies on the HKEX in 2012 had a dominant shareholder, such as an individual/family or state-owned entity, which owned at least 30\% of the issued shares.\textsuperscript{161} Tracking ownership patterns in the largest 200 publicly traded companies based on market capitalization, Carney and Child found that 55.1\% remained under family control in 2008, compared with 68.3\% in 1996.\textsuperscript{162} Another empirical study found that the 10 wealthiest families in Hong Kong owned over 47\% of the total market capitalization of the HKEX in 2000.\textsuperscript{163} It was also found that 53\% of all listed companies had one shareholder or one family group of shareholders owning at least 50\% of the issued capital, with the board of directors owning at least a third of all shares in over 85\% of listed companies.\textsuperscript{164} Similarly, the majority of listed companies in Singapore had a block shareholder of 15\% or more of issued shares in 2016.\textsuperscript{165} Amongst the 100 largest firms in Singapore in 2007-2008, 69 are family-owned firms with the control block

\textsuperscript{158} See Wee & Puchniak, \textit{supra} note 12, at 365–68.

\textsuperscript{159} \textsc{David C. Donald}, \textsc{A Financial Centre for Two Empires: Hong Kong’s Corporate, Securities and Tax Laws in Its Transition from Britain to China} 54–57 (2014); Luh Luh Lan & Umakanth Varotiil, \textit{Shareholder Empowerment In Controlled Companies: The Case Of Singapore}, \textit{in Research Handbook on Shareholder Power} 572, 578 (Jennifer G. Hill & Randall S Thomas, 2015).


\textsuperscript{161} \textit{OECD Survey 2017}, \textit{supra} note 13, at 5.

\textsuperscript{162} Richard W. Carney & Travers Barclay Child, \textit{Changes to the Ownership and Control of East Asian Corporations Between 1996 and 2008: The Primacy of Politics}, 107 J. Fin. Econ. 494, 505 (2013). See Stijn, Claessens et al., \textit{The Separation of Ownership and Control in East Asian Corporations}, 58 J. Fin. Econ. 81, 106–108 (2000) (an empirical study finding that as of 1996, 66.7\% of Hong Kong’s public companies were family-owned, with corporate assets held by the largest 15 families amounting to 84\% of Hong Kong’s GDP, which was higher than all the other countries studied).

\textsuperscript{163} S.S.M. Ho, \textit{Hong Kong System of Corporate Governance, in Corporate Governance Around the World} 198, 210 (Ahmed Naciri ed., 2008).

\textsuperscript{164} \textit{Id}.

\textsuperscript{165} \textit{OECD Survey 2017}, \textit{supra} note 13, at 6.
holding an average percentage of shares of 69.52%. A separate study with a larger sample size of 692 companies listed on the SGX in 2010-2011 found that 421 companies (or 60.8% of the sample size) comprised family-owned companies. It revealed that the top five shareholders owned 65.9% of the family firm, compared to 62.7% in a non-family firm. While shareholder protections Singapore and Hong Kong are often ranked amongst the strongest in Asia, the persistence of concentrated ownership amongst families and the state is a key reason why their corporate governance has been argued to lag behind those of other high-income common law jurisdictions such as the US, UK and Australia.

In Hong Kong, there is also an increasing number of mainland Chinese state-owned enterprises (SOEs). Since 1993, Chinese SOEs have listed “H-shares” in Hong Kong and, as of 2012, comprise approximately 11% of the listed companies and over 20% of the HKEX market capitalization. Similarly, the Singapore government maintains substantial ownership of corporatized SOEs (i.e. government-linked companies (GLCs) and real estate investment trusts) through its holding company, namely, Temasek Holdings, in which it is the sole equity shareholder. From 2008 to 2013, GLCs accounted for 37% of the SGX’s market capitalization. Block

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168 Id.


171 S.H. Goo & Yu-Hsin Lin, *Hong Kong, in Corporate Governance In Asia: A COMPARATIVE APPROACH* 151, 156 (Bruce Aronson & Joongi Kim eds., 2019).


shareholders may tolerate or approve of compensation practices where they are perceived to be consistent with shareholder value maximization particularly when they manage the firms they control and set the level of their own compensation or that of their affiliated directors. Depending on the circumstances, however, the presence of concentrated ownership brings with it different agency problems, namely the risk of the expropriation of minority shareholder interests arising from conflicts of interest with the majority shareholders.

B. Institutional Shareholder Activism

Arguably, a stronger factor accounting for the advent of “say on pay” reforms in the US and UK is the rise of institutional shareholder activism, which is less commonly witnessed in Singapore and Hong Kong. While ownership structures in the US, UK, Canada and Australia still remain relatively dispersed, concentrated ownership is making inroads, with growing portfolio investment by institutional investors (i.e. pension funds, mutual funds, money managers, insurers, investment banks, commercial trusts, endowment funds, hedge funds, and private equity). This has led to increased shareholder activism which has been argued to be instrumental in the adoption of “say on pay” reforms as institutional investors seek better alignment between executive remuneration and the long-term performance of the company. In the US and UK, the twenty largest institutional owners on average hold more than 30% of issued capital in listed companies. Institutional shareholder ownership in the top 1,000 US corporations has increased from below 10% in the early 1950s to over 70%. In the UK, institutional shareholder ownership has historically been high and individual investors now hold only about 10% of listed shares, with the remainder held by institutional investors. Institutional investor ownership is also increasingly


Thomas & van der Elst, supra note 1, at 716. See also Pamela Brandes & Palash Deb, Executive Compensation and Corporate Governance: What Do We “Know” and Where Are We Going?, in THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 222, 229–230 (Douglas Michael Wright et al eds., 2013).

Ferrarini & Ungureanu, supra note 5, at 355–57.

OECD FACTBOOK 2019, supra note 1, at 17–18.

Hill, supra note 49, at 512.

Id.
important in Australia, where the introduction of a compulsory private pension system in the early 1990s had contributed to a marked increase in financial intermediaries.\textsuperscript{180} A recent OECD study about ownership in companies from 54 jurisdictions that together represent 95\% of global market capitalization found that four main categories of investors dominate shareholder ownership of today’s publicly listed companies—institutional investors, public sector owners, private corporations, and strategic individual investors, with the largest category being institutional investors, which hold 41\% of global market capitalization.\textsuperscript{181} With shareholding patterns continuing to evolve, the OECD notes that the traditional concepts of dispersed and concentrated ownership “may no longer be sufficient as a basis for understanding and adapting corporate governance frameworks to the more complex landscape of corporate ownership structures in place around the world.”\textsuperscript{182}

In principle, broader shareholder ownership by institutional investors would assist shareholders to overcome the costs of collective action in monitoring management, even though institutional investors vary considerably in their capacity and economic incentives to do so.\textsuperscript{183} In this regard, the adoption of “say on pay” in the US was precipitated in part by growing institutional shareholder activism in the wake of the dot-com bubble burst and a series of prominent governance and accounting scandals (such as Worldcom and Enron). These scandals spurred many institutional investors to take on a more active role in shareholder monitoring, catalyzing a new wave of shareholder activism.\textsuperscript{184} Since 2006, shareholder activists led by union pension funds had submitted shareholder proposals to adopt “say on pay” at hundreds of US companies in an endeavor to induce voluntary or mandatory broad-based adoption of “say on pay.”\textsuperscript{185} Further factors contributed to the reconcentration of shares from retail investors to institutional investors, including low cost diversification, retirement savings plans, tax benefits and a more permissive regulatory environment, which

\textsuperscript{180} Id.
\textsuperscript{181} OECD FACTBOOK 2019, supra note 1, at 17–18.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Fabrizio Ferri & Robert F. Cox, Executive Compensation, Corporate Governance, and Say on Pay, 12 FOUNDATIONS AND TRENDS IN ACCOUNTING 1, 58 (2018).
\textsuperscript{185} Ferri, Say on Pay, supra note 47, at 328.
facilitated institutional investors’ voting of portfolio shares and greater shareholder participation that altered the balance of power between shareholders and managers. For example, since 2003, the SEC has required investment advisers exercising voting authority over client proxies to exercise their voting rights in the best interests of clients in accordance with their fiduciary duties and disclose their proxy voting policies. An important trend has been the proliferation of stewardship codes following the financial crisis drafted on the premise that institutional investors “as ‘universal owners’ with broad economic exposure” should exercise their decision rights to ensure accountability to their beneficiaries and to promote the interests of society as a whole as stewards of the public good.

Under this premise, institutional investors are given a quasi-regulatory role with respect to executive compensation by serving as a valuable check and balance on managerial power in a dispersed ownership context in accordance with their evolving stewardship roles.

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participation at both US and foreign portfolio firms and led to a new industry of governance intermediaries (including Institutional Shareholder Services (ISS) and Glass Lewis, the two dominant global proxy advisers). These proxy advisers have been implicitly granted significant influence by regulators in shaping corporate governance policies in US public corporations and have played an important role in ensuring pay-for-performance alignment in their voting recommendations to institutional investors.

While institutional shareholders are on the rise in Singapore and Hong Kong as well, with institutional investors contributing to 55% of total market turnover on the HKEX in 2018, institutional shareholder activism remains rare and primarily an Anglo-American phenomenon (and not without its critics). Institutional shareholder activism and private ordering are generally effective only in firms with dispersed ownership structures, given that they have little prospect of challenging incumbent boards that are in the hands of controlling shareholders. The typical activist in Hong Kong owns a stake of less than 5% of the company’s equity and has to rely on solidarity with other shareholders in order to engage with management. Such activists would therefore face the same collective action problem of dispersed shareholders in monitoring management. For this reason, the introduction by the Hong Kong Securities and Futures Commission of the “Principles of Responsible Ownership” based on the UK Stewardship Code has been argued to have little effect in spurring engagement on the part of institutional shareholders.

191 Armour et al., The Basic Governance Structure: The Interests of Shareholders as a Class, supra note 51, at 61.
192 Ferrarini & Ungureanu, supra note 5, at 344.
196 James Early & Alex Pape, Why Hong Kong Should Embrace Active Investors, H.K. ECON. J. (Nov. 10, 2015), http://www.ejinsight.com/20151110-why-hong-kong-should-embrace-active-investors[https://perma.cc/W7QY-F94G] (contending that “the shorter an investor’s time horizon, the more likely he is to view himself as a renter than an owner with concerns about long-term shareholder value creation”).
While investment by Hong Kong’s mandatory pension schemes in the domestic stock market has increased over the years, such investment still forms a small proportion of their total equity investment. With just HK$2 billion on average for each pension fund scheme constituting less than 1% of market capitalization on the Hang Seng index, such schemes have been argued to have little bargaining power in influencing corporate governance. Institutional shareholder activism is perhaps even rarer in Singapore, with the market for proxy advisory firms still at a nascent stage, coupled with a government policy that goes against the grain by requiring funds managed by the sovereign wealth fund GIC to be invested overseas instead of Singapore companies. Retail investors, fund managers and institutional investors which held shares via a nominee company or custodian bank had faced a regulatory barrier to shareholder engagement as they were previously prevented from attending shareholders’ meetings due to the limit in the number of proxies at shareholder meetings, and were effectively disenfranchised. This limitation was only removed in 2016. Hedge fund activism is also almost non-existent in Singapore. Further reasons often cited for the lack of shareholder monitoring include the passivity of shareholders with a short-term trading mentality and an Asian market etiquette that discourages outright conflicts between shareholders and managers. That is not to say that shareholder activism never takes place; rather, it usually occurs

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199 Lan & Varottil, supra note 159, at 582.
201 Ministry of Finance, supra note 133, at 2–10.
202 Companies Act (Cap. 50, Rev. Ed. 2006), § 181 (Sing.).
on an ad hoc basis privately between minority and controlling shareholders or by way of extraordinary publicity campaigns to gain public support where these private engagements fail. That many of these institutional investors are foreign are also likely to hinder their effectiveness as an interest group and reduce the chances that investor-oriented laws like “say on pay” are enacted.

C. Socio-Political Culture and Role of the State

While arguably akin to LMEs in an economic sense, Hong Kong and Singapore have been described as distinct from the standard Western liberal democratic model and defined by their “corporatist” structures. In such circumstances, one may assert that Singapore and Hong Kong are more insulated from populist pressures to curb executive remuneration, wherein institutions may be designed with a view to broader economic interests and with it, the interests of corporate elites (i.e. controlling shareholders and managers) in particular. Socio-political and cultural norms against excessive executive remuneration and income inequality have served as a catalyst for pay reforms in the West. Social democracies and left-wing parties with a stronger sense of egalitarianism and distributional concerns played a role in the introduction of “say on pay” reforms in Europe. More significant is that even with LMEs such as the US and UK, the populist movements and public pressure arising from the global financial crisis have compelled legislatures to constrain board


206 Ho, supra note 197, at 453; John Armour et al., Beyond the Anatomy, in THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 268, 270 (Reinier Kraakman et al. eds., 2017).


209 Thomas & van der Elst, supra note 1, at 720–726.
power in setting executive pay.\textsuperscript{210} Despite its historical antipathy toward “socialism” (as used here in the broad sense), the recent primary debates have revealed how populist pressures have moved the Democratic Party’s center of gravity to the left, with a greater emphasis on the role of the state in regulating market economies, protecting the weakest sectors of society, reducing poverty and inequality under the capitalist framework, and strengthening labor unions.\textsuperscript{211} This parallels similar historical developments in Europe, and is in stark contrast with the traditional deregulated, everyone-for-himself, free-market American model, which had contributed to economic development in the US since the 1950s.\textsuperscript{212} Where concentrated ownership and affiliated managers are prevalent, as in the cases of Singapore and Hong Kong, however, entrenched incumbents within the firm can project their influence into the body politic to resist new regulations which would undermine their autonomy, perpetuating a path dependent political economy.\textsuperscript{213} Well-connected blockholders have been argued to be “an economic asset for firms in a politicized environment, to the extent that these ‘owners’ have more legitimacy and resources to protect their companies from political intervention than mere managers backed by dispersed shareholders could muster.”\textsuperscript{214}

In this connection, it is difficult to classify Singapore and Hong Kong as strictly LMEs or CMEs. Hong Kong’s corporate sector is defined by enterprises owned in tight social and familial networks that have cultivated longstanding relationships with the local and global banking networks for capital.\textsuperscript{215} While its stock markets are well-developed, Singapore’s capital markets are more oriented

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\item[	extsuperscript{210}] Gordon, supra note 31, at 50–52.
\item[	extsuperscript{211}] Jorge G. Castañeda, Of Course Americans Are Turning to Social Democracy, N.Y. TIMES, (Aug. 2, 2019), https://www.nytimes.com/2019/08/01/opinion/social-democracy.html [https://perma.cc/4Q9U-PF8Z]. Such recent proposals include Medicare for All or universal health care, raising the minimum wage to $15 an hour, tuition-free higher public education, and raising taxes on the wealthy.
\item[	extsuperscript{212}] Id.
\item[	extsuperscript{213}] Bebchuk & Roe, supra note 90, at 157; Coffee, The Political Economy Of Dodd-Frank, supra note 70, at 1030. Short of regulatory capture, this is akin to what Coffee terms the “Regulatory Sine Curve”—a cycle that is driven by the differential in resources, organization, and lobbying capacity, which favors those business interests determined to resist intrusive regulation.
\item[	extsuperscript{214}] Armour et al., The Basic Governance Structure: The Interests of Shareholders as a Class, supra note 51, at 75.
\item[	extsuperscript{215}] Redding et al., supra note 21, at 38–39.
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towards bank lending as compared with the US.\textsuperscript{216} The “Varieties of Capitalism” hypothesis fails to account adequately for the role of the state and the type of democracy within the capitalist system concerned.\textsuperscript{217} Both Singapore and Hong Kong are relative outliers which favor pro-business policies coupled with ownership concentration by family groups and the state. While their respective governments have been instrumental in building strong regulatory frameworks for investment and business-friendly institutions, Hong Kong remains a bastion of laissez-faire capitalism\textsuperscript{218} while Singapore is characterized by its state-driven capitalism.\textsuperscript{219} Singapore’s capitalist system therefore owes its fundamental characteristics to the economy’s strong reliance on and deep ties to foreign capital and business.\textsuperscript{220} While this would ordinarily lead to stronger pressures on the state to demonstrate credible commitments to international standards of best practice, including strong protections for shareholders, this is militated against by the pre-existing dominant structural ownership by families and the state in listed entities.\textsuperscript{221}

Both may therefore be said to have a “hybrid” capitalist model. Both polities also rank relatively low in terms of income inequality, with Singapore—which has not introduced a minimum wage—ranking among the bottom 10 countries in the world for its efforts to reduce inequality.\textsuperscript{222} The structural nature of income inequality in Hong Kong is rooted in its political environment, with its complex historical and political relationship with China,\textsuperscript{223} which has been argued to allow for disproportionate influence by corporate and economic elites, notwithstanding the democratization agenda

\textsuperscript{216} Carney, supra note 170, at 197–198.
\textsuperscript{217} Id. at 210.
\textsuperscript{218} Redding et al., supra note 21, at 50.
\textsuperscript{219} Tan et al., supra note 173, at 79–80.
\textsuperscript{221} Carney, supra note 170, at 198–199.
provided by the “One Country Two Systems” framework under its Constitution, the Basic Law.\textsuperscript{224} Hong Kong adds a new dimension to the vexed issue of the role of business in politics in a capitalist society. It has been reported that the support of business elites is pivotal to the Chief Executive’s election, with half of the seats in the legislative council reserved for specific sectors or industries comprising interest group constituencies representing predominantly business interests.\textsuperscript{225} With effective veto power over the group of directly elected lawmakers, these functional representatives have been contended to have the ability to impede policies which might affect business interests, with the result that the Hong Kong’s governance has continued to be distinctively pro-business in its outlook.\textsuperscript{226} Further, the interests of controlling shareholders or families representing the most powerful groups in Hong Kong are said to be further promoted by political connections, and the Hong Kong government has been often criticized for being too close with powerful vested business interests.\textsuperscript{227}

It is argued that any attempt to incorporate broader stakeholder (in particular, employee) interests in the design of remuneration packages, including imposing similar requirements for listed companies to disclose the ratio of the remuneration of key executives to the remuneration of employees, is unlikely in view of the existing structural frameworks in Singapore and Hong Kong’s industrial relations. Such reforms do not cohere well with Singapore’s consensus-driven policy of tripartism, which refers to the


\textsuperscript{226} \textit{Id.}

\textsuperscript{227} Ho, \textit{supra} note 197, at 448.
collaboration amongst labor unions represented by the National Trades Union Congress (NTUC), employers represented by the Singapore National Employers Federation, and the government.\textsuperscript{228} Tripartism was instituted during Singapore’s stage as a developmental state to guard against industrial strife, and manage labor costs and labor-management relations to secure a key competitive advantage for Singapore. This enabled the government to intervene in the labor market through the regulation of manpower planning, wage determination and skills upgrading.\textsuperscript{229} Under Singapore’s tripartite framework, the National Wage Council—a tripartite body consisting of representatives of employers, trade unions and the government—conducts annual deliberations to forge a “national consensus” on salary and related matters. On the basis of the tripartite consensus reached during the deliberations, it issues annual guidelines on wage-adjustment recommendations, taking into account public views and factors such as “productivity growth, employment situation, international competitiveness, and economic growth and prospects.” These guidelines are relied upon as a reference point by companies in determining salary increments for their employees.\textsuperscript{230} In Hong Kong, labor relations are described as “quiescent” and collective bargaining generally takes place only with respect to the few large and prominent organizations.\textsuperscript{231} Pay issues in Singapore and Hong Kong are dealt with against a highly fluid labor market, with the World Economic Forum’s latest Global Competitiveness Report ranking them amongst the highest in terms of hiring and firing flexibility.\textsuperscript{232} Under such frameworks, there is arguably less room for stakeholder interests in their corporate governance models than the US and UK. Singapore and Hong Kong’s CEO pay-to-average income ratio also trails the US and UK, which further militates against the likelihood of such reforms.\textsuperscript{233}


\textsuperscript{229} See generally Leggett et al., supra note 208, at 84.


\textsuperscript{231} Redding et al., supra note 21, at 42–43.

\textsuperscript{232} WORLD ECONOMIC FORUM, supra note 26, at 266–68, 506–08.

\textsuperscript{233} Fernando Duarte, It Takes a CEO Just Days to Earn Your Annual Wage, BBC (Jan. 9, 2019), https://www.bbc.com/worklife/article/20190108-how-long-it-takes-a-ceo-to-earn-
D. Corporate Culture and Confucian Capitalism

Studies increasingly affirm culture as an institution in itself, which can exert substantial influence on corporate decision-making. Cultural values between different jurisdictions may influence the level of acceptance or acquiescence of managerial remuneration packages, including the appropriate structure and amount of such packages, independent of the legal regime. Cultural orientations manifest themselves in the design of executive agreements, levels of compensation, social tolerance for economic inequality and attitudes in general toward remuneration disclosure. While “Asian values”—the notion that East Asia’s economic success in the nineties was attributed to its culture of Confucianism—was largely discredited after the Asian Financial Crisis in 1997, it is argued that they have proven their resilience in the important role they play in Singapore and Hong Kong’s corporate culture. In this connection, it is interesting to note from history an important white paper released by Singapore during the height of the “Asian values” debate, which purported to set out a set of “Shared Values” by which Singaporeans could live by. The paper highlighted, inter alia, that unlike the West, “Singapore is an Asian society” that “has always weighted group interests more heavily than individual ones” and where issues are resolved “through consensus instead of contention.” As importantly, the paper also noted that family is “the basic unit of society” and “[m]any Confucian ideals are relevant to Singapore,” in particular, the “strictly hierarchical” nature of [t]raditional Confucian family relationships,” albeit noting that “the Confucian concept of more-than-you-do-in-a-year [https://perma.cc/R62H-VFJB]. See also Anders Melin & Wei Lu, CEOs in U.S., India Earn The Most Compared With Average Workers, BLOOMBERG (Dec. 28, 2017, 9:00 AM), https://www.bloomberg.com/news/articles/2017-12-28/ceos-in-u-s-india-earn-the-most-compared-with-average-workers [https://perma.cc/DE8N-EZKP].


235 Hill, supra note 79, at 219, 221 (and accompanying endnotes).


family ties” had historically “led to nepotism.” Employing the terminology advanced by Hofstede and Schwartz, corporate culture in neo-Confucianist societies with Chinese ethnic majorities such as Singapore and Hong Kong may be characterized by paternalistic control by dominant owners, relative power distance and a sense of hierarchy limiting manager-worker interdependence. This may indirectly explain the subordination of the role of broader shareholders in capital markets and corporate governance, and the entrenchment of the relationship between ownership and control. Ruskola offered a three-fold typology of the business enterprise—liberal, Confucian and socialist. At risk of oversimplification, “liberal” firms prevalent in the West, on which the Anglo-American “theory of the firm” is premised, are organized according to the economic logic of contract, with each actor—managers, shareholders and workers—acting rationally in the pursuit of their respective self-interests and the profit incentive. In contrast, “Confucian” family firms—or what Ruskola has termed “clan corporations” —prevalent in Chinese businesses are organized on the fiduciary logic of kinship relations, which emphasize interpersonal hierarchies, long-term stability and non-confrontation, as opposed to individualism and short-term interests. The Chinese family firm has been said to have a management structure rooted in Chinese social history and tend to be run by dominant owners, who make all important decisions and are assisted by family members and trusted subordinates. Corporate decision-making is embodied by a spirit of paternalism and conveys “the Confucian ideals of responsibility downwards in exchange for disciplined obedience upwards” and “[s]ocial respect is accorded to

238 Id. at ¶¶ 41, 43, 44.
239 GEERT H. HOFSTEDE, CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 104 (2001); Shalom H. Schwartz, Culture Matters: National Value Cultures, Sources, and Consequences, in UNDERSTANDING CULTURE: THEORY, RESEARCH, AND APPLICATION 127, 136 (Robert S. Wyerm et al., 2009). Hofstede identified five value dimensions which been cited widely in studies on corporate governance, accounting and management: (i) individualism/collectivism, (ii) power distance, (iii) uncertainty avoidance, (iv) masculinity/femininity, and (v) long-term orientation (or Confucian work dynamism). Schwartz identified seven cultural value orientations based on an analysis of data across 75 countries: (i) embeddedness, (ii) hierarchy, (iii) mastery, (iv) affective autonomy, (v) intellectual autonomy, (vi) egalitarianism, and (vii) harmony.
240 Redding et al., supra note 21, at 40; Redding et al., Culture and the Business Systems of Asia, in THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 358, 366–67 (Michael A. Witt & Gordon Redding, 2014).
241 Ruskola, supra note 11, at 307.
owners, not employees.” In a leading Singapore case on the common law derivative action, the Singapore Court of Appeal inferred that the influence of family relationships on business decisions cannot be discounted in an “Asian family which still tends to be rather clan-like, especially where the ties are through blood rather than marriage.”

Any discussion of culture, however, opens a Pandora’s Box of controversies as to its implications—what does one make of the influence of “Confucian paternalism” by corporate managers in corporate decision-making and its implications for executive remuneration, for example? On the one hand, it suggests that the priority of the collective interest of the firm over self-interest would lead to self-restraint on the part of owner-managers not to extract beyond a fair share of their contribution to the firm’s value in view of the interests of other stakeholders. Donald thus argues that the limited liability company originating from the West, which was designed largely to allow a firm to transact with the financial system and investors to profit from the firm’s business, should be adjusted to reflect the distinct corporate environment of Asia. Values which a family might find important, such as firm autonomy, longevity or culture, are not taken into account in the Anglo-American corporate model which is premised on short-term value maximization of the firm. This ostensibly suggests that regulatory restrictions on managerial discretion such as “say on pay” are unnecessary because owner-managers are able to make such decisions in the best interests of the firm. While this is a compelling argument, one finds it difficult to ignore the possibility of nepotism in an environment that emphasizes family loyalty and the risks of managerial unaccountability in a paternalistic hierarchical framework based upon power distance. In an empirical study of 609 firms listed on the SGX, it was reported that companies, which disclosed employees who were family members of a director or the CEO and earned at least $50,000 in annual compensation (as required by the Singapore Code of Corporate Governance), generally also paid higher compensation to directors and key management relative to market capitalization.

242 Redding et al., supra note 21, at 41 (and accompanying endnotes).
244 See generally David C. Donald, Conceiving Corporate Governance for an Asian Environment, 12 U. PA. L. REV. 88, 92, 113 (2016) (discussing cultural values that are important to family-run firms in Asia).
revenues and total assets. Such companies with higher compensation also tended to be less transparent in their compensation disclosures.\(^\text{245}\) This, the report noted, suggested that “companies with extensive family involvement in the business are less efficient or pay higher remuneration,” and it recommended that regulators “consider requiring or recommending the disclosure of the total remuneration paid to the controlling shareholder and family members” to provide stronger safeguards against excessive compensation in founder- and family controlled firms.\(^\text{246}\) The report’s author also noted that unlike in professionally managed firms where CEO pay is generally benchmarked with peer companies of similar industry and size, in family-managed firms, family shareholders generally have a great deal of influence over compensation, with remuneration consultants and independent directors having little influence. This has often resulted in CEOs in family-managed firms receiving much higher compensation than their counterparts in professionally managed firms.\(^\text{247}\) The cultural emphasis on non-confrontation may also explain the passivity of shareholder culture particularly in Singapore, which may increase the risk of managerial opportunism and unaccountability. It has been observed that the shareholder community in Singapore does not generally monitor executive remuneration and tend to entrust the board of directors to oversee the firm in the belief that they would drive corporate performance in the firm’s best interests. Intrusive questions from shareholders are therefore the exception rather than the norm.\(^\text{248}\) In this regard, both Singapore and Hong Kong challenge Roe’s “social democracy” theory which had suggested a binary distinction between social and non-social democracies and that left-leaning social democracies induce concentrated shareholdings in order to counterbalance the


\(^{246}\) Id. at 42, 45.


influence of labor in firm management. 249 Such a hypothesis cannot explain the positions of common law countries such Singapore and Hong Kong vis-à-vis the UK and the US, where concentrated shareholdings have arisen in the former in spite of the lack of the labor influence on corporate management or stakeholder orientation in their corporate governance.

V. POLICY RESPONSES FOR SINGAPORE AND HONG KONG

So long as these institutional arrangements in Singapore and Hong Kong discussed above persist in their current forms, which seem highly probable, “say on pay” is likely to be less effective as a means of mobilizing shareholder (and broader societal) opposition against high executive pay levels. Their attendant implications for regulatory reforms are also likely to continue. In jurisdictions with concentrated ownership, controlling shareholders are liable to block legal reforms which restrict their private benefits, whereas in jurisdictions where dispersed ownership prevails, public institutions and the broader investor class are likely to have greater political influence to push for reforms to limit minority expropriation. 250 Where such path dependence persists, it is said that they can only be overcome by sufficiently large efficiency gains 251—if this is correct, the question is whether “say on pay” reforms may achieve more economically efficient outcomes on a relative basis for executive remuneration in the particular contexts examined.

As the efficacy of legal mechanisms are closely related to the extent to which principals are capable of coordinating amongst themselves, one may anticipate institutional complementarities between share ownership structures and the types of mechanisms relied on to constrain agency costs. Where such coordination costs are low, principals (i.e. controlling shareholders) are able to rely on less intrusive governance strategies to control managers, as opposed


250 Armour et al., The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies, supra note 66, at 104.

251 Bebchuk & Roe, supra note 90, at 147.
to more robust regulatory strategies.\textsuperscript{252} Not instituting “say on pay” in such circumstances makes sense not least in respect of the regulatory and compliance costs which would be incurred by firms to hold a regular shareholder vote on executive remuneration.

\textbf{A. Institutional Complementarities and Path Dependence}

In view of the prevailing institutional complementarities in Singapore and Hong Kong, in respect of which key corporate institutions complement and derive their value, introducing “say on pay” may not lead to anticipated efficiency gains but instead result in unintended consequences later. In this regard, it has been argued that several American mechanisms for shareholder power which have been transplanted to Asia, such as independent directors and derivative actions, have tended to turn into localized forms and bring unexpected consequences.\textsuperscript{253} For example, as opposed to the conception of US-style independent directors as a watchdog for dispersed minority shareholders, independent directors in family-controlled firms in Singapore might have ironically been used to reinforce controlling shareholder power by leveraging their close ties with family controllers to act as mediators in inter-family shareholder disputes and/or trusted advisors to the family chairman.\textsuperscript{254} Failure to adapt the legal rule to the local context is likely to lead to the creation of a “legal irritant” by irritating law’s “binding arrangements,” which sets off a whole chain of new and unexpected results.\textsuperscript{255}

In this regard, this article argues that such institutional complementarities in Singapore and Hong Kong include, in particular, the existing legal regime governing related-party transactions (RPTs). Currently, regulatory reforms in Singapore and Hong Kong are focused on improving the disclosure of executive remuneration and

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strengthening the regulatory framework governing independent directors as the primary means of regulating managerial power and executive pay. Strengthening the disclosure and independent director regimes may benefit minority investors to the extent that they may mitigate the information asymmetry with majority shareholders and serve as a check on insider directors. Introducing “say on pay”, however, may eliminate any benefits arising therefrom by shifting the balance in favor of controlling shareholder power. For jurisdictions characterized by controlling ownership structures, shareholder approval of remuneration is likely to be a mere formality, which would do little to curb pay, and instead further aggrandize majority shareholder power leading to the unintended consequence of permitting majority shareholder approval of excessive executive compensation at the expense of minority shareholders. At the same time, it is doubtful if strengthening the disclosure and independent director regimes alone can work sufficiently to regulate compensation practices. The different institutional settings in Singapore and Hong Kong encourage different economic incentives for executive remuneration in Singapore. While controlling shareholders are able to use non-monetary incentives to align managerial interests with those of the firm, this may have the consequence (intended or unintended) of tying managerial interests with those of the controlling shareholders. As a result, boards in controlled companies are often dominated by insiders aligned to or affiliated with controlling shareholders who lack the independent capacity to exercise effective oversight of the compensation setting process. In such circumstances, the problems revolve less around excessive compensation per se but in ensuring that effective mechanisms are in place to tie managerial incentives with the long term interests of the firm as a whole.

Further, implementing “say on pay” reforms in Singapore and Hong Kong may undermine reliance on RPTs as a regulatory tool to protect minority shareholders. The factors that appear to have led to the successful implementation of “say on pay” in the UK and Australia—including the presence of large institutional investors with

256 HKEX CONSULTATION PAPER 2002, supra note 36, at 131–33; HKEX, supra note 6, at 36; MAS, supra note 6, at 19–20, 35.
257 OECD, supra note 55, at 37.
258 Id.
259 Id.
direct contact with corporations, which are willing and able to vote against a remuneration report—do not exist to the same extent in Singapore and Hong Kong at the moment. Therefore, a “one size fits all” approach to “say on pay” is unlikely to be easily transferrable. 260 Regulators may continue to promote greater shareholder engagement, independent directors and improved corporate disclosure on remuneration practices as the less costly and more limited form of intervention, which would allow for greater flexibilities and latitude in remuneration-setting in concentrated ownership companies. 261 This may allow for greater input by minority shareholders on remuneration matters but at the same time preserve the prerogative of the board and the majority shareholders in the remuneration setting process. At the same time, however, the risks of the board becoming passive or captured by the majority shareholders increases with concentrated shareholdings. 262 This creates the separate agency risk of “tunneling” or expropriation of minority interests by controlling shareholders, 263 and by extension, negative externalities at the expense of the interests of employees, creditors and broader stakeholders.

On one view, a majority shareholder may—under certain circumstances—be better positioned to make credible commitments to workers, which may facilitate employee relations. 264 Others, however, argue that the presence of controlling shareholders increases the risk of exploitation of workers. 265 It may also be argued that with ownership and control remaining firmly in the hands of families or the state, coupled with a cultural aversion to risk-taking, owners and managers in Singapore and Hong Kong are shielded from short-term capital market pressures, such as hostile takeovers, and do not feel the same pressure to meet quarterly performance expectations in the same way as American companies, with the result that a long-

261  See Ferrarini & Ungureanu, supra note 5, at 342–45.
262  Id. at 342.
263  See Vladimir Atanasov et al., Law and Tunneling, 37 J. CORP. L. 1, 2–3 (2011).
term view of shareholder value is taken. In this regard, the presence of a block shareholder has been linked to significantly lower CEO pay. At the same time, the lack of a stakeholder orientation and a fluid labor market coupled with strong managerial and controlling shareholder power might mean that employee interests are less likely to be safeguarded in these contexts.

One, however, cannot overlook the risk of collusion between the board, management and majority shareholders. Remuneration committees may not exercise effective oversight of remuneration because they risk losing their board seats if they object or are the beneficiaries of generous remuneration packages themselves; owner-managers may in turn favor generous compensation packages to themselves and to professional managers who acquiesce to minority expropriation. This is especially since controlling shareholders are not generally subject to any fiduciary duties unless they are deemed to be acting as de facto or shadow directors. As highlighted by the OECD, the prevalence of controlling shareholders and corporate groups increases the importance of minority shareholder protection especially since related party transactions are a common business feature in Asia, which increases the possibilities of abuse. In Hong Kong, conflicts of interest are likely to arise between controlling and minority shareholders given the common overlap between controlling shareholders and board control, which increases the risks of self-dealing. In its study of 412 public-listed Hong Kong firms during 1995–1998, Cheung et al. found a positive relationship between cash

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267 Armour et al., The Basic Governance Structure: The Interests of Shareholders as a Class, supra note 51, at 67. Management literature also suggests that CEO firm ownership can create alignment with shareholder interest. See Noam Wasserman, Stewards, Agents, and the Founder Discount: Executive Compensation in New Ventures, 49 ACAD. MANAG. J. 960, 972 (2006) (Under a stewardship approach, Wasserman found that CEOs in founder-owner controlled companies received lower cash remuneration and the percentage of executive equity holdings was inversely related to cash remuneration).

268 Carney, supra note 170, at 208–09.


270 ERNEST LIM, A CASE FOR SHAREHOLDERS’ FIDUCIARY DUTIES IN COMMON LAW ASIA 13 (2019).

271 REFORM PRIORITIES IN ASIA, supra note 14, at 16.

272 See DONALD, supra note 159, at 101 (2014).
compensation received by the CEO and Chairman and their respective equity holdings for levels of shareholdings of up to 35% in small companies and 10% in large companies, with CEOs with no shareholdings receiving lower cash compensation compared with CEOs with share ownership. The results were interpreted by the authors to suggest that the presence of information asymmetry between owner-managers and external investors may induce the former to invoke their shareholder rights to extract higher compensation for themselves.  

Independent directors in Hong Kong and Singapore are also appointed with the support of controlling shareholders and are often affiliated with the incumbent directors—in such circumstances, the presence of independent directors on the board may add little value as a source of monitoring. After a certain point, it is not clear if increasing disclosure requirements and the independence of directors would be effective in the face of opposition and stonewalling by concentrated shareholders with vested interests.

B. Executive Compensation, Controlling Shareholders and Tunneling

A more nuanced analysis of controlled companies indicates that block shareholdings may either be efficient or inefficient depending on, inter alia, the effectiveness of the regulatory regime. In the case of efficient controlled shareholdings, the regulatory regime plays an important role in moderating the conduct of the block shareholders such that the benefits accruing from the ability of the block shareholders to monitor the managers are shared with the minority shareholders, and their private benefits of control do not exceed the benefits of monitoring management. On this basis, it is

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273 Yan-Leung Cheung et al., Ownership Concentration and Executive Compensation in Closely Held Firms: Evidence from Hong Kong, 12 J. FIN. ECON. 511, 512 (2005).
274 Vivienne Bath, Independent Directors in Hong Kong, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 277, 301–02, 309 (Dan W. Puchniak et al. eds., 2017).
277 Id. at 1653.
argued that in addition to strengthening the disclosure requirements of executive remuneration in Singapore and Hong Kong, a more effective regulatory tool would be to reinforce the existing requirements of *ex ante* shareholder approval of RPTs, which are designed in response to the complex family and other structures in place. An alternative would be to require a supermajority shareholder vote to approve remuneration packages to enfranchise minority shareholders.

Executive remuneration is currently generally exempt from the RPT requirements in Singapore and Hong Kong, but share options granted to a director and other relevant parties under a share option scheme of the listed issuer or any of its subsidiaries must be approved by independent non-executive directors (in the case of Hong Kong) and independent shareholders (in the case of Singapore). In this regard, in its review of the RPT regulatory framework in Hong Kong, the HKEX took cognizance of the “say on pay” requirements introduced by the SEC in the US, but emphasized the prevalence of closely-held issuers in Hong Kong which merited a different regulatory approach. A recent study on Israeli companies shows that minority veto rights are effective in constraining the pay of controller executives. Further, the current difficulties in the private enforcement of shareholder rights in Singapore and Hong

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278 Goo & Lin, supra note 171, at 164. See Australia’s “two-strikes” rule discussed above.
281 HKEX, Main Board Listing Rules, § 17.04(1) (H.K.); SGX, Mainboard Rules, §§ 853–54 (Sing.).
Kong arguably justifies the use of \textit{ex ante} governance measures with regulatory backing to empower shareholders, as opposed to \textit{ex post} regulatory strategies such as the statutory derivative action to enforce minority protection rights.\textsuperscript{284} Singapore and Hong Kong further lack strong external governance mechanisms, which can alter the balance of power against controlling shareholders, such as US-style contingency fee-based shareholder litigation and class action regimes, and an active market for corporate control.\textsuperscript{285} In Hong Kong, no listed company was faced with an unfair prejudice claim from 2004 to 2014.\textsuperscript{286} Singapore has also experienced a dearth of derivative actions against listed companies.\textsuperscript{287}

It may be argued that requiring “majority of the minority” \textit{(MoM)} approval for executive compensation imposes unnecessary regulatory costs for companies given that the requirement of \textit{ex ante} shareholder approval of RPTs are generally preserved for “significant” transactions not carried out in the ordinary course of business. In this regard, “say on pay” rules were developed separately from the general rules on self-dealing transactions by the board of directors, presumably because shareholders might otherwise have to assess transactions, which, from the point of view of the firm, are routine and not significant. As Davies noted, the exclusion of “say on pay” demonstrates that the basis of the general rules on self-dealing transactions in the UK Listing Rules is shareholder protection of large-scale firm expropriation rather than a policy of reviewing managers’ remuneration.\textsuperscript{288} It is also important to note that where the managers are (or are affiliated with) the controlling shareholders themselves, as is common in business families, executive pay would matter less as such managers would likely have other less visible means of self-aggrandizement such as through an increase in dividends or entering into ostensibly arms-length commercial


\textsuperscript{285} Lan & Varoti, \textit{supra} note 159, at 583–88.

\textsuperscript{286} Ho, \textit{supra} note 197, at 457. \textit{See also} Felix E. Mezzanotte, \textit{The Unconvincing Rise of the Statutory Derivative Action in Hong Kong: Evidence from its first Ten Years of Enforcement}, \textit{17} \textit{J. CORP. L. STUD.} 469, 496 (2017).

\textsuperscript{287} Wee & Puchniak, \textit{supra} note 12, at 336–40.

transactions with the company. The difficulty therefore for the regulatory design is deciding what are the types and thresholds of executive compensation which may be deemed “value-destroying” and “unfair” (i.e. bad for shareholders and for society as a whole), along with the necessary carve-outs, within the specific contexts in Singapore and Hong Kong, respectively, in order to avoid unnecessary regulatory costs of impeding economically efficient executive compensation.289 Such reforms may be prudent especially because of the possible increase in shareholder participation in the future with the recent promulgation of the “Principles of Responsible Ownership” in 2016 in Hong Kong and the relaxation of proxy voting in Singapore, along with the increasing internationalization of the shareholder base and changing dynamics between companies and shareholders through new technological developments.290

VI. CONCLUSION

In the preceding analysis of the current trends in “say on pay” regulation along with their implications for the traditional common law corporate model within the evolving capitalist framework, it is argued that the underlying capitalist institutions of political economy that support the regulatory state are better indicators over the prospects of the adoption and successful implementation of internationally prescribed standards governing executive remuneration. As seen, the institutional settings in Singapore and Hong Kong are very different from those in the US and UK. These include the presence of concentrated ownership by families and the state, which discourages institutional shareholder activism, as well as a socio-political culture and ethos that militate against the prospect of taking into account broader stakeholder interests in pay governance. Shareholders—particularly majority shareholders—bear the direct cost of misaligned pay and inefficient managerial incentives, and are thus incentivized to choose optimal contracts.291 If so, “say on pay” regulation can only be beneficial and economically efficient when

290 Lin, supra note 195, at 8–9.
there are market failures arising from the pre-existing institutional framework of remuneration-setting. Imposing “say on pay” without regard to these institutional factors may demonstrate credible commitments on the part of the state to international investors but pay service to constraining executive pay and promoting executive accountability. On this basis, it would be incorrect and oversimplistic to claim that “say on pay” reforms are necessary to improve corporate performance as international “global governance” standards would suggest. On the contrary, such reforms may lead to unintended regulatory consequences in Singapore and Hong Kong by either having no or little effect on restricting executive remuneration. Such reforms may even lead to shareholder acquiescence or encouragement of misaligned executive remuneration, especially considering that the efficacy of “say on pay” reforms in providing for economically efficient executive remuneration in the US and UK are still inconclusive to date.

At the same time, these same institutional factors, which militate against the likelihood of the successful regulatory adoption of “say on pay” in Singapore and Hong Kong, are also reasons why further regulatory reforms may be necessary to prevent the “tyranny of the majority (shareholder).” The presence of controlling ownership by family groups and the state give rise to the potential for separate agency costs by increasing conflicts between controlling and minority shareholders, and between shareholders and broader stakeholders (in particular, employees). In this regard, the necessity of “say on pay” reforms would depend on the extent to which executive remuneration in Singapore and Hong Kong continue to be effectively regulated in the future under the existing frameworks pursuant to the requirements relating to remuneration disclosures and independent directors, as well as the manner in which executive remuneration continue to rise out of alignment with firm value. If these trends suggest the necessity for further regulation, requiring

292 Id.
293 See Ferri & Cox, supra note 184, at 84–85.
294 Luca Enriques et al., The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies, in THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 79, 79, 106 (Reinier Kraakman et al. eds., 2017). This argument, however, does not necessarily apply with full force with respect to Singapore’s GLCs, which have been recognized for their strong corporate governance: Puchniak, Multiple Faces of Shareholder Power in Asia: Complexity Revealed, supra note 253, at 529–30.
separate MoM approval for certain prescribed thresholds and types of executive compensation which fall within the category of undesirable RPTs may serve to empower the minority to prevent potential disguised tunneling. Concurrently, this avoids the disruption of existing shareholding structures by keeping management power in the hands of controlling shareholders and possibly incentivizing them to act in the firm’s interests.295 One may also consider the possibility for the firm to conduct a separate supermajority shareholder vote to determine if minority shareholders may choose to opt-out of such a regulatory requirement on an *ex ante* basis, especially since the necessity for such MoM approval may depend from firm to firm with different business practices and the types and configuration of shareholders therein. Such *ex ante* governance measures are particularly important in view of the weaknesses of *ex post* regulatory measures currently in place in Singapore and Hong Kong, given the difficulties in shareholder litigation in both jurisdictions.296 This calls for a well-calibrated regulatory design by ensuring that the benefits of requiring MoM approval outweighs the regulatory costs of conducting a regular MoM shareholder vote for what are otherwise routine transactions which are normally carried out in the ordinary course of business.

The foregoing suggests that the presumptions underlying orthodox corporate governance theories such as the “Varieties of Capitalism” theory,298 Roe’s “social democracy” theory,299 and the “law matters” theory300 are useful only as starting points, but are insufficient on their own to explain or predict regulatory reforms, particularly in the Asian context. Ultimately, the prospect of regulatory convergence depends on the degree in which the divergences in the institutions of political economy amongst common law systems reflect variances not with reference to a standardized governance metric, but rather differences in objectives which each jurisdiction expects the corporate governance framework to

300 La Porta et al., *Law and Finance, supra* note 86, at 1149–52.
achieve. Put simply, one has to examine each corporate governance system on its own terms and not simply with respect to an overarching theory that purports to be all-encompassing. Regulatory divergences thus reflects differences in the social and economic priorities which each jurisdiction seeks to manage through the fluctuating balance of power amongst executives, investors, employees and above all, the state, within the respective corporate governance systems with reference to the diversity in historical, cultural and political contexts. This implies that corporate governance reforms should accommodate these circumstances in a manner that provides the right incentives for both entrepreneurs and investors to contribute to capital formation, the efficient use of capital and market competition. Only then would policymakers provide market participants with a sound basis to exploit new business opportunities and innovate in a globalized economy, and ensure the most economically efficient allocation of capital and corporate resources, which ultimately contribute economic value for the corporation’s stakeholders and broader society.

301 BRUNER, supra note 152, at 140–41.
302 Armour et al., The Basic Governance Structure: The Interests of Shareholders as a Class, supra note 51, at 72.
303 OECD FACTBOOK 2019, supra note 1, at 171, 174.
304 Id. at 171.