Centre for Asian Legal Studies
Faculty of Law

NUS Centre for Asian Legal Studies Working Paper 19/05

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[September 2019]

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

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'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 environments in the world for investors to do business respectively, have bucked the international trend of allowing shareholders a binding or advisory vote on the remuneration of corporate managers. 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 despite studies which have found that Singapore and Hong Kong 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 in 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 paper 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 states. It argues that this may be attributed to factors such as Singapore and Hong Kong's distinctive patterns of corporate ownership, the participation 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 regulatory reforms on 'say on pay' and theories of corporate governance in the broader context – namely, why are certain reforms not adopted in certain states, and if adopted, how effective are such reforms likely to be?

[*] Research Associate, Centre for Asian Legal Studies, Faculty of Law, National University of Singapore. This article was awarded the ICGRG Routledge Prize for the best paper submitted by a delegate at the International Conference on Unpacking the Complexity of Regulatory Governance in a Globalising World held at the Chinese University of Hong Kong. The author wishes to thank Dan W. Puchniak and Umakanth Varottil for their helpful comments and the Centre for Asian Legal Studies at the NUS Faculty of Law for its support and funding. This is a working draft which is still in the process of being revised.

I. INTRODUCTION

Executive remuneration lies at the heart of current discussions on corporate governance reforms, which has 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 time and time again been cited as reasons for many corporate failures and remain a highly controversial and politicized issue in many countries. Corporate law has generally assigned decision-making power on executive remuneration to the board of directors as part of their management authority, but as states restructure from the period of neo-liberalism preceding the global financial crisis in 2008 and take on a more progressive agenda,[2] '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 matters.[3] Populist pressures over executive compensation, which were deemed either excessive or misaligned with corporate performance, have further transformed this

[1] Randall S. Thomas & Christoph van der Elst, *Say on Pay Around the World*, 92 WASH. U. L. REV. 653 (2015). Others include Belgium, France, Germany, Sweden, and The Netherlands: *id*.
[2] David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANN. AM. ACAD. POLIT. SS. 12 (2005).
[3] Michael Klausner, *The "Corporate Contract" Today, in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 84, 84 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

from a corporate governance issue to a broader issue on social policy.[4] From this vantage point, society and not just shareholders have a stake on the issue of executive remuneration.

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.[5] This is despite studies which have found that Singapore and Hong Kong have the highest executive pay in Asia, with base salaries 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. [6] The conspicuous absence of 'say on pay' reforms in Singapore and Hong Kong despite their recognition by the World Bank to have the second- and fourth-best regulatory environments in the world for investors to do business respectively, along with a higher score on the shareholder rights index as compared with the US,[7] brings to mind the earlier debate on "Asian values" as the supposed antithesis to Western norms, which parallels the contemporary rivalry in the value systems between the US and China.[8] In the late twentieth century, "Confucian capitalism" became the rallying call in many East Asian economies, suggesting that delimiting a clear separation between the market and the family might be

[4] Guido Ferrarini & Maria Cristina Ungureanu, Executive Remuneration, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 334, 334 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[5] HKEX, CONSULTATION CONCLUSIONS: REVIEW OF THE CORPORATE GOVERNANCE CODE AND RELATED LISTING RULES (2018), https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/November-2017-Review-of-the-CG-code-and-Related-LRs/Conclusions-(July-2018)/cp2017111cc.pdf?la=en; MAS, RECOMMENDATIONS OF THE CORPORATE GOVERNANCE COUNCIL (2018), https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulatory-and-Supervisory-Framework/Corporate-Governance-of-Listed-Companies/Consultation-2018-Jan-16/Response-to-consult/Response-paper-on-Councils-recommendations.pdf.

[6] WILLIS TOWERS WATSON, 2016/2017 GLOBAL 50 REMUNERATION PLANNING REPORT (2017) [hereinafter REMUNERATION PLANNING REPORT (2017)].

[7] WORLD BANK, DOING BUSINESS, at 5, 176, 202, 212 (2019), https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.

[8] See Donald K. Emmerson, *Singapore and the "Asian Values" Debate*, 6 J. DEMOCR. 95 (1995).

difficult.[9] Singapore was one of its most forceful proponents and argued that "Asian values" were preferable to "Western" democratic norms and were essential in achieving economic growth while the West stagnates.[10]

Yet, Asia, in particular Singapore and Hong Kong, 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 UK.[11] These 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.[12] They may be said to practice a different form of 'regulatory capitalism' from their Anglo-American counterparts with respect to the regulation of executive remuneration 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.[13]

Following North's definition as a starting point, "[i]nstitutions are the humanly devised constraints that structure political, economic, and social interaction."[14] 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

[9] Teemu Ruskola, *Theorizing The Corporation: Liberal, Confucian, And Socialist Perspectives, in* THE OXFORD HANDBOOK OF THE CORPORATION (Thomas Clarke et al., 2019).
[10] Humphrey Hawksley, *Asian Values*, YALEGLOBAL ONLINE (Sep. 27, 2018), https://yaleglobal.yale.edu/content/asian-values.
[11] OECD, OECD CORPORATE GOVERNANCE FACTBOOK 2019, at 17 (2019), https://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf [hereinafter OECD FACTBOOK 2019]; OECD, OECD SURVEY OF CORPORATE GOVERNANCE FRAMEWORKS IN ASIA, at 5 (2017), https://www.oecd.org/daf/ca/OECD-Survey-Corporate-Governance-Frameworks-Asia.pdf [hereinafter OECD SURVEY 2017].
[12] See OECD, REFORM PRIORITIES IN ASIA: TAKING CORPORATE GOVERNANCE TO A HIGHER LEVEL (2013) at 13-16, https://read.oecd-ilibrary.org/governance/reform-priorities-in-asia_9789264204416-en#page1 [hereinafter REFORM PRIORITIES IN ASIA].
[13] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism, in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1 (Peter A. Hall & David Soskice eds., 2003).
[14] Douglass C. North, *Institutions*, 5 J. ECON. PERSPECT. 97, 97 (1991).

policy outcomes in the capitalist order.[15] This implies different regulatory outcomes for different societies. Governance, as defined by the World Bank, is "the process through which state and nonstate actors interact to design and implement policies within a given set of formal and informal rules that shape and are shaped by power."[16] This suggests that corporate governance is not uniform across time and space as corporate governance systems need to be understood as institutionalized power relations amongst social, economic and political actors, the different varieties of which informs our search for suitable regulatory design and alternatives.[17]

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 the one hand, and the US and UK, on the other, may be explained by the differences in the political and economic institutions between each polity. Singapore and Hong Kong present complex phenomena, which make them fascinating cases to examine – both are small entrepot Asian city-states sharing similar colonial common law institutions with the US and UK as hybrids of Chinese and Western culture but are not liberal democracies in the Western sense. They have nevertheless achieved unprecedented success in their financial institutions and economic progress, which are constantly adapting to rapid developments brought by globalization. Despite their strong rule of law and low corruption,[18] they were recently highlighted in The Economist's crony capitalism ranking, which purports to measure the extent economic elites

[15] David Levi-Faur, David, *From "Big Government" to "Big Governance"*, *in* THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012); David Levi-Faur, *The Regulatory State and Regulatory Capitalism: An Institutional Perspective*, *in* HANDBOOK ON THE POLITICS OF REGULATION (David Levi-Faur ed., 2011).

[16] WORLD BANK, WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW 3 (2017), https://www.worldbank.org/en/publication/wdr2017.

[17] Dieter Plehwe, *Modes Of Economic Governance: The Dynamics Of Governance At The National And Firm Level*, *in* THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012).

[18] WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2019 (2019) at 16, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced.pdf. Singapore and Hong Kong are ranked 13th and 16th in their rule of law respectively, behind the UK but ahead of the US.

with close relations with the government seek to profit by rent-seeking.[19] While consistently ranked as leaders in corporate governance in Asia, along with Australia, by the Asian Corporate Governance Association, it is not entirely clear if either has a world-class system of corporate governance, in particular with respect to minority shareholder protection.[20]

Nevertheless, these apparent shortcomings have not impeded the sustained economic growth miracles which have rapidly transformed two of Asia's four tiger economies (along with South 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.[21] In 2018, the HKEX attracted more shareholder capital than either the New York Stock Exchange or London Stock Exchange, leading the world in capital raised through IPOs.[22] Singapore's GDP per capita is now higher than that of the United States, and both recently topped the US as the world's most competitive economies.[23] This makes Singapore and Hong Kong fascinating subjects of study in corporate governance to ascertain the possible reasons for different regulatory approaches for apparently similar corporate governance problems, which may yield important insights for other Asian jurisdictions.

In this connection, this article critiques the "Varieties of Capitalism" theory and other similar orthodox corporate governance theories, and contributes to the existing scholarship on regulatory governance by examining the Asian corporate context which is understudied

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[19] *Planet Plutocrat*, THE ECONOMIST, Mar. 15, 2014, https://www.economist.com/international/2014/03/15/planet-plutocrat.

[20] Asian Corporate Governance Association, CG WATCH 2018 (2018) at 3, https://www.acga-asia.org/cgwatch-detail.php?id=362 [hereinafter CG WATCH 2018]; Vivienne Bath, *Independent Directors in Hong Kong*, *in* INDEPENDENT DIRECTORS IN ASIA : A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 277, 298-299 (Dan W. Puchniak et al. eds., 2017).

[21] OECD FACTBOOK 2019, *supra* note 11, *at* 19, 21.

[22] Takeshi Kihara, *Hong Kong Leads World In IPOS For 2018, Driven By Tech Listings*, NIKKEI ASIAN REVIEW, Dec. 20, 2018.

[23] Allan Akhtar, *These Are The World's Most Competitive Economies*, WORLD ECONOMIC FORUM (Jun. 5 2019), https://www.weforum.org/agenda/2019/06/singapore-and-hong-kong-have-overtaken-the-us-as-the-most-competitive-economies-heres-how-25-countries-rank/.

despite the growing economic impact of Asian companies in the fastest-growing region in the world.[24] The analysis reveals that further refinement to existing orthodox theories and metrics of corporate governance is needed. In doing so, the author contributes 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.[25] It argues that 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 this insight is critical to understanding why 'say on pay' reforms are, and are likely to remain, such contentious issues in Singapore and Hong Kong, and if eventually adopted, are unlikely to function in a similar way as compared to other common law 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 countries. Part IV examines the institutions of political economy within Singapore and Hong Kong and how they may explain this variance in the regulation between states; 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, which share "a fundamentally similar set of legal characteristics" suggests that business

[24] Kensaku Ihara & Yusho Cho, *Asia Is Home To 50% Of World's Fastest Growing Companies*, NIKKEI ASIAN REVIEW, May 9, 2019, https://asia.nikkei.com/Business/Companies/Asia-is-home-to-50-of-world-s-fastest-growing-companies2.

[25] See e.g. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, *in* COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS (Andreas M. Fleckner & Klaus J. Hopt, eds., 2013).

corporations "face a fundamentally similar set of legal problems – in all jurisdictions".[26] As leading corporate law and governance scholars have argued, economic rationality and efficiency dictates that corporate laws should face similar economically motivated pressures for reform towards the same objective.[27] "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 after the Asian financial crisis in 1997-1998 and global financial crisis in 2007-2008.[28] 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.[29]

'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. Since 'say on pay' was first introduced in the UK in 2002, there has been a remarkable diffusion of such reforms including Belgium, France, Germany, Sweden, and The Netherlands.[30] Although the trend might, at first sight, suggest regulatory convergence,

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[26] 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".

[27] *Id*. at 4.

[28] Jeffery N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 30 (Jeffery N. Gordon & Wolf-Georg Ringe eds., 2015).

[29] OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 21 (2015), https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf [hereinafter OECD PRINCIPLES 2015].

[30] Thomas & van der Elst, *supra* note 1, at 707-708.

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 the EU member states, compared to emerging market economies.[31] According to the OECD's 2019 survey, 51% of 49 countries surveyed had adopted a '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', but there is a continued trend toward increased disclosure of company remuneration policy and remuneration levels.[32]

Singapore and Hong Kong in themselves represent two such anomalies, where high remuneration is often justified on the basis of the need to attract talent to the company notwithstanding controversies arising from time to time from directors being rewarded with excessive remuneration despite poor corporate performance.[33] While the OECD regards '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 of funds available for board remuneration, but in practice, decisions concerning remuneration of individual directors and senior management are often delegated to the board.[34] In Japan, shareholder voting is only required when there is a change in the total level of board remuneration and shareholders routinely approve such requests.[35] In China, aggregate board remuneration is approved by the shareholders but they are not able to

[31] Gordon, *supra* note 28.
[32] OECD FACTBOOK 2019, *supra* note 11, at 128-130.
[33] See STEFAN H.C. LO & CHARLES Z. QU, LAW OF COMPANIES IN HONG KONG, 2018.
[34] Lee & Ko, *Corporate Governance in South Korea*, LEXOLOGY, Jul. 5, 2019, https://www.lexology.com/library/detail.aspx?g=a48c6ebf-af0b-48f5-80ea-85ea920e8313.
[35] Kaisha-hō [Companies Act], Act 86 of 26 July 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 ASIAN J. COMP. LAW 87, 89 (2018).

propose remuneration structures or policies, and shareholder voting is in any event perfunctory in the presence of prevalent concentrated ownership structures.[36]

These international regulatory developments may be better understood when evaluated in the broader context of the corporate governance framework and the wider environment beyond the corporation – which together encompass different varieties of capitalism. In this regard, North had added 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".[37] In this sense, regulatory reform requires a political consensus between the state and its key stakeholders, especially 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 their firms.[38] 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.[39] How each capitalist economy's institutions of political economy are able to negotiate these contradictions within the existing predilections of its corporate governance framework determines the regulatory outcome. Despite apparent global convergence, therefore, there are differences in how and to what extent corporate governance laws, whether hard or soft, are structured to prioritize shareholder interests against managerial

[36] Zhongguo Renmin Gongheguo Gongsifa (中华人民共和国公司法) [Company Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018) art. 38(2); Lin Lin, *Regulating Executive Compensation in China: Problems and Solutions*, 32 J.L. & COM. 207, 247 (2014).
[37] Douglass C. North, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 16 (1990).
[38] Mark J. Roe & Jeffrey N. Gordon, *Introduction, in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 1, 2-3 (Jeffrey N. Gordon & Mark J Roe eds., 2010).
[39] MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2006).

opportunism, which reflects each jurisdiction's distinctive balance of power among shareholders, managers, labor, and the state.[40]

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, it is argued, 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 countries, 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 from 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".[41] 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.[42] This primacy accorded to managerial power coincided with the expansion of globalization and the retreat of the state in its involvement

[40] Armour, *supra* note 26, at 72.

[41] STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 135 (2012) (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

[42] 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 incorporation" (8 Del. C. 1953). Similarly, the Singapore Companies Act provides that "[t]he business of a company shall be managed by, or under the direction or supervision of, the directors" (Cap. 50, Rev. Ed. 2006), § 157A(1)). Hong Kong's Model Articles for public companies states that "the business and affairs of the company are managed by the directors, who may exercise all the powers of the company" subject to the Companies Ordinance and the articles (Companies (Model Articles) Notice, L.N. 77 (2013) — L.N. 127 of 2013, E.R. 1 of 2014, 35 of 2018, Schedule 1, art. 2(1)).

with industry and economic governance, with increasingly mobile capital forcing the state to create an attractive pro-investor environment to attract international capital through low taxes, pro-business labor laws and a generally permissible regulatory environment.[43]

1. *'Say on pay' and Shareholder Empowerment*

Modern corporate governance theory credits Berle and Means with tracing the problem of the ceding of control by shareholders to professional managers over the operations in public corporations, which "produces a condition where the interests of owner and of ultimate manager may, and often do, diverge". This gives rise to the risk of corporate opportunism by managers with dispersed owners having no option to express dissent other than to exit the corporation.[44] 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.[45] The OECD Principles, thus, states:

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

[43] Richard W. Carney & Michael A. Witt, *The Role of the State in Asian Business Systems*, *in* THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 538, 540 (Michael A. Witt & Gordon Reddings eds., 2014).
[44] ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).
[45] Fabrizio Ferri, *Say on Pay*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 319, 322 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

important role in conveying the strength and tone of shareholder sentiment to the board.[46]

Apart from the adoption of 'say on pay', recent US developments include the controversial reforms of proxy access to give US shareholders stronger rights in the director nomination process for 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."[47] 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.[48] 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.[49] While this was considered to be an economically efficient solution under an "optimal contracting approach", Bebchuk and Fried 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

[46] OECD PRINCIPLES 2015, *supra* note 29.
[47] Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 562 (2019).
[48] Michael C. Jensen & Kevin J. Murphy, *CEO Incentives: It's Not How Much You Pay, But How*, HARV. BUS. REV., May-June 1990, https://hbr.org/1990/05/ceo-incentives-its-not-how-much-you-pay-but-how.
[49] Armour, *supra* note 26, at 66.

chances of arm's length bargaining.[50] On this basis, executive compensation is a manifestation of, rather than a solution to, the agency problem.[51] 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.[52] The structuring of executive compensation was thus reconceptualized post-financial crisis, when it was recognized that there are 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 overly risk-averse management.[53] In an empirical study by Geiler and Renneboog, it was found that many remuneration agreements were ineffective and promoted managerial self-dealing and profit skimming. Singapore, amongst others, 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.[54]

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 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.[55] Gordon also cautioned that the challenges of analyzing executive pay at thousands of

[50] LUCIAN A. BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004). See also Marianne Bertrand & Sendhil Mullainathan, *Are CEOs Rewarded For Luck? The Ones Without Principals Are*, 116 QUART. J. ECON. 901 (2001), which found in its study that on a "skimming model", CEO pay-for-luck is as much as pay-for-performance especially in poorly governed firms.
[51] Ferri, *supra* note 45, at 330.
[52] H.R. Rep. No. 110-88 (2007), at 3-5.
[53] OECD, CORPORATE GOVERNANCE BOARD PRACTICES: INCENTIVES AND GOVERNING RISKS 37 (2011).
[54] Philipp Geiler & Luc Renneboog, *Managerial Compensation: Agency Solution or Problem*, 11 J. CORP. L. STUD. 99, 125, 138 (2011).
[55] Stephen M. Bainbridge, *'Say on Pay' Justified?*, 32 REGULATION 42 (2009).

corporations would lead to outsourcing of voting decisions to proxy advisors, which in turn would promote one-size-fits-all compensation practices that would hurt firm value.[56] Consistent with the concern of investor short-termism, former Chief Justice of Delaware Strine stated that increasing shareholder power would leave boards increasingly subject to the "immediate whims of stockholders."[57] Such concerns still remain 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.[58] This shift towards a more stakeholder-oriented approach of corporate governance has arisen because the existing capitalist framework is under assault with the popular perception that the pursuit of shareholder value has 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.[59] Therefore, in 2015, the SEC adopted a final rule pushed by labor unions that requires certain public companies to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees from 2017,[60] along with similar developments in the UK. This rule may be

[56] Jeffrey N. Gordon, *Say On Pay; Cautionary Notes On The U.K. Experience And The Case For Shareholder Opt-In*, 46 HARV. J. ON LEGIS. 323 (2009).
[57] 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).
[58] *What Companies Are For*, THE ECONOMIST, Aug. 24-30, 2019, at 7.
[59] *Id.*
[60] SEC, Pay Ratio Disclosure, 17 C.F.R. Parts 229 and 249 (2015).

understood as a response to increasing apprehension of worker inequality in its attempt to assist workers in their bargaining positions in wage negotiations rather than as a metric for measuring corporate performance.[61] Such developments challenges the traditional de jure "shareholder primary" model characteristic of companies in common law jurisdictions such as the US and UK, as opposed to the stakeholder model prevalent in companies in civil law jurisdictions in continental Europe.[62]

Previously, corporate governance was viewed predominantly as the mechanism of the ordering of private interests through a "nexus of contracts"[63] through corporate hierarchies as argued by neo-institutional economists[64] that was embedded in a preferably "non-interventionist" framework of legal rules.[65] The financial crisis, however, upended such assumptions that underpinned corporate governance with critics arguing 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.[66] The steep rises in executive compensation and income inequality witnessed during the earlier winner-takes-all capitalist culture has been well-documented.[67] Entity shielding, coupled with the

[61] Armour, *supra* note 26, *at* 89, 94.
[62] Marina Martynova & Luc Renneboog, *An International Corporate Governance Index*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE (Douglas Michael Wright et al. eds., 2013). The "shareholder primacy" model posits that as shareholders are the primary beneficiaries of the company, directors' duties should be exercised in the shareholders' interest to maximize shareholder value. In contrast, the stakeholder model requires directors to take into account not simply 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.
[63] Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FINANC. ECON. 305 (1976), which drew on Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 21 AER 777 (1972).
[64] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985).
[65] Peer Zumbansen, *Governance: An Interdisciplinary Perspective*, in THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012). This position is traditionally advocated by the small community of libertarians such as the "Tea Party Causus" who are characterized by their skepticism and rejection of government regulation which underlies the theory that democracy is bad for economic efficiency and markets are naturally self-regulating: John C. Coffee, Jr, *The Political Economy Of Dodd-Frank: Why Financial Reform Tends To Be Frustrated And Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1025 (2012).
[66] See generally P.M. Vasudev & Susan Watson, *Introduction*, *in* CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS (P.M. Vasudev & Susan Watson eds., 2012).
[67] Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXF. REV. ECON. POLICY 283 (2005).

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 between shareholders and broader stakeholders as well, by providing a vehicle for externalizing the costs of corporate plundering to involuntary creditors.[68] 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, affecting social welfare as a whole.[69] 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 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.[70]

Others like Lipton, however, argue that it was shareholder pressure that had led to short-termism in the first place.[71] 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

[68] Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1917–26 (2013).
[69] Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247 (2010).
[70] Lucian A. Bebchuk, *How to Fix Bankers' Pay*, 139 DAEDALUS 52 (2010); Bebhuk & Spamann, *supra* note 69, *at* 255-74; Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 YALE J. ON REG. 257, 273–6 (2010).
[71] Martin Lipton, *The Proposed "Shareholder Bill of Rights Act of 2009"*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May. 12, 2009) https://corpgov.law.harvard.edu/2009/05/12/the-proposed-shareholder-bill-of-rights-act-of-2009/.

in a catastrophe."[72] 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.[73]

Convergence 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, which creates a potential tension between this broader, public approach and the focus on shareholder power under the 'say on pay' reforms.[74] 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 corporation from broader corporate stakeholders or "outsiders" (ie the public through the state) through the invocation of broader societal interests.[75]

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 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

[72] Sir David Walker, A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations 71-72 (HM Treasury 2009), https://webarchive.nationalarchives.gov.uk/+/www.hm-treasury.gov.uk/d/walker_review_261109.pdf.
[73] Coffee, *supra* note 65, *at* 338.
[74] Jennifer G. Hill, *Regulating Executive Remuneration After the Global Financial Crisis: Common Law Perspectives*, *in* Research Handbook on Executive Pay 219, 233 (Randall S. Thomas and Jennifer G. Hill eds., 2012).
[75] Zumbansen, *supra* note 65.

shareholders from 2009-2016 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).[76] Studies have also observed weak pay-for-performance alignment between Singapore CEOs' remuneration and the firm's profitability with some still getting bonuses when their firms were in the red, or were paid larger bonuses even when the firm's profits had declined.[77] Similarly, in a study of the annual reports of 233 Hong Kong listed firms, it was found that only 15% of them used long-term incentive schemes such as stock options to incentivize CEOs,[78] with its highest paid executives receiving an average of 20% higher than their US counterparts in compensation and incentives. According to the Hong Kong Confederation of Trade Unions, income disparity between corporate managers and frontline employees is also widening.[79] As developed financial hubs with increasing regulatory competition for listings, one would argue from conventional theory that the liberalization of capital markets should serve as a force for convergence as Singapore and Hong Kong regulators pay special attention to shareholder interest to ensure that corporate and securities laws support economic efficiency to attract investors and in turn economic growth through robust financial markets.[80] Yet, notwithstanding the broad similarities in the corporate governance structure with US and UK listed companies, the apparent regulatory inertia in the adoption of 'say on pay' reforms in Singapore and Hong Kong calls for a deeper examination of their underlying institutional factors and calls into question the oft-criticized "law matters" hypothesis that argued that common law jurisdictions provide stronger shareholder protection than civil law countries,

[76] Andy Mukherjee, *Singapore Boards Are Killing Value*, BLOOMBERG (Apr. 8, 2016) https://www.bloomberg.com/opinion/articles/2016-04-08/singapore-boards-are-killing-value.

[77] Siow Li Sen, *CEO Pay At Singapore-Listed Firms Not Aligned With Performance: Study*, THE BUSINESS TIMES, Sep. 14, 2017, https://www.businesstimes.com.sg/companies-markets/ceo-pay-at-singapore-listed-firms-not-aligned-with-performance-study.

[78] Benjamin Robertson, *Performance Not A Factor In Hong Kong CEO Pay Scale, Study Finds*, SOUTH CHINA MORNING POST, Jan. 24, 2014, https://www.scmp.com/business/companies/article/1412167/performance-not-factor-hong-kong-ceo-pay-scale-study-finds

[79] Jada Nagumo, *Asia's Highest Paid CEOs Trump US Execs In Pay Rankings*, NIKKEI ASIAN REVIEW, Dec. 19, 2018, https://asia.nikkei.com/Business/Business-trends/Asia-s-highest-paid-CEOs-trump-US-execs-in-pay-rankings.

[80] MATHIAS M. SIEMS, CONVERGENCE IN SHAREHOLDER LAW 327-335 (2008).

with the former associated with more developed capital markets and strong economic growth.[81]

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. In liberal market economies (LMEs), firms coordinate their endeavors primarily 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.[82] This broadly corresponds with the Anglo-American common law shareholder primacy model and the continental European civil law stakeholder-oriented model.[83] Further, an 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 regulatory choices based on supermodularity, which shape the likelihood and nature of change for future institutions.[84] At times, however, political and economic exigencies during critical junctures influence the trajectory of otherwise path-dependent regulatory reforms.

A key characteristic of corporate governance, as observed by Gordon and Roe, is its embeddedness in domestic legal systems and in particular in patterns of shareholder ownership, control, and monitoring. In consequence, notwithstanding the impact of "global

[81] Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FINANCE. 1131 (1997); Rafael La Porta et al., *Law and Finance*, 106 J. POLIT. ECON. 1113 (1998). See also the criticism of the "law matters" theory in Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 THE REVIEW OF FINANCIAL STUDIES 467 (2010).
[82] Hall & Soskice, *supra* note 13.
[83] Sigurt Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 337-360 (Peter A. Hall & David Soskice, 2001).
[84] Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffery N. Gordon & Wolf-Georg Ringe eds., 2018).

governance" standards, the rate and extent of convergence of legal rules are constrained by the forces of path-dependency along two distinct dimensions.[85] First, from an efficiency perspective, initial conditions or "institutional complementarities" in a particular system can lead the system down a specific path, which can make it difficult to reform existing institutions to conform to the "international" model by increasing the transition costs of doing so.[86] Second, an existing governance setup would have had distributional effects affecting the resources of incumbents in the political process that favors the status quo, creating rents that incumbents would fight to preserve.[87] Controlling shareholders may resist the convergence of governance institutions such as 'say on pay' that could impede various sorts of "tunneling" from minority shareholders. Thus, studies have suggested that managers were not merely passive rule-takers of regulatory reforms and lobbied rule-makers to avoid fuller disclosure of their compensation.[88]

These 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, but this 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).[89] Yet, the thrust of 'say on pay' reforms may be seen to be less of direct government intervention in executive compensation than to improve the functioning of markets and to enable better coordination between private actors insofar as shareholders, as opposed to the state, will have a say on the company's executive remuneration.

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[85] Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence of Corporate Ownership and Governance*, 52 STAN. L. REV. (1999).
[86] Gilson, *supra* note 84.
[87] Bebchuk & Roe, *supra* note 85.
[88] Patricia M. Dechow et al., *Economic Consequences of Accounting for Stock-Based Compensation*, 34 J. ACCOUNT. RES. 1 (1996).
[89] Thomas & van der Elst, *supra* note 1, *at* 707-708.

In this respect, at face value, Singapore and Hong Kong should arguably be considered LMEs. According to the Economic Freedom Index 2019, Hong Kong and Singapore are ranked the highest in terms of economic freedom, above the US and UK.[90] There are, however, a wide variety of regulatory states and classifying them as either LMEs or CMEs does not obviate the need for a closer examination at the institutional landscape and the patterns of interaction amongst actors in the political economy which often reveals significant differences between states. It is necessary to regard the regulatory state as a dynamic as opposed to a static analytical construct; failure to do so risks oversimplifying regulation, which is often a social and political phenomena that is context-dependent.[91] The original formulation of the "Varieties of Capitalism" argument had attracted much criticism, in particular the underplaying of politics and the state, particularly in the Asian context.[92] Other scholars have subsequently developed and refined the "Varieties of Capitalism" theory with different typologies.[93] 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.[94] It is useful in giving us insight into the broad patterns of governance but it does not give us granularity and precision in understanding specifics in all socio-legal phenomena. As a theory dating from the turn of the millennium, it also does not account for new governance patterns – is, for example, Singapore's state-driven capitalism or Hong Kong's close-knit corporate community an LME or CME (or a hybrid)?[95]

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[90] THE HERITAGE FOUNDATION, 2019 INDEX OF ECONOMIC FREEDOM: COUNTRY RANKINGS (2019), https://www.heritage.org/index/ranking.

[91] Karen Yeung, *The Regulatory State*, *in* THE OXFORD HANDBOOK OF REGULATION (Robert Baldwin et al. eds., 2010).

[92] See BOB HANCKÉ, ET AL. BEYOND VARIETIES OF CAPITALISM: CONFLICT, CONTRADICTION, AND COMPLEMENTARITIES IN THE EUROPEAN ECONOMY (2008) for a discussion of the criticisms of the theory.

[93] See e.g. ALAN DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE (2009); PETER A. GOUREVITCH AND JAMES SHINN, POLITICAL POWER AND CORPORATE CONTROL (2007).

[94] Christoph Knill & Jale Tosun, *Policy-making*, *in* COMPARATIVE POLITICS (Daniele Caramani ed., 2008).

[95] Mark J. Roe & Massimiliano Vatiero, *Corporate Governance and Its Political Economy*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 56 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2017).

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 which required bailout recipients to provide their shareholders with an advisory vote on the pay for the company's executives.[96] This was made mandatory for public companies by the Dodd–Frank Wall Street Reform and Consumer Protection Act,[97] which was implemented in January 2011 by the Securities and Exchange Commission (SEC). Specifically, the SEC amended the Securities Exchange Act of 1934[98], which 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.[99]

B. UNITED KINGDOM

The UK has traditionally had the most extensive set of governance requirements with respect to executive compensation in Europe. Since 2002, listed companies have been required to submit a Directors' Remuneration Report to the advisory vote of shareholders. Concerns

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See Gordon Redding et al., *Hong Kong: Hybrid Capitalism as Catalyst*, *in* THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS (Michael A. Witt & Gordon Redding, 2014).

[96] Pub. L. 110–343, 122 Stat. 3765 § 5221 (2008).

[97] Pub. L. No. 111-203, 124 Stat. 1899 § 951 (2010).

[98] Pub. L. 73–291, 48 Stat. 881, 5 U.S.C. § 78a (1934).

[99] SEC, Shareholder Approval Of Executive Compensation And Golden Parachute Compensation, 17 C.F.R. PARTS 229, 240 and 249 (2011).

were raised about the efficacy about an advisory vote, which led the UK government to legislate a binding regime.[100] In 2013, the Enterprise and Regulatory Reform Act 2013 was passed, under which quoted companies must have a directors' remuneration policy approved by shareholders 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 must be approved by shareholders if otherwise.[101]

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), 25th and 75th quartile pay remuneration of their UK employees in their directors' remuneration report. Such companies will also have to disclose supporting information, including whether the median ratio is consistent with the company's wider employment policies.[102] 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 into account when setting the policy for executive director remuneration.[103] 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.[104] Most recently, on 9 April 2019, the draft Companies (Directors' Remuneration Policy and Directors' Remuneration Report) Regulations 2019 were published which include extending the scope of the UK's existing

[100] Thomas & van der Elst, *supra* note 1.
[101] Enterprise and Regulatory Reform Act 2013, c. 24 (Eng.), http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted.
[102] Companies (Miscellaneous Reporting) Regulations 2018, 2018 No. 860 (Eng.), https://www.legislation.gov.uk/uksi/2018/860/contents/made.
[103] FRC, UK CODE OF CORPORATE GOVERNANCE (2018), §§ 33, 40.
[104] *Id.*, § 5.

executive pay framework to cover unquoted traded companies as well as quoted companies.[105]

C. AUSTRALIA

After the financial crisis, the Corporations Act 2001 (Cth) in Australia was amended to provide for a new "two-strikes and re-election" process. 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.[106]

D. EUROPEAN UNION

'Say on pay' reforms have also been passed across Europe, including France, the Netherlands, Germany, Sweden and Belgium.[107] The amended Shareholder Rights Directive II adopted in 2017 strengthens shareholder power over management. Each listed company in the European Union (EU) will be required to put its remuneration policy to a binding shareholder vote, but member states may provide for the vote on remuneration policy to be advisory. The company's remuneration report will also be subject to an advisory vote and where the shareholders vote against the remuneration report, boards will need to explain in

[105] Companies (Directors' Remuneration Policy and Directors' Remuneration Report) Regulations 2019, 2019 No. 970 (Eng.), http://www.legislation.gov.uk/uksi/2019/970/contents/made.
[106] *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth) (Austl.).
[107] Thomas & van der Elst, *supra* note 1.

their next remuneration report how they have taken into account the shareholder vote. The directive needs to be implemented by EU member states by 10 June 2019.[108]

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' but decided 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, 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".[109] Curiously, the OECD lists Singapore as a jurisdiction with at least one "flexibility" mechanism for 'say on pay', and in its 2017 Factbook, as having a requirement for shareholder approval on remuneration policy under its listing rules.[110] However, 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 deviation from the recommendation.[111] The Code of Corporate Governance is not binding but applies on a comply-or-explain basis and provides that the board should develop remuneration packages, which are appropriate

[108] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, O.J. (L 132).
[109] MAS, CONSULTATION PAPER ON RECOMMENDATION OF THE CORPORATE GOVERNANCE COUNCIL 17-18 (2018), https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulatory-and-Supervisory-Framework/Corporate-Governance-of-Listed-Companies/Consultation-2018-Jan-16/Consultation-paper-on-Corporate-Governance-Councils-recommendations.pdf.
[110] OECD, FLEXIBILITY AND PROPORTIONALITY IN CORPORATE GOVERNANCE (2018), http://www.oecd.org/corporate/flexibility-and-proportionality-in-corporate-governance-9789264307490-en.htm; OECD, OECD CORPORATE GOVERNANCE FACTBOOK 2017 (2017), https://www.oecd.org/daf/ca/OECD-Corporate-Governance-Factbook-2017.pdf.
[111] SGX, Mainboard Rules, rule 1207(12) (Sing.).

and proportionate to the sustained performance and value creation of the company, based on the recommendations of the Remuneration Committee, the majority of which should be 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.[112] These disclosure requirements were not made mandatory pursuant to the 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.[113]

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.[114] Compensation for loss of office or retirement by a director must also be approved by a shareholder vote, but this does not include payments which are part of the director's remuneration package.[115] 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 the directors' benefits therein was of little value and unnecessary, and recommended its abolishment despite similar requirements in the UK and Australia. It also introduced a new exception to remove the requirement for shareholder approval where the payment of compensation to an executive director for termination of employment does not exceed his base salary for the 3 preceding years.[116]

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[112] Code of Corporate Governance (6 August 2018), Principles 6-8.
[113] Chua Wei Hwa, *Remuneration Disclosures – Is "Comply-or-Explain" Enough?*, THE BUSINESS TIMES, Mar. 8 2018, https://www.businesstimes.com.sg/hub/boardroom-matters/remuneration-disclosures-%E2%80%93-is-%E2%80%9Ccomply-or-explain%E2%80%9D-enough.
[114] Companies Act (Cap. 50, Rev. Ed. 2006), § 169 (Sing.).
[115] Companies Act (Cap. 50, Rev. Ed. 2006), § 168 (Sing.).
[116] MINISTRY OF FINANCE, CONSULTATION PAPER: REPORT OF THE STEERING COMMITTEE FOR REVIEW OF THE COMPANIES ACT (2011), https://www.mof.gov.sg/portals/0/data/cmsresource/public%20consultation/2011/Review%20of%20Companies%20Act%20and%20Foreign%20Entities%20Act/Annex%20A%20SC%20Report%20Complete%202.pdf.

F. HONG KONG

Hong Kong is incorrectly listed by the OECD as a jurisdiction in which "the law or regulations provide for the approval of executive directors' compensation by shareholders".[117] Listed companies are instead required to establish a Remuneration Committee, a majority of which must be independent directors, which determines the remuneration packages of all executive directors and senior management, or make recommendations to the board on such remuneration packages.[118] Notably, during the consultations to the amendments of the Listing Rules, the HKEX did not consider it appropriate to impose a requirement for shareholder approval when increases in directors' remuneration exceeded a certain monetary level on the basis, inter alia, that this is essentially a commercial decision of the issuer and the board should have the flexibility to attract, reward and motivate its directors and employees by compensation packages it deems appropriate.[119] Like Singapore, however, Hong Kong provides for a minimal 'say on pay' and shareholder approval is required 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 make other payments of more than one year's emoluments to terminate the contract, which may have the effect as an indirect check on excessive managerial compensation. The Remuneration 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.[120] The Listing Rules require that a listed company disclose in its financial statements details of its directors' remuneration on a

[117] REFORM PRIORITIES IN ASIA, *supra* note 12, *at* 117.
[118] HREX, Main Board Listing Rules, rule 3.25 (H.K.); Corporate Governance Code and Corporate Governance Report, Appendix 14.
[119] HKEX, CONSULTATION PAPER ON PROPOSED AMENDMENTS TO THE LISTING RULES RELATING TO CORPORATE GOVERNANCE ISSUES (2002).
[120] HREX, Main Board Listing Rules, rule 13.68 (H.K.).

named basis, along with the remuneration of the five highest paid individuals in the company for the financial year.[121]

However, in Hong Kong, it is common for the board to obtain a shareholders' mandate to authorize the board to decide on the directors' remuneration even though the company's articles of association may provide that directors' remuneration is determined by the company at the annual general meeting.[122] The Companies Ordinance also requires the company 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.[123] It also requires a company to disclose in its financial statements details regarding directors' pay on a collective basis.[124] The issue of setting legal controls on executive remuneration was not considered during the consultations prior to the new Companies Ordinance passed in 2012.[125]

IV. CAPITALIST VARIATIONS IN INSTITUTIONS OF POLITICAL ECONOMY

This article argues that regulatory variances in the 'say on pay' reforms adopted by various countries must be understood against the backdrop of the distinctive institutional contexts from which they emerged. Here, the basic feature of the corporate model in listed companies in Singapore and Hong Kong resemble those in the US and UK, including a one-tier board separated from the operational managers and shareholders, made up of executive and non-executive (including independent) directors elected by shareholders and responsible for monitoring the management and acting in the best interests of the shareholders, and the presence of remuneration, nomination and audit committees. This suggests that the agency problems within and beyond the corporation should be similar and implies similar regulatory

[121] HREX, Main Board Listing Rules, App 16, para 24-25 (H.K.).
[122] (Companies (Model Articles) Notice, L.N. 77 (2013) — L.N. 127 of 2013, E.R. 1 of 2014, 35 of 2018, Schedule 1, art. 2(1)).
[123] Companies Ordinance, (2013) Cap. 622, 1, §§ 521-523, 534 (H.K.).
[124] *Id.*, § 383.
[125] Stefan H.C. Lo, *Corporate Governance and The New Companies Ordinance in Hong Kong*, 21 ASIA PAC. LAW REV. 267 (2013).

and governance strategies to mitigate these costs. 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 factors such as their distinctive patterns of corporate ownership, the presence of institutional investors (or lack thereof), 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, substantial differences in ownership structure persist. Even with improvements in minority shareholder protection, the Anglo-American model of the diffusely-owned firm does not predominate in Asia. Instead, there is a proliferation of different forms of ownership concentration, including family ownership through cross-shareholdings and pyramidal structures, and state ownership.[126] Unlike in the US or UK, which are characterized by dispersed shareholdings such that no single shareholder, or affiliated group of shareholders, is capable of exercising control,[127] there has always been a large concentration of ownership in Singapore and Hong Kong companies. 'Say on pay' is consequently less important as a means of mobilizing shareholder opposition against high executive remuneration in Singapore and Hong Kong. As 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.[128] Incentive pay systems are, in turn, less important and executive pay levels may be constrained more effectively.[129]

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[126] Gordon, *supra* note 28, who argues that "governance elements commonly have country-specific effects because of country-specific positive and negative complementarities, as well as substitution effects".

[127] Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FINANCE 471, 492–3 (1999). *Cf.* Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEG. STUD. 459 (2001); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001), who argue that the diverse structures of corporate ownership in the UK and US respectively are in part due to forces exogenous to corporate law.

[128] Mark J. Roe, *Modern Politics and Ownership Separation*, *in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J Roe eds., 2010).

[129] Thomas & van der Elst, *supra* note 1, *at* 712-13; Randall S. Thomas, *Explaining The International CEO Pay Gap: Board Capture Or Market Driven*?, 57 VAND. L. REV. 1171, 1215 (2004).

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.[130] Shareholders were famously portrayed by Berle and Means as a dispersed and marginalized group, in need of legal protection due to their incapacity to act collectively.[131] In this regard, just as dispersed ownership is traditionally cited as the reason why performance pay was implemented in the first place to promote alignment between managerial and shareholder interests (at least in theory), 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 to counter the inefficiencies arising from board capture, as well as to resolve the collective action problem faced by dispersed shareholders. On this basis, the presence of concentrated ownership by block shareholders increases the economic efficiency of setting executive remuneration because of the reduction in the risk of board capture by management.

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 dispersity 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.[132] Under Delaware law, for example,

[130] Ferrarini & Ungureanu, *supra* note 4.
[131] Berle & Means, *supra* note 44. See also Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990).
[132] Hill, *supra* note 47.

shareholders have restricted rights on calling special meetings, removing directors and initiating charter amendments, which suggests that shareholder interests are not equated with corporate interests in the way that they are in the UK (or Singapore or Hong Kong).[133] Federal proxy regulation was historically less concerned with managerial agency costs than the risk that a group of shareholders would gain control to the detriment of the shareholders in general, which translated into rules that discouraged insurgents seeking to gain control through proxy contests and restrained coordination attempts amongst shareholders generally.[134] Roe has argued that the traditionally retail-oriented pattern of shareholdings in US corporations was a product of its history of populist politics, which led to policies purporting to frustrate family and institutional control of industrial enterprise.[135] This insulated much of board activity from shareholder interference, rendering shareholders "spectators" rather than "participants".[136] This, along with the consequent perceived agency costs which led to excessive executive compensation, explains why 'say on pay' was introduced but also why such reforms are likely to remain contentious in the US, along with broader reforms toward shareholder empowerment and participation in corporate governance.[137]

Singapore and Hong Kong challenge the presumption that the dispersedly-held Berle-Means corporation as the zenith of efficiency and the end of history. The power which block shareholders hold is greater than what 'say on pay' and other shareholder protection regulation designed to overcome the collective action of dispersed shareholders would

[133] See CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 40-42 (2013).
[134] This includes registration and disclosure requirements for any 5% "group" of shareholders whose members agree to coordinate their votes: SEC Rule 13d-5 (17 C.F.R. § 240.13d-5 (2008)). See Armour, *supra* note 26.
[135] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS (1994).
[136] Bruner, *supra* note 133, *at* 38.
[137] *Id.*

purport to confer in the US and UK.[138] This explains why 'say on pay', as with other American mechanisms for shareholder power, have gained little traction. Singapore and Hong Kong are similar insofar as public companies are dominated by families and the state as controlling shareholders and sharing a common trend towards greater shareholder concentration than dispersal,[139] with the recent introduction of dual-class share structures possibly perpetuating this further. 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.[140] Tracking ownership patterns in the largest 200 publicly listed companies in Hong Kong, Carney and Child found that 60% remained under family control in 2008, compared with 65% in 1996.[141] 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.[142] It was also found that 53% of all listed companies had one shareholder or one family group of shareholders owning at least 50% or more of the issued capital, with the board of directors owning at least a third of all shares in over 85% of listed companies.[143] Similarly, the majority of listed companies in Singapore have a block shareholder of 15% or more in 2016.[144] Amongst the 100 largest firms in Singapore in 2007-2008, 69 are family-

[138] Meng Seng Wee & Dan W. Puchniak, *Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan W. Puchniak et al. eds., 2012)

[139] DAVID C. DONALD, A FINANCIAL CENTRE FOR TWO EMPIRES: HONG KONG'S CORPORATE, SECURITIES AND TAX LAWS IN ITS TRANSITION FROM BRITAIN TO CHINA (2014); Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment In Controlled Companies: The Case Of Singapore*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 572 (Jennifer G. Hill & Randall S Thomas, 2015).

[140] OECD SURVEY 2017, *supra* note 11, *at* 5.

[141] Richard W. Carney & Travers Barclay Child, *Changes to the Ownership and Control of East Asian Corporations Between 1996 and 2008: The Primacy of Politics*, 107 J . FINAN. ECON. 494 (2013). An empirical study found 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: Stijn, Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FINANC. ECON. 81 (2000).

[142] S.S.M. Ho, *Hong Kong System of Corporate Governance*, *in* CORPORATE GOVERNANCE AROUND THE WORLD 198, 210 (Ahmed Naciri ed., 2008).

[143] *Id*.

[144] OECD SURVEY 2017, *supra* note 11, *at* 6.

owned firms with the control block holding a mean percentage of shares of 69.52%.[145] A separate study with a larger sample size of 692 companies listed on the SGX found that 421 companies (or 60.8% of the sample size) comprised family-owned companies in 2010-2011.[146] It revealed that the top 5 shareholders owned 65.9% of the family firm, compared to 62.7% in a non-family firm.[147] While shareholder protections Singapore and Hong Kong are often ranked amongst the strongest in Asia,[148] the persistence of concentrated ownership amongst families and the state is a key reason why their corporate governance lag behind those of other high-income common law jurisdictions such as the US, UK and Australia.[149] Independent directors in Singapore were previously only required to be independent from management but not controlling shareholders, for example.

In Hong Kong, there is also an increasing number of mainland Chinese state-owned enterprises (SOEs).[150] As of the end of 2012, mainland Chinese companies represented 47% of the total number of listed companies in Hong Kong and constituted 57% of the total market capitalization.[151] Similarly, the Singapore government maintains substantial ownership of corporatized state-owned enterprises, as well as a list of wholly owned subsidiaries through its holding companies, namely, Temasek Holdings, MND Holdings and Health Corporation of Singapore, and statutory boards.[152] In 2006, the state's ownership stakes accounted for one-third of the SGX's market capitalization.[153] While executive remuneration in Hong Kong and Singapore were previously understood to be relatively low

[145] Tan Lay Hong, *Family-Owned Firms in Singapore: Legal Strategies for Constraining Self-Dealing in Concentrated Ownership Structures*, 23 SING. ACAD. LAW J. 890 (2011).
[146] DR MARLEEN DIELEMAN ET AL., SUCCESS AND SUCCESSION: A STUDY OF SGX-LISTED FAMILY FIRMS 8 (2011), https://bschool.nus.edu.sg/Portals/0/images/CGIO/Report/Asian%20Family%20Business%20Report.pdf
[147] *Id*.
[148] CG WATCH 2018, *supra* note 20.
[149] See Richard W. Carney, *Singapore: Open State-Led Capitalism*, *in* THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 193, 200 (Michael A. Witt & Gordon Redding eds., 2014).
[150] S.H. Goo & Yu-Hsin Lin, *Hong Kong*, *in* CORPORATE GOVERNANCE IN ASIA : A COMPARATIVE APPROACH 151, 156 (Bruce Aronson & Joongi Kim eds., 2019).
[151] G.Y.M. Chan, *Understanding the Enforcement Strategy for Regulating the Listing Market of Hong Kong*, 14 J. CORP. LAW STUD. 79 (2014).
[152] LINDA LOW, THE POLITICAL ECONOMY OF A CITY-STATE REVISITED (2006).
[153] A. Goldstein & P. Pananond, *Singapore Inc. Goes Shopping Abroad: Profits and Pitfalls*, 38 J. CONTEMP. ASIA (2008).

by international standards,[154] base salaries for top executives have recently exceeded their US counterparts,[155] with weak pay-for-performance alignment in Singapore.[156] A study found a positive relationship between executive compensation and large shareholdings in Hong Kong during 1995-8.[157] Large blockholders may tolerate compensation practices where they are consistent with shareholder wealth maximization especially when controlling shareholders manage the firms they control and set the level of their own compensation. This brings with it different agency problems, namely the risk of the expropriation of minority interests rather than managerial abuses.

B. INSTITUTIONAL SHAREHOLDER ACTIVISM

Perhaps 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 seen in Singapore and Hong Kong. The strong levels of portfolio investment by institutional investors, particularly in the US and UK, had led to increased shareholder activism which has been argued to be instrumental in the adoption of 'say on pay' reforms[158] to ensure better alignment between executive remuneration and the long-term performance of the company.[159] While ownership structures in the US, UK, Canada and Australia still remain relatively dispersed, concentrated ownership is making inroads, with the growing significance of institutional investors. In the US and UK, the largest 20 institutional owners on average

[154] Anders Melin & Wei Lu, *CEOs in U.S., India Earn The Most Compared With Average Workers*, BLOOMBERG, Dec. 28, 2017.
[155] REMUNERATION PLANNING REPORT (2017), *supra* note 6.
[156] Siow Li Sen, *CEO Pay At Singapore-Listed Firms Not Aligned With Performance: Study*, THE BUSINESS TIMES, Sep. 14, 2017.
[157] Yan-Leung Cheung et al., *Ownership Concentration and Executive Compensation in Closely Held Firms: Evidence from Hong Kong*, 12 J. FINANC. ECON. 511 (2005).
[158] Thomas & van der Elst, *supra* note 1. 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 229-230 (Douglas Michael Wright et al eds., 2013).
[159] Ferrarini & Ungureanu, *supra* note 4.

hold more than 30% of issued capital in listed companies.[160] Institutional shareholder ownership in the top 1,000 American companies has risen from less than 10% in the early 1950s to over 70%, while in the UK, where institutional ownership has traditionally been high, individual investors now hold only about 10% of listed equities, with the remainder in the hands of institutional investors. Institutional investor ownership is also increasingly important in Australia, where the introduction of a mandatory private pension system in the early 1990s had led to a massive rise in financial intermediation.[161] 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, namely, institutional investors, public sector owners, private corporations, and strategic individual investors, with the largest category being institutional investors, holding 41% of global market capitalization.[162] The rise of institutional investors has been driven by low cost diversification, retirement savings plans, tax benefits and a more permissive regulatory environment. With shareholding patterns continuing to evolve, the traditional concepts of dispersed and concentrated ownership, as the OECD has noted, "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".[163]

From a corporate governance perspective, broader shareholder ownership by institutional investors would in principle 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 exercise their shareholder rights.[164] In this regard, the adoption of 'say on pay' was precipitated in part by growing

[160] OECD FACTBOOK 2019, *supra* note 11, *at* 17-18.
[161] Hill, *supra* note 47, *at* 562.
[162] OECD FACTBOOK 2019, *supra* note 11, *at* 17-18.
[163] *Id*.
[164] *Id*.

institutional shareholder activism in the wake of the dot-com bubble burst and a series of 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 and a new industry of governance intermediaries (such as proxy advisors and governance ratings agencies).[165] 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'.[166] Along with the changes in the relative power of shareholders and managers following the reconcentration of shares from retail investors to institutional investors followed changes in corporate governance practices and corporate law reforms, which encouraged institutional investors' voting of portfolio shares and greater shareholder activism.[167] A rule that first covered pension funds required other asset managers to owe fiduciary duties to beneficiaries in the exercise of voting rights under their portfolio shares.[168] Further, since 2003, mutual funds have had to disclose their proxy voting policies.[169] These rules have helped to increase participation at both US and foreign portfolio firms and to standardize asset managers' views on corporate governance matters, usually in the direction of pro-shareholder policies at the portfolio company level. Importantly, such regulations have increased the demand for proxy advisory services and the influence of ISS and Glass Lewis, the two dominant global proxy advisers,[170] which have been implicitly granted significant power in shaping corporate

[165] Fabrizio Ferri & Robert F. Cox, *Executive Compensation, Corporate Governance, and Say on Pay*, 12 FOUNDATIONS AND TRENDS IN ACCOUNTING 61-63 (2018).
[166] Fabrizio Ferri, *Say On Pay*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 320, 328 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[167] As a result, the US is "nowadays much less of a poster child for managerialist corporate law than in the past": Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1917–26 (2013).
[168] See e.g. Robert B. Thompson, *The Power of Shareholders in the United States*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 441, 451 (Jennifer G. Hill & Randall S. Thomas, 2015).
[169] SEC, Proxy Voting by Investment Advisers, Release No. IA-2106, 68 FR 6585 (7 Feb. 2003).
[170] Armour, *supra* note 26, *at* 61.

governance policies in the US by regulators and have played an important role in ensuring pay-for-performance alignment in their voting recommendations to institutional investors.[171]

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,[172] institutional shareholder activism remains rare and primarily an Anglo-American phenomenon (which is not without its critics such as Lipton).[173] Institutional shareholder activism and private ordering are generally effective only in firms with dispersed ownership structures,[174] given that they have little prospect of challenging incumbent boards that are in the hands of controlling shareholders.[175] 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.[176] While investment by Hong Kong's mandatory pension schemes in the local equities market has risen over the years, such investment still represents a small portion of their total equity investment. With only HK$2 billion on average per pension fund scheme making up less than 1% of market capital on the Hang Seng index, such schemes have therefore been argued to have little bargaining power in influencing corporate governance.[177] Institutional shareholder activism is perhaps even rarer in Singapore, with the market for proxy advisory firms nascent, if not non-existent,[178] coupled with a government policy that goes against the grain by requiring funds managed by the sovereign wealth fund

[171] Ferrarini & Ungureanu, *supra* note 4.
[172] HKEX, CASH MARKET TRANSACTION SURVEY 2018 (FULL REPORT) 1 (2018), https://www.hkex.com.hk/-/media/HKEX-Market/News/Research-Reports/HKEX-Surveys/Cash-Market-Transaction-Survey-2018/cmts2018_fullreport.pdf?la=en.
[173] See Stephen Foley, *Shareholder Activism: Battle For The Boardroom*, FINANCIAL TIMES, Apr. 24, 2014, https://www.ft.com/content/a555abec-be32-11e3-961f-00144feabdc0.
[174] Brian R. Cheffins & John Armour, *The Past, Present, And Future Of Shareholder Activism By Hedge Funds*, 37 J. CORP. L. 51 (2011).
[175] Yu-Hsin Lin, *When Activists Meet Controlling Shareholders in the Shadow of the Law: A Case Study of Hong Kong*, 14 ASIAN J. COMP. LAW 1 (2019).
[176] John Kong Shan Ho, *Bringing Responsible Ownership To The Financial Market Of Hong Kong: How Effective Could It Be?*, 16 J. CORP. LAW STUD. 437 (2016).
[177] Bryane Michael & S.H. Goo, *Corporate Governance and its Reform in Hong Kong: A Study in Corporate Governance*, 15 CORPORATE GOVERNANCE 444, 454-455 (2015).
[178] Lan & Varottil, *supra* note 139.

GIC, pension fund Central Provident Fund and state investment firm Temasek Holdings to be invested overseas instead of the local market.[179] Retail investors, fund managers and institutional investors who 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.[180] This limitation was only removed in 2016.[181] Hedge fund activism is also almost non-existent in Singapore.[182] Further reasons for the lack of demand for increased shareholder monitoring include the passivity of shareholders with a short-term trading mentality, and an Asian market etiquette that frowns against outright confrontation between shareholder and manager.[183] Institutional shareholder concentration has been argued to serve as a substitute for board monitoring, leading to lower executive compensation and stronger better pay-for-performance sensitivity.[184] However, the typical activist in Hong Kong has a stake of less than 5% of the company's equity and has to rely on other shareholders' solidarity to engage with management. Such activists would therefore face the same collective action problem of disperse shareholders in monitoring management.[185] That is not to say that shareholder activism never takes place; rather, it

[179] Yap Shi Wen, *It's Time To Consider Injecting CPF Capital Into The Singapore Bourse*, BUSINESS TIMES, Nov. 30, 2018, https://www.businesstimes.com.sg/opinion/its-time-to-consider-injecting-cpf-capital-into-the-singapore-bourse.

[180] MINISTRY OF FINANCE, CONSULTATION PAPER: REPORT OF THE STEERING COMMITTEE FOR REVIEW OF THE COMPANIES ACT (2011), https://www.mof.gov.sg/portals/0/data/cmsresource/public%20consultation/2011/Review%20of%20Companies%20Act%20and%20Foreign%20Entities%20Act/Annex%20A%20SC%20Report%20Complete%202.pdf.

[181] Companies Act (Cap. 50, Rev. Ed. 2006), § 181 (Sing.).

[182] Jerry Koh, *Shareholder Activism And How Directors Can Respond*, SINGAPORE INSTITUTE OF DIRECTORS' CONFERENCE 2014: TOWARDS THE NEW CAPITALISM (2014), http://www.eguide.sid.org.sg/images/SIDeGuide/articles/Conference/2014-Shareholder%20Activism%20&%20how%20Directors%20respond.pdf.

[183] Redding et al., *supra* note 95; John Adebiyi, *Recent Shareholder Activism in Asia Could Signal Changing Attitudes*, SKADDEN'S 2016 INSIGHTS - GLOBAL M&A (2016).

[184] Vidhi Chhaochharia & Yaniv Grinstein, *CEO Compensation and Board Structure*, 64 J. FINANCE. 231 (2009). See also Jay C. Hartzell & Laura T. Starks, *Institutional Investors and Executive Compensation*, 58 J. FINANCE. 2351 (2003).

[185] James Early & Alex Paper, *Why Hong Kong Should Embrace Active Investors*, HONG KONG ECONOMIC JOURNAL (Nov. 10, 2015), http://www.ejinsight.com/20151110-why-hong-kong-should-embrace-active-investors/, who contend 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".

usually takes place on an ad hoc basis behind closed doors between minority and controlling shareholders or extraordinary campaigns to gain public support where these interactions fail.[186] That many of these institutional investors in Singapore and Hong Kong 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.[187]

C. SOCIO-POLITICAL CULTURE AND ROLE OF THE STATE

Non-liberal democracies like Singapore and Hong Kong are arguably more insulated from populist pressures to curb executive remuneration, and institutions may be designed with a view to the interests of corporate elites (ie controlling shareholders and managers), which may differ from broader social (or populist) interests. In the West, socio-political and cultural norms against excessive executive remuneration and income inequality have served as a catalyst for pay reforms. 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.[188] More significant is that even 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 power in setting executive pay.[189] Despite its historical antipathy toward "socialism" (as used here in the broad sense), the recent Democratic debates have revealed how populist pressures have moved the party's center of gravity 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

[186] Lin, *supra* note 175. See e.g. Kelvin Koh & Niklas Wong, *Giving a voice to minority shareholders*, TODAY (Jan. 9, 2019).
[187] Ho, *supra* note 176; Armour, *supra* note 26, *at* 270.
[188] Thomas & van der Elst, *supra* note 1, *at* 707-708.
[189] Gordon, *supra* note 28.

framework, protecting the environment and strengthening labor unions.[190] 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.[191]

Where concentrated ownership and affiliated managers exist, as in the cases of Singapore and Hong Kong, however, entrenched incumbents within the firm can project their influence into the polity to resist new regulations which would undermine their autonomy, perpetuating a path-dependent political economy.[192] 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."[193] In this respect, it is difficult to classify Singapore and Hong Kong as strictly LMEs or CMEs. For Hong Kong, lying at the base of the corporate pyramid are large numbers of closely-held small and medium-sized enterprises (SMEs), which are owned in tight social networks such as families that have cultivated longstanding relations with local banks for capital, with local banks permitted to take equity.[194] The "Varieties of Capitalism" hypothesis also fails to account adequately for the role of the state and the level of democracy within the capitalist system concerned.[195] Both Singapore and Hong Kong are neither autocracies nor liberal democracies in the Western sense. They are listed as 'flawed democracies' by the Economist Intelligence Unit's Democracy 2018 index, and are considered less democratic than other high-income countries such as the US and UK, and those with small open economies such as

[190] Jorge G. Castañeda, *Of Course Americans Are Turning to Social Democracy*, N.Y. TIMES, Aug. 2, 2019. Such recent proposals include Medicare for All or universal health care, raising the minimum wage to $15 an hour, tuition-free higher public education, raising taxes on the wealthy, and the Green New Deal.
[191] *Id*.
[192] Bebchuk & Roe, *supra* note 85.
[193] Armour, *supra* note 26, *at* 75.
[194] Redding et al., *supra* note 95.
[195] Carney, *supra* note 149.

Sweden and Switzerland, and Taiwan and South Korea.[196] Both are relatively outliers with political ideologies favoring pro-business policies by corporatist governments 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,[197] while Singapore is characterized by its state-driven capitalism.[198] Tan argues that the "ideology of pragmatism" manifested itself within the dynamics of "political hegemony" which enabled the Singapore government to manage the discourse of survival and success in the ability of the Singapore model, as a viable alternative to Western liberal democracy, to attract global capital and generate economic growth in a period of neo-liberal globalization.[199] Singapore's capitalist system therefore owes its fundamental characteristics to the economy's strong reliance on and deep ties to foreign capital and business. While this would ordinarily lead to stronger pressures on the state to demonstrate credit commitments to international standards of best practice, including strong protections for shareholders, this is militated against retaining dominant structural ownership by local families and the state in listed entities. While its stock markets are well developed, Singapore companies are also more oriented towards bank lending as compared with US companies, which is consistent with the government's "paternalistic" guidance of local businesses.[200]

Both may therefore be said to have a "hybrid" capitalist model. Both polities 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

[196] THE ECONOMIST INTELLIGENCE UNIT'S DEMOCRACY INDEX (2018), https://infographics.economist.com/2019/DemocracyIndex/.
[197] Redding et al., *supra* note 95.
[198] Tan Cheng-Han et al., *Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform*, 28 COLUM. J. ASIAN L. 61 (2014).
[199] Kenneth Paul Tan, *The Ideology of Pragmatism: Neo-liberal Globalisation and Political Authoritarianism in Singapore*, 42 J. CONTEMP. ASIA (2012).
[200] Carney, *supra* note 149, *at* 198-199.

inequality.[201] The structural nature of the rising income gap and housing prices in Hong Kong are rooted in the political environment of Hong Kong, which allows for disproportionate influence by various economic and political elites, notwithstanding the democratization agenda provided by the 'One Country Two Systems' framework and its (mini-) Constitution. It has been reported that the support of business tycoons is pivotal to the Chief Executive's election, with half of the seats in the legislative council reserved for narrow sectors or industries comprising interest group constituencies representing predominantly business interests.[202] With these functional representatives having effective veto power over the group of directly elected legislators, they have the ability to obstruct policies which might harm business interests, with the result that the governance of Hong Kong have continued to carry a strong pro-business flavor.[203] Further, the interests of controlling shareholders or families representing the most powerful groups in Hong Kong are sometimes further promoted by political connections, and the Hong Kong government has been often criticized for being too close with powerful vested business interests.[204] Therefore, given the close cooperation between the state and corporate groups in both polities, coupled with the dominance of controlling shareholders and lack of activism on the part of investors, it is not surprising that 'say on pay' reforms have yet to gain traction in Singapore and Hong Kong.

Moreover, it is argued that any attempt to impose 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 corporatist frameworks in Singapore and Hong Kong which prioritizes employers' interests. Such reforms are inconsistent with Singapore's policy

[201] OXFAM INTERNATIONAL, THE COMMITMENT TO REDUCING INEQUALITY INDEX 2018 (2018), https://www.oxfam.org/en/research/commitment-reducing-inequality-index-2018.
[202] LEO F. GOODSTADT, UNEASY PARTNERS: THE CONFLICT BETWEEN PUBLIC INTEREST AND PRIVATE PROFIT IN HONG KONG (2005). See also Alexandra Stevenson & Jin Wu, *Tiny Apartments and Punishing Work Hours: The Economic Roots of Hong Kong's Protests*, N.Y. TIMES, Jul. 22, 2019, https://www.nytimes.com/interactive/2019/07/22/world/asia/hong-kong-housing-inequality.html.
[203] Mathew Wong, *Political Economy of Hong Kong: Income Inequality and Housing Issues*, ASIA DIALOGUE, June 30, 2017, https://theasiadialogue.com/2017/06/30/political-economy-of-hong-kong-income-inequality-and-housing-issues/.
[204] Ho, *supra* note 176, *at* 448.

of tripartism, which refers to the collaboration amongst labor unions represented by the National Trades Union Congress (NTUC), employers represented by the Singapore National Employers Federation, and the government.[205] 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 resulted in restrictions in collective bargaining by labor unions as union leaders were co-opted into the government's tripartite framework, which enabled the government to intervene in the labor market through the regulation of manpower planning, wage determination and skills upgrading. An indirect result of this framework is that employee relations are relatively quiescent.[206] Carney argues that this framework enables the government to introduce pro-employer policies in a top-down manner which distinguishes it from other small and corporatist OECD countries such as Switzerland and Austria.[207] Similarly, in Hong Kong, collective bargaining rights are rare and union representatives are generally involved only in negotiations with few well-known organizations. In most SMEs, labor relations have been described as "personalistic" rather than formally institutionalized, and strikes are uncommon, with employment issues dealt with against a highly fluid labor market.[208] Singapore is thus classified by Carney as an LME but with a "personalized" form of business system,[209] and there are arguably less room for stakeholder interests in its corporate model than the US and UK. That Singapore and Hong Kong's CEO pay-to-average income ratio still trails the US and UK also militates against the likelihood of such reforms.[210] Short of regulatory capture,

[205] SINGAPORE MINISTRY OF MANPOWER, WHAT IS TRIPARTISM (2016), https://www.mom.gov.sg/employment-practices/tripartism-in-singapore/what-is-tripartism.
[206] Chris Leggett et al., *Employers' Associations In Singapore: Tripartite Engagement*, in EMPLOYERS' ASSOCIATIONS IN ASIA: EMPLOYER COLLECTIVE ACTION 82 (John Benson et al. eds., 2017).
[207] Carney, *supra* note 149, *at* 202-204, 207.
[208] Redding et al., *supra* note 95.
[209] Carney & Witt, *supra* note 43, 555. Singapore and Hong Kong are ranked with lower union density than the UK but higher than the US, with unions existing in Hong Kong mostly in the context of a few public organizations: *id*.
[210] Anders Melin & Wei Lu, *CEOs in U.S., India Earn The Most Compared With Average Workers*, BLOOMBERG, Dec. 28, 2017.

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 that favors those business interests determined to resist intrusive regulation.[211]

D. CORPORATE CULTURE AND CONFUCIAN CAPITALISM

Empirical studies further suggest that respective cultural values 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.[212] Cultural differences between various jurisdictions are reflected in the design of executive agreements, levels of compensation, social tolerance for income inequality and attitudes in general toward remuneration disclosure.[213] Employing the terminology advanced by Hofstede and Schwartz,[214] corporate culture in neo-Confucianist societies 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 explain the downplaying of the role of shareholders in capital markets and corporate governance, and the entrenchment of the relationship between ownership and control.[215] Ruskola offered a three-fold typology of the business enterprise – liberal, Confucian and socialist. At risk of oversimplification, "liberal" firms prevalent in the West are premised on the economic logic of contract with each actor – managers, shareholders and workers – acting rationally in the pursuit of their respective self-interests. In contrast, "Confucian" firms

[211] Coffee, *supra* note 65.
[212] Amir N. Licht, *Culture and Law in Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffery N. Gordon & Wolf-Georg Ringe (eds), (Oxford: Oxford University Press, 2018) 149-150
[213] Jennifer G. Hill, *Regulating Executive Remuneration After the Global Financial Crisis: Common Law Perspectives*, *in* RESEARCH HANDBOOK ON EXECUTIVE PAY 219, 221 (Randall S. Thomas and Jennifer G. Hill eds., 2012).
[214] GEERT H. HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2001); Shalom H. Schwartz, *Culture Matters: National Value Cultures, Sources, and Consequences*, *in* UNDERSTANDING CULTURE: THEORY, RESEARCH, AND APPLICATION (Robert S. Wyerm et al., 2009).
[215] Redding et al., *supra* note 95.

prevalent in Chinese businesses emphasize social hierarchies, long-term stability and non-confrontation, as opposed to individualism and short-term interests.[216] The Chinese family firm, large or small, has been said to have a management structure reflecting its origins in Chinese social history and tend to be run by dominant owners who make all key 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".[217]

Any discussion of culture, however, opens a Pandora's Box of opposing views as to its effects – 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, especially employees. Donald thus argues that the limited liability company originating from the West was designed largely to allow a firm to transact with the financial system and financial investors to profit from the firm's business, which should be adjusted to reflect the 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 corporate model which is premised on short-term value maximization of the firm.[218]

This suggests 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, it is difficult to ignore the possibility of nepotism and the risks of managerial unaccountability in a paternalistic hierarchical

[216] Teemu Ruskola, *Theorizing The Corporation: Liberal, Confucian, And Socialist Perspectives*, *in* THE OXFORD HANDBOOK OF THE CORPORATION (Thomas Clarke et al., 2019).
[217] Redding et al., *supra* note 95.
[218] David C. Donald, *Conceiving Corporate Governance for an Asian Environment*, 12 U. PA. L. REV. 88 (2016).

framework based upon power-distance. In Singapore, for example, it is reported that while CEO pay in professionally managed firms is generally determined by benchmarking with peer companies of similar industry and size, in family-managed firms, family shareholders generally have a great deal of influence over compensation in family-managed firms, with external remuneration consultants and independent directors having little impact. This has resulted in CEOs in family-managed firms receiving much higher compensation than what a CEO in a professionally-managed company would receive. This is not surprising when considering that CEO and executive compensation in Singapore do not require the approval of minority shareholders, and support from the controlling shareholder is necessary in the appointment of the independent directors who set the pay of the CEO.[219] The cultural emphasis on non-confrontation may also explain the anemic shareholder culture in Singapore, which may increase the risk of managerial opportunism and unaccountability. Unlike the US corporate culture in which CEO pay-for-performance is well developed, the shareholder community in Singapore does not generally monitor CEO pay and tend to leave it to the board of directors to oversee the firm in the belief that they would do a good job. Directors therefore do not face probing questions from shareholders and there is no external drive to upend this existing status quo.[220] 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 influence of labor in firm management.[221] Such a hypothesis cannot explain the positions of common law countries such Singapore and Hong Kong vis-à-vis the UK and US, where concentrated shareholdings have arisen in the former

[219] Vivien Shiao, *Fat Cats Or Top Dogs: Is The Singapore CEO Overpaid*?, THE BUSINESS TIMES, Mar.16, 2019, https://www.businesstimes.com.sg/brunch/fat-cats-or-top-dogs-is-the-singapore-ceo-overpaid.
[220] Siow Li Sen, *CEO Pay At Singapore-Listed Firms Not Aligned With Performance: Study*, THE BUSINESS TIMES, Sep. 14, 2017, https://www.businesstimes.com.sg/companies-markets/ceo-pay-at-singapore-listed-firms-not-aligned-with-performance-study.
[221] Roe, *supra* note 39. See Bruner, *supra* note 133, at 126-127.

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, their attendant implications for regulatory reforms are likely to continue. The observed pattern is that in jurisdictions with concentrated ownership, controlling shareholders tend to block the enactment of regulations which could restrict their private benefits, whereas in jurisdictions where dispersed ownership prevails, institutions and the investing public are likely to have greater political clout in pushing for reforms which reduce minority expropriation.[222] Where such path dependence persists, it is said that they can only be overcome by extremely high efficiency gains[223] – if this is correct, the question is whether 'say on pay' reforms may achieve the most economically efficient outcomes for executive remuneration in the particular contexts examined.

Given the prevalence of concentrated shareholdings in Singapore and Hong Kong, the consequent relative dearth of institutional shareholder activism and the corporatist role of the state and hierarchical firm culture, 'say on pay' is likely to be less effective as a means of mobilizing shareholder (and broader societal) opposition against high executive pay levels. As the efficacy of legal mechanisms are closely linked to the extent to which principals are able to coordinate with one another, one may expect institutional complementarities between the structure of share ownership and the kind of strategies relied upon in constraining agency costs. Where such coordination costs are low, principals (ie controlling shareholders) are able to rely on less intrusive governance strategies to control managers, as opposed to more robust

[222] Armour, *supra* note 26, *at* 104.
[223] Bebchuk & Roe, *supra* note 85.

regulatory strategies.[224] 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 in pro-business LMEs to hold a regular shareholder vote on executive remuneration.

A. INSTITUTIONAL COMPLEMENTARITIES AND PATH DEPENDENCE

This leads us back to the literature on 'institutional complementarity', which holds that key corporate institutions complement and derive their value from their interactions with other institutions such that changing one without taking into account the others may undermine the efficient integration of institutional components. Therefore, legal transplants without due regard for the existing institutional complementary framework may lead to unintended consequences later. Consequently, academics have argued that many American mechanisms for shareholder power which have been transplanted to Asia, such as derivative actions and independent directors, have tended to transform into a localized form and bring unexpected results.[225] For example, it has been argued that independent directors in Singapore might have ironically been used to reinforce controlling shareholder power by leveraging on their close relations with family controllers to serve as mediators in resolving disputes amongst family-member shareholders and/or act as trusted advisors to the family chairman in family-controlled firms, which contradicts the conception of US-style independent directors as a watchdog for dispersed minority shareholders.[226] 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 triggers a whole series of new and unexpected results.[227]

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[224] Armour, *supra* note 26, *at* 46.
[225] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G. Hill & Randall S. Thomas, 2015).
[226] Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265 (2017).
[227] Gunther Teubner, *Legal Irritants: How Unifying Law Ends up in New Divergences*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).

In this regard, this article argues that in the contexts of corporate governance in Singapore and Hong Kong, such institutional complementarities include but are not limited to the existing legal regimes governing remuneration disclosure, related-party transactions (RPTs) and independent directors. Currently, regulatory reforms in Singapore and Hong Kong focus on improving the disclosure of executive remuneration and strengthening the regulatory framework governing independent directors[228] as the primary means of constraining majority shareholder power. A strong and nimble government with a pragmatic regulatory philosophy such as Hong Kong and Singapore's unimpeded by populist pressures is able to pick and choose the best practices from different systems to suit its circumstances with the expectation that the end product to be at least as good as the sum of its components. The synergy of complementary institutions means that the sum will exceed the summation of its parts if their incentives complement, but not if they contradict with one another.[229]

Strengthening the disclosure and independent director regimes benefits minority investors to the extent that they may mitigate the information asymmetry with majority shareholders and serve as a check on insider directors. Yet, it is doubtful if these strategies 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. For jurisdictions characterized by controlling ownership structures, the problems do not revolve around excessive compensation but in having effective mechanisms and structures in place to ensure that managerial incentives are aligned with the long term interests of the firm as a whole. Shareholder approval of remuneration is

[228] HKEX, CONSULTATION CONCLUSIONS: REVIEW OF THE CORPORATE GOVERNANCE CODE AND RELATED LISTING RULES (2018), https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/November-2017-Review-of-the-CG-code-and-Related-LRs/Conclusions-(July-2018)/cp2017111cc.pdf?la=en; MAS, RECOMMENDATIONS OF THE CORPORATE GOVERNANCE COUNCIL (2018), https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulatory-and-Supervisory-Framework/Corporate-Governance-of-Listed-Companies/Consultation-2018-Jan-16/Response-to-consult/Response-paper-on-Councils-recommendations.pdf.

[229] Carney, *supra* note 149.

likely to be a mere formality in the presence of controlling shareholders. Block shareholders have the capacity to use non-monetary rewards to tie the interests of executives to the firm's longer- term interests. However, this can have the effect (intended or unintended) of aligning managerial interests with those of the controlling shareholder. For such companies, boards are often dominated by insiders aligned to or affiliated with controlling shareholders and lack the independent capacity to exercise effective oversight of the compensation setting process.[230]

As corporate governance reforms are shaped by regulatory competition for shareholders and investor preferences, implementing 'say on pay' reforms in Singapore and Hong Kong may have the benefit of signalling credible commitments to shareholder protection without fundamentally altering the functionally efficient corporate structures based on concentrated shareholdings and hence face less political opposition. Yet, to do so may undermine reliance on RPTs as a regulatory tool to protect minority shareholders and instead further aggrandize shareholder power for majority shareholders which would do little to curb pay or might even create the perverse consequence of approval by the majority shareholders of excessive executive compensation at the expense of 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 concerned institutional investors with direct contact with companies, and their willingness and ability to vote against a remuneration report, do not exist in Singapore and Hong Kong at the moment and therefore a "one size fits all" approach to 'say on pay' is unlikely to be easily transferrable.[231] 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 in governance, which would allow for greater flexibilities and latitude in remuneration-setting in

[230] OECD, CORPORATE GOVERNANCE BOARD PRACTICES: INCENTIVES AND GOVERNING RISKS 37 (2011).
[231] OECD, CORPORATE GOVERNANCE AND THE FINANCIAL CRISIS: KEY FINDINGS AND MAIN MESSAGES 24 (June 2009), https://www.oecd.org/corporate/ca/corporategovernanceprinciples/43056196.pdf.

concentrated ownership companies.[232] This may allow for greater input by minority shareholders on remuneration matters but at the same time preserves the prerogative of the board and the majority shareholder in this regard. At the same time, the risks of the board becoming passive or captured by the majority shareholders increases with concentrated shareholdings.[233] This creates the separate agency risk of "tunneling" or expropriation of minority interests by controlling shareholders, and by extension, negative externalities at the expense of broader interests of employees and society.

On one view, a controlling shareholder may, under certain circumstances, be better placed to make credible long-term commitments to workers, which may facilitate employee relations.[234] Others however argue that the presence of powerful shareholders increases the risk of exploitation of workers.[235] 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-run capital market pressures, such as hostile takeovers, and do not feel the same pressure to meet quarterly earnings expectations in the same way as American companies, with the result that a long-term view of shareholder value is taken. The presence of a block shareholder has also been associated with significantly lower CEO compensation.[236] At the same time, the lack of a stakeholder orientation and a fluid labour market coupled with strong managerial power might mean that employee interests are less likely to be safeguarded in these contexts.[237] It is difficult to say which is more likely and this may depend on business culture from company

[232] Ferrarini & Ungureanu, *supra* note 4, *at* 334.
[233] *Id*.
[234] Armour, *supra* note 26, *at* 27.
[235] Martin Gelter, *The Dark Side Of Shareholder Influence: Managerial Autonomy And Stakeholder Orientation In Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129 (2009).
[236] Armour, *supra* note 26, *at* 67. Management literature also suggests that CEO firm ownership can create alignment with shareholder interest. Under a stewardship approach, Wasserman found that CEOs in founder-owner controlled companies received lower monetary compensation and the percentage of managerial ownership was inversely related to monetary compensation: Noah Wasserman, *Stewards, Agents, and the Founder Discount: Executive Compensation in New Ventures*, 49 ACAD. MANAG. J. 960 (2006).
[237] Carney, *supra* note 149.

to company. Puchniak argues that there may be external benefits of control which accrue to controlling shareholders depending on their identities (apart from the internal private benefits of control), which in some cases may general residual benefits for minority shareholders. There may, for example, be political legitimacy on the part of the state as a controlling shareholder and the desire of the controlling family shareholder to pass on the business to the next generation and maintain the controlling family's reputation in Singapore's small and tight-knit business community, which he argues can mitigate the risk of expropriation.[238]

One, however, cannot overlook the risk of collusion between the board / management and majority shareholders – directors might favor excessive remuneration because they are richly compensated themselves or because they fear losing their seats on the board if they refuse; owner-managers, in turn, might favor generous compensation packages to themselves and to professional managers who acquiesce to minority abuse.[239] This is especially where controlling shareholders are not generally subject to any fiduciary duties to minority shareholders or to the company 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.[240] In Hong Kong, conflicts of interest are likely to arise between controlling and minority shareholders, which risks the expropriation of the latter.[241] In its study of sample of 412 Hong Kong firms during 1995–1998, Cheung et al. found a positive relationship between managerial ownership and cash emoluments for levels of ownership of

[238] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G. Hill & Randall S. Thomas, 2015); Wilson Ng & John Roberts, *"Helping the Family": The Mediating Role of Outside Directors in Ethnic Chinese Family Firms*, 60 HUMAN RELATIONS 287, 307 (2007).
[239] Armour, *supra* note 26, *at* 145.
[240] REFORM PRIORITIES IN ASIA, *supra* note 12.
[241] Y.L. Cheung et al., *Tunneling, Propping and Expropriation: Evidence from Connected Party Transactions in Hong Kong*, 82 J. FINANC. ECON. 343 (2006). See also Say H. Goo & Rolf H. Weber, *The Expropriation Game: Minority Shareholders' Protection*, 33 HONG KONG LAW JOURNAL 71 (2003).

up to 35% in small and in family-controlled companies, and up to 10% in large companies.[242] It has been argued that a family-controlled firm may be expected to place its family's interests in the firm as a priority at the expense of shareholders and other stakeholders.[243] Further, as many Hong Kong-listed SOEs are majority owned by the Chinese government, there is a perception that senior managers are answerable not to minority shareholders but to the former, which often places political interests above the economic or financial interests of such entities.[244] Independent directors in Hong Kong are also appointed with the support of controlling shareholders and who are often affiliated with the incumbent directors.[245] Where boards are controlled by the founding family or otherwise dominated by a close-knit shareholding faction, the presence of independent directors on the board may add little value as a source of monitoring.[246] In such circumstances, 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 legal system.[247] 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

[242] Yan-Leung Cheung el., *Ownership Concentration And Executive Compensation In Closely Held Firms: Evidence From Hong Kong*, 12 J. EMPIR. FINANCE 511 (2005).
[243] A Hargovan, 'Shareholders as Creditors in Hong Kong Corporate Insolvency: Myth or Reality?' (2008) 38 HONG KONG LAW JOURNAL 685.
[244] Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-owned Enterprises*, 47 CORNELL INT'L L.J. 631 (2014). According to Wang, most of the top managers at Chinese SOEs are members of the Chinese Communist Party (CCP) and the obligations imposed upon party members have profound implications for the corporate governance of such entities. Such obligations lead to a form of ideological control on the part of these executives, who must, at least in theory, implement party policies and execute party orders while performing their responsibilities in an SOE.
[245] Bath, *supra* note 20, *at* 301-302, 309.
[246] Douglas W. Arner, et al, *Assessing Hong Kong as an International Financial C*entre 123-7 (University of Hong Kong Faculty of Law Research Paper No 2014/012, 2014).
[247] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006).

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.[248] The goal of corporate governance in a concentrated shareholding environment therefore should be to ensure that such a shareholding structure generates efficiencies which create a net benefit to the minority shareholders and the firm as a whole, and to mitigate inefficiencies which cause a net reduction in firm value. On this basis, it is 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 complicated family and other arrangements in place.[249] An alternative would be to require a supermajority shareholder vote to approve remuneration packages to enfranchise minority shareholders.[250]

Executive remuneration is currently generally exempt from the RPT requirements in Singapore and Hong Kong,[251] but recent studies on Israeli companies show that minority veto rights are effective in constraining the pay of controller executives.[252] Further, the current difficulties in the private enforcement of shareholder rights in Singapore and Hong Kong arguably justifies the use of *ex ante* governance measures with regulatory backing to empower shareholders, as opposed to *ex post* regulatory strategies such as the statutory

[248] *Id*.
[249] S.H. Goo & Yu-Hsin Lin, *Hong Kong*, *in* CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE APPROACH (Bruce Aronson & Joongi Kim eds., 2019).
[250] The voting standard on 'say-on-pay' resolutions appears to differ among Delaware corporations with many applying a majority of shares present and entitled to vote standard but with others applying a majority-of-votes-cast measure: Daniel E. Wolf & Michael P. Brueck, *Voting Standards Are Not that Standard*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Oct. 20, 2016), https://corpgov.law.harvard.edu/2016/10/20/voting-standards-are-not-that-standard/.
[251] SGX, Mainboard Rules, rule 915(8) (Sing.); HKEX, Main Board Listing Rules, rule 14A.95 (H.K.).
[252] Jesse M. Fried et al., *The Effect of Minority Veto Rights on Controller Tunnelling* (ECGI Working Paper Series in Law N° 385/2018).

derivative action to enforce minority protection rights.[253] Singapore and Hong Kong lack strong external governance mechanisms which can alter the balance of power against controlling shareholders, such as a US-style contingency fee-based shareholder litigation and class action regimes, and an active market for corporate control.[254] In Hong Kong, no listed company was faced with an unfair prejudice claim from 2004 to 2014.[255] Singapore has also experienced a dearth of derivative actions against listed companies.[256]

Nevertheless, it may be argued that requiring "majority of the minority" (MoM) approval for executive compensation may be unduly cumbersome and imposes unnecessary regulatory costs for companies given that the requirement of *ex ante* shareholder approval of RPTs are generally preserved for "large" 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 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.[257] 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 easier means of self-aggrandizement such as

[253] Ho, *supra* note 176, *at* 464. Bath, *supra* note 20, *at* 305-308. *Cf.* Felix E. Mezzanotte & Simon Fung, *Do Institutional Owners Monitor: Evidence from Voting on Connected Transaction Proposals in Hong Kong-Listed Companies*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 221, 223 (2018).
[254] Lan & Varottil, *supra* note 139.
[255] Ho, *supra* note 176, *at* 457. Class actions are unavailable in Hong Kong and shareholder derivative actions have largely been invoked against private firms because of restrictions on the plaintiff's legal standing to bring lawsuits against listed companies and the presence of economic disincentives for plaintiffs to sue: Felix E. Mezzanotte, *The Unconvincing Rise of the Statutory Derivative Action in Hong Kong: Evidence from its first Ten Years of Enforcement*, 17 J. CORP. L. STUD. 469, 496 (2017).
[256] Meng Seng Wee & Dan W. Puchniak, *Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 323 (Dan W. Puchniak et al. eds., 2012).
[257] Paul Davies, *Related Party Transactions: UK Model*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 361, 388 (Luca Enriques & Tobias H. Tröger eds., 2019).

through an increase in dividends or entering into ostensibly arms-length commercial transactions with the company. The difficulty therefore is in the regulatory design on what should constitute executive compensation which is "value-destroying" and "unfair" (ie bad for shareholders and for society as a whole)[258] within the specific contexts in Singapore and Hong Kong respectively in order to avoid unnecessary regulatory costs of impeding economically efficient executive compensation. Regulatory reforms to strengthen minority shareholder protection in this regard may simultaneously empower the minority but keep management power in the hands of controlling shareholders.[259] Such reforms may be prudent especially in view of the possibility of an increase in institutional shareholder participation in the future with the recent promulgation of the Principles of Responsible Ownership in 2016 in Hong Kong[260] and the relaxation of proxy voting in Singapore, along with the increasing internationalization of the shareholder base and changing dynamics between companies and shareholders with the advent of technology.

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 these 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 militate against the potential for institutional shareholder

[258] Luca Enriques & Tobias H. Tröger, *The Law and (Some) Finance of Related Party Transactions: An Introduction, in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 4-5. (Luca Enriques &Tobias H. Tröger eds., 2019).
[259] Lin, *supra* note 175.
[260] *Id.*

activism, as well as a corporatist socio-political culture and ethos that discourages the prospect of taking into account broader social interests in pay governance. Shareholders – particularly majority shareholders – bear the direct cost of pay and the losses from inefficient incentives, and are thus incentivized to choose optimal contracts.[261] If so, 'say on pay' regulation can only be beneficial and economically efficient when there are market failures arising from unaccountable managers.[262] Imposing 'say on pay' without regard to these factors may demonstrate credible commitments on the part of the state to international investors but pay lip service to constraining executive pay and promoting effective corporate governance of the firm as a whole. On this basis, it would be incorrect and oversimplistic to say 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 or even lead to shareholder acquiescence or encouragement of executive remuneration which is insufficiently tied to corporate performance and firm value, 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.[263]

At the same time, these same 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 gives rise to separate agency costs by increasing conflicts between controlling and minority shareholders, and between shareholders and broader stakeholders (in particular,

[261] Alex Edmans et al., *Executive Compensation: A Survey of Theory and Evidence* (ECGI Working Paper Series in Law N° 514/2017).
[262] *Id.*
[263] See Fabrizio Ferri & Robert F. Cox, *Executive Compensation, Corporate Governance, and Say on Pay*, 12 FOUNDATIONS AND TRENDS IN ACCOUNTING 61-63 (2018).

employees).[264] Depending 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, requiring separate "majority of the minority" approval for certain specifically 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, but concurrently avoid 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.[265] 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.[266] This calls for a well-calibrated regulatory design by ensuring that the benefits of requiring MoM approval in tying executive remuneration to the firm's interests outweighs the regulatory costs of firm compliance for minority shareholder approval for what are otherwise routine transactions which are normally carried out in the ordinary course of business, including the possibility of minority shareholder opportunism or the obverse consequence of the "tyranny of the minority".[267]

[264] See Vladimir Atanasov et al., *Law and Tunneling*, 37 J. CORP. L. 1 (2011).
[265] Lin, *supra* note 175.
[266] Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment In Controlled Companies: The Case Of Singapore*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 572 (Jennifer G. Hill & Randall S Thomas, 2015); John Kong Shan Ho, *Bringing Responsible Ownership To The Financial Market Of Hong Kong: How Effective Could It Be?*, 16 J. CORP. LAW STUD. 437 (2016).
[267] See Luca Enriques &Tobias H. Tröger, *The Law and (Some) Finance of Related Party Transactions: An Introduction*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 4-5 (Luca Enriques & Tobias H. Tröger eds., 2019).

The foregoing suggests that the presumptions underlying orthodox corporate governance theories such as the "Varieties of Capitalism" theory,[268] Roe's "social democracy" theory,[269] and the "law matters" theory[270] are useful only as starting points, but are insufficient on their own to explain or predict regulatory reforms, particularly in the underexamined Asian context. Ultimately, one has to assess the degree in which the substantial divergences in the institutions of political economy amongst common law systems reflect variances not with reference to a universal policy metric, but rather variances in objectives which each society expects corporate governance to achieve.[271] Put simply, one has to examine each corporate governance system on its own terms and not simply with respect to an overarching theory which purports to be all-encompassing. Regulatory divergences thus reflects differences in the social and economic priorities which each society seeks to manage through the fluctuating balance of power amongst owners, shareholders, labor and above all, the state, within the respective corporate governance systems with reference to the diversity in historical, cultural and political contexts.[272] This implies that the greatest challenge for policymakers is to accommodate these circumstances in a way which provides sound incentives for both investors and entrepreneurs to contribute to capital formation, efficient capital allocation and market competition. Policymakers thus have a responsibility to establish a regulatory framework which is sufficiently flexible to meet the requirements of corporations that operate under differing circumstances in line with an overarching functional and outcome-oriented approach which does not lead to over-regulation and simplifies effective compliance, and strikes a rational balance between the

[268] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1 (Peter A. Hall & David Soskice eds., 2003).
[269] Roe, *supra* note 39.
[270] Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FINANCE. 1131 (1997); Rafael La Porta et al., *Law and Finance*, 106 J. POLIT. ECON. 1113 (1998).
[271] CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 140-141 (2013).
[272] Armour, *supra* note 26, *at* 72.

costs and benefits of regulation.[273] Only then would governments provide market participants with the correct incentives to exploit new business opportunities which create social value and ensure the most economically efficient use of capital and corporate resources.

[273] OECD FACTBOOK 2019, *supra* note 11, at 171, 174.