Corporate Law in the Global South: Heterodox Stakeholderism

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ABSTRACT

How do the corporate laws of Global South jurisdictions differ from their Global North counterparts? Prevailing stereotypes depict the corporate laws of developing countries as either antiquated or plagued by problems of enforcement and misfit despite formal convergence. This Article offers a different view by showing how Global South jurisdictions have pioneered heterodox stakeholder approaches in corporate law, such as the erosion of limited liability for purposes of stakeholder protection in Brazil and India, the adoption of mandatory corporate social responsibility in Indonesia and India, and the large-scale program of Black corporate ownership and empowerment in South Africa, among many others. By incorporating broader public policy and distribution objectives into corporate law, heterodox stakeholderism can be interpreted as an institutional adaptation—be it sensible or misguided—to a context of high inequality and externalities that remain unaddressed through other areas of law. As the rise of inequality and growing distrust in the state's ability to tackle social and environmental concerns have brought the Global North closer to the Global South's realities, the resurgent interest in stakeholderism in the developed world constitutes a surprising form of "reverse convergence" that merits greater attention. Finally, heterodox stakeholderism in the Global South also responds to critical, but heretofore neglected, distributional

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implications of corporate law rules, such as limited liability for environmental harm caused by corporate subsidiaries, which tend to enrich Global North companies and investors at the expense of Global South victims. These findings have implications for ongoing debates in corporate law, comparative law, law and development, and business and human rights.

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INTRODUCTION

How do the corporate laws of developing countries differ from those of their developed counterparts? A common view is that the corporate laws of Global South jurisdictions—like their private laws more generally—are either (i) outdated, (ii) failed transplants of modern foreign laws, or (iii) plagued by severe challenges of enforcement.[1] An even more extreme view, building on the former, is that corporate laws in developing countries

1. *See*, *e.g.*, Francisco Reyes Villamizar, *The Organization of American States' Model Law on Simplified Corporations*, 11 J. CIV. L. STUD. 1, 7, 31 (2018) (on problems of formalism and enforcement in corporate laws in Latin America); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 168 (2003) (describing the problem of misfit of legal transplants due to the lack of adaptation to local conditions). A focus on problems of enforcement, as opposed to substantive legal differences, also exists in comparative contract law. *See* Mariana Pargendler, *Comparative Contract Law and Development: The Missing Link?*, 85 GEO. WASH. L. REV. 1717, 1719 (2017). For earlier work suggesting alternative institutional arrangements to respond to difficulties in enforcement, as well as a greater focus on distributional concerns and stakeholder issues in environments of high inequality, see Mariana Pargendler, *Corporate Governance in Emerging Markets*, *in* OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

are so ineffective that they are not worth studying, given that extralegal factors dominate.[2] While these views reflect more than a kernel of truth in numerous contexts, they offer an incomplete and impoverished perspective of corporate laws in the developing world. Rather than being inevitably antiquated or blind copies of Global North models, emerging economies have pioneered distinct stakeholder approaches to corporate laws. I call these approaches "heterodox stakeholderism" as they are different and often bolder than the longstanding strategies of corporate law to protect non-shareholder constituencies in the Global North.[3]

Preceding the "rise of ESG" and the renaissance of a stakeholder focus on corporate law in the Global North, core developing jurisdictions such as Brazil, India, and South Africa had embraced novel, and often more aggressive, legal strategies to protect stakeholder interests.[4] In the

2. *See*, *e.g.*, REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY B. HANSMANN, GÉRARD HERTIG, KLAUS J. HOPT, HIDEKI KANDA & EDWARD B. ROCK, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2d ed., 2009) ("We focus on developed, rather than developing, economies, because where foundational legal institutions, such as functioning courts and the protection of property rights, are absent or compromised, then the way in which corporate law responds to specific problems is less likely to make a difference to the real economy"). Interestingly, the third edition of the same book simply deleted the excerpt above and included Brazil as one of the core jurisdictions examined. JOHN ARMOUR, LUCA ENRIQUES, REINIER KRAAKMAN, PAUL DAVIES, HENRY B. HANSMANN, GÉRARD HERTIG, KLAUS J. HOPT, HIDEKI KANDA, MARIANA PARGENDLER, WOLF-GEORG RINGE & EDWARD B. ROCK, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed., 2017) [hereinafter THE ANATOMY OF CORPORATE LAW] (with this author and Wolf-Georg Ringe joining as coauthors). For the methodological recommendation from the authors of the leading treatise in comparative law to focus on a handful of advanced "parent" jurisdictions and "ignore the affiliate [legal system]," including the presumably derivative legal systems of the Global South, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 4 (3d ed., 1998). For critiques of such devaluing of legal systems in the Global South, see Jorge Esquirol, *The Failed Law in Latin America*, 56 AM. J. COMP. L. 75, 77 (2008) ("The diagnosis of failed law is a contemporary strategy of legal politics"); DANIEL BONILLA MALDONADO, LEGAL BARBARIANS: IDENTITY, MODERN COMPARATIVE LAW AND THE GLOBAL SOUTH 10 (2021) (criticizing the view of Global South legal systems as "derivative," "low quality," and "marginal objects of study" that may be of interest to anthropologists or sociologists but that are irrelevant to the production of legal knowledge).

3. For an overview of corporate law strategies to protect stakeholders in developed economies, see Luca Enriques, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 2, at 89–108. Nothing here is to suggest that corporate laws in the Global North have not been shaped by stakeholder interests until recently. *See*, *e.g.*, Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533 (2020) (documenting the longstanding impact of nationalism and protectionism on the corporate laws of Global North jurisdictions throughout history).

4. Scholars have highlighted the ebb and flow of shareholder-stakeholder approaches in different jurisdictions, as well as the peculiar–and particularly strong–stakeholder orientation of China's corporate law regime, which falls squarely within the concept of heterodox stakeholderism in the Global South as described here. *See* Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influence on Corporate Governance: Capital Market Completeness and Policy Channeling*, 12 HARV. BUS. L. REV. 1, 49 (2022) (describing the Chinese system under the influence of the Communist Party as "possibly the world's most stakeholder-oriented system of corporate governance"); Dan W. Puchniak, *No Need for*

last decades, Brazil has largely eliminated shareholders' limited liability for the benefit of stakeholders, such as workers, consumers, and victims of environmental harm. Before interest in ESG exploded in the Global North, Indonesia and India mandated corporate social responsibility, and India and South Africa required dedicated committees in charge of social responsibility. While legal reforms seeking to advance diversity in corporate governance date back to the last two decades in the Global North, Malaysia has boldly pursued affirmative action in corporate ownership for the benefit of the Malays since the 1970s, while South Africa has pushed for greater Black ownership and empowerment in corporate governance through its laws on Broad-Based Black Economic Empowerment (B-BBEE) since 2003. South Africa has also innovated by expanding workers' ability to enforce directors' duties under the Companies Act of 2008 and has been hailed as a "global leader in sustainable corporate governance."[5]

Taken together, these developments offer a different picture of corporate governance developments around the world. Although Global South constitutional law and courts have achieved significant recognition and notoriety in the literature on comparative constitutional law for their distinct approaches to enforcing social rights,[6] developing countries' heterodoxies in corporate law—be they regarded as promising innovations or pernicious developments—have been largely neglected. The comparative literature on corporate law remains dominated by North-North comparison,[7] individual country studies of developing economies,[8] regional

Asia to be Woke: Contextualizing Anglo-American "Discovery" of Corporate Purpose, 4 REVUE EUROPÉENNE DU DROIT 14, 16 (2022) ("at least on paper, Chinese corporate law and governance is as purposeful as can be"); Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 VAND. J. TRANSNAT'L. L. 375, 382 (2013) (describing state-centric CSR in China as "an adaptation of the institutions and accountability structures that shape law's legitimacy, enforcement, and even substance"). Given the growing literature on China as a global superpower, as well as existing claims about "Chinese exceptionalism," this Article focuses on the laws of democratic jurisdictions in the Global South that have received comparatively less attention.

5. CHRISTOPHER M. BRUNER, THE CORPORATION AS TECHNOLOGY: RE-CALIBRATING CORPORATE GOVERNANCE FOR A SUSTAINABLE FUTURE 227 (2022).

6. See notes 210–211 *infra* and accompanying text.

7. *See*, *e.g.*, THE ANATOMY OF CORPORATE LAW, *supra* note 2; ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY LAW: TEXT AND CASES ON THE LAWS GOVERNING CORPORATIONS IN GERMANY, THE UK AND THE USA (2018); MARCO VENTORUZZO, PIERRE-HENRI CONAC, GEN GOTO, SEBASTIAN MOCK & MARIO NOTARI, COMPARATIVE CORPORATE LAW (2015).

8. *See*, *e.g.*, Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013); Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377 (2013); Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L L. REV. 253 (2016).

studies,[9] and works focusing on the common-civil law divide.[10] The growing literature on China often embraces Chinese exceptionalism and fails to place China within a continuum of heterodox stakeholderism in developing countries.[11] Studies that incorporate a broader set of developed and developing economies often do not engage in North-South comparisons.[12]

Including a broader array of Global South jurisdictions in comparative corporate governance produces distinct intellectual and policy payoffs. First, it helps overcome existing shortcomings in our understanding of global developments. One is the "World Series" syndrome in the comparative literature, understood as the pretense that insights from a select group of "usual suspects" from the developed world are representative of global developments.[13] Another problem is the "odd duck" syndrome: because Global South jurisdictions are often examined in single-country studies, this can easily produce misleading diagnoses of exceptionalism. For instance, commentators have described India's approach to enterprise liability as "unique" and "revolutionary" from a comparative perspective, without recognizing that Brazil and other emerging economies are part of a similar trend.[14]

Second, appreciating common approaches to corporate law in developing countries generates insights into how background economic and social conditions may influence corporate law strategies. Heterodox stakeholderism in corporate law can be viewed as an institutional *adaptation* to

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9. *See*, *e.g.*, INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017); THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012).

10. *See*, *e.g.*, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008); Katharina Pistor, *Legal Ground Rules in Coordinated and Liberal Market Economies*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE U.S. (Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda & Harald Baum eds., 2005); Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 B.Y.U. L. REV. 1813 (2009).

11. See *supra* note 4 and accompanying text.

12. For a notable, if discrete, exception, see Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences*, 23 U. PENN. J. BUS. L. 429 (2021) (comparing legislation in France, Mauritius, India, South Africa, China, and Indonesia, among others, and finding the diffusion of mandatory philanthropy legislation only in developing countries as well as unique approaches in developing countries, such as mandatory corporate philanthropy laws). *See also* Djankov, La Porta, Lopez-de-Silanes & Shleifer, *supra* note 10, at 443 (finding that the correlation of their anti-self-dealing interest and log of GDP is statistically insignificant).

13. For the use of this metaphor to describe a similar phenomenon in comparative constitutional law, see RAN HIRSCHL, COMPARATIVE MATTERS 192 (2014) (explaining "the 'World Series' syndrome in comparative constitutional law" as "the pretense that insights based on the constitutional experience of a small set of 'usual suspect' settings—all prosperous, stable constitutional democracies of the 'global north'—are truly representative of the wide variety of constitutional experiences worldwide, and constitute a 'gold standard' for understanding and assessing it").

14. See note 76 *infra* and accompanying text.

environments of high inequality and insufficient state capacity to curb externalities and promote social welfare through other areas of law. This is the flip side of the implicit "modularity approach" that has traditionally dominated law-and-economics analysis.[15] Under a modular approach premised on compartmentalization and functional specialization, each area of law should contribute to social welfare by focusing on *one* economic problem: for corporate law, the standard single objective is the reduction of agency costs associated with the corporate form.[16] However, if other areas of law (such as tax, environmental, and antitrust laws) fail in accomplishing their objectives, the case for such a modular approach—which may not be optimal to begin with[17]—falters accordingly.

This heterodox or "social turn" in the Global South is not unique to corporate law.[18] Previous work has shown how certain developing jurisdictions, such as Brazil, South Africa, and Colombia, have incorporated concerns about inequality in contract law more strongly and explicitly than their counterparts in the Global North.[19] Similarly, a common claim in comparative constitutional law is that, because of larger socioeconomic gaps and lower state capacity in the Global South, "constitutional courts in these countries will be more inclined to intervene on behalf of the poor, or to support the constitutional recognition and progressive realization of social and economic rights"[20]—an argument that mirrors our account of heterodox stakeholderism in corporate law.

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15. For a description of the approach, see Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 969–72 (2020).

16. *Id.* at 969.

17. This is not to endorse a modular approach to law and regulation, which is why I refrain from adopting the framing of "second-best" laws or institutions in the Global South. For such a framing, see Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100, 100 (2008) (arguing that "dealing with the institutional landscape in developing countries requires a second-best mindset"). For a discussion of the limits of modular thinking in law, see Pargendler, *supra* note 15, at 971 ("A key problem of modular thinking in law and economics is that different areas of law or legal rules are not fully separable or 'nearly decomposable,' in Herbert Simon's terminology"). *See also* Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016) (for a discussion of how corporate governance change has emerged as a solution to a variety of social and economic problems over time).

18. These developments can be understood as the Global South's resistance to elements that Katharina Pistor has termed "The Code of Capital." KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2021).

19. *See generally* Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485 (2022).

20. HIRSCHL, *supra* note 13, at 221. Hirschl himself argues that the evidence for greater social activism by courts in the Global South is mixed, mentioning instances of activism in India and Colombia, but its absence in Mexico. My claim here is that the Global South offers important and overlooked examples of heterodox stakeholderism, not the stronger —and questionable—claim that heterodox stakeholderism is present in all Global South jurisdictions. The recognition of legal heterodoxy in the Global South does not entail a claim about the pervasiveness of legal heterodoxy in all Global

Problems of state capacity to curb externalities and address inequality help explain both the rise of heterodox stakeholderism in corporate laws in the Global South and the resurgence of stakeholder approaches in the Global North and on a global scale in recent years. The ESG agenda emerged from an effort of the United Nations at the turn of the 21st century to recruit corporations and investors to fight the regulatory gaps left by globalization, which threatened the legitimacy of global capitalism by permitting human rights abuses and environmental degradation.[21] The financial crisis of 2008, for its part, cracked the U.S. hyper-modular law-and-economics consensus that a legal regime fostering shareholder wealth maximization is always socially optimal. In the aftermath of the crisis, a new academic consensus emerged that systemic risk externalities and the difficulties in regulating financial institutions require a distinct corporate governance model designed to mitigate risk from within.[22]

While the initial anti-modular diagnosis was limited to financial institutions,[23] it did not take long for this mode of reasoning to expand in calling for the internalization of other forms of risks and externalities, such as climate change risk and social harms.[24] Interestingly, the current crisis of the modularity approach is by no means unique to corporate law in the Global North, but is also observed in other areas of law.[25] Recent challenges to the modularity approach in other areas of law include the growing incorporation of concerns about democracy, workers' welfare and climate change in antitrust law, and about climate change in financial

South jurisdictions nor in single jurisdictions. For the same argument in the context of contract law heterodoxy, see Davis & Pargendler, *supra* note 19, at 1487.

21. *See* Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1794 et seq. (2021).

22. *See*, *e.g.*, Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 247 (2010) (identifying how executive compensation in banks created incentives for excessive risk-taking); John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 39–40 (2014) (proposing the imposition of stricter liability rules for directors and officers of financial institutions); Jonathan Macey & Maureen O'Hara, *Bank Corporate Governance: A Proposal for the Post-Crisis World*, 22 ECON. POL'Y REV. 85, 86 (2016) (advocating for stricter standards of conduct of bank directors and bank risk committees).

23. John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 2, at 25 ("In the immediate aftermath of the crisis, many asked whether it did not call into question effectiveness of corporate law in promoting social welfare. As the dust settled, it became tolerably clear—at least to us—that the implications of the crisis were mostly confined to the governance regimes applicable to banks and other financial institutions, which have an unusual degree of interconnection and propensity to contagion") (footnote omitted).

24. *See*, *e.g.*, Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 631 (2022); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare not Market Value* 4 (Eur. Corp. Governance Inst., Working Paper No. 521, 2017).

25. Pargendler, *supra* note 15, at 969.

regulation.[26] From this perspective, the increasingly welfarist, nonmodular trend in the Global North can be interpreted as a surprising and unpredicted form of "reverse convergence" in corporate law as in other areas of law, with economic and social crises—and the urgency of solutions—bringing the Global North closer to the Global South in various respects.

Beyond the failure of other areas of law in addressing externalities and inequality, heterodox stakeholderism in the Global South also responds to interjurisdictional externalities and distributive implications along North-South lines. By focusing on aggregate efficiency or social welfare, comparative corporate governance has neglected the importance of geopolitical boundaries and how they affect interjurisdictional externalities and distribution.[27] At least some facets of heterodox stakeholderism respond precisely to such a national calculus. Commentators observed that the infamous Bhopal industrial disaster—a major leakage of toxic gas caused by a subsidiary of a multinational company—played a key role in pushing Indian courts to hold parent companies liable for ultrahazardous activities.[28] Foreign wrongdoers and local victims are a tough sell to local polities. Similarly, Argentina's embrace of enterprise liability in the bankruptcy context in the 1970s favored local creditors at the expense of foreign parent company debtors.[29]

This phenomenon highlights the importance of nationalism and North-South distribution in explaining variation in comparative corporate law. This is a familiar concept in other areas of law. For instance, it is well established in the field of international intellectual property law that strong patent protection tends to transfer wealth from developing to developed countries,[30] which means that the optimal level patent protection for Global South jurisdictions is lower than for Global North ones. The existence of heterodox stakeholderism suggests that a similar distributional dynamic is in play with respect to at least certain features of corporate law rules, such as limited liability for environmental and human rights

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26. For a discussion of the current push for the incorporation of stakeholder concerns in corporate, antitrust, and bankruptcy law in the United States, see Aneil Kovvali, *Stakeholderism Silo Busting*, 90 U. CHI. L. REV. 203, 235–45 (2022).

27. On these issues, see generally Pargendler, *The Grip of Nationalism on Corporate Law*, *supra* note 3 (on the significance of political boundaries and disparate distribution effects across jurisdictions); Pargendler, *The Rise of International Corporate Law*, *supra* note 21 (on interjurisdictional externalities of corporate law).

28. *See* Section I *infra*.

29. *Id.*

30. *See*, *e.g.*, Dani Rodrik, *What Do Trade Agreements Really Do?* 32 J. ECON. PERSP. 73, 76–77 (2018) (arguing that, because of the TRIPS agreement, "[c]onsumers in the developing nations pay higher prices for pharmaceuticals and other research-intensive products and the advanced countries' firms reap higher monopoly rents," so that "the advanced countries' gains are largely the developing countries' losses").

disasters caused by corporate groups, thus making developing countries more likely to embrace heterodox forms of resistance.

This Article's description and analysis of heterodox stakeholderism in the Global South focuses on legal innovations in corporate law. Heterodoxy is defined as (i) distinct from the norm in the Global North in (ii) incorporating a broader set of public policy and distributional objectives in corporate law rules. I focus on six distinct manifestations of heterodox stakeholderism in corporate law and address each in a separate section: the erosion of limited liability for the benefit of stakeholders in Argentina, Colombia, India, and especially Brazil (Part I); the adoption of mandatory corporate social responsibility (CSR) spending in India, Indonesia, and Mauritius (Part II); the imposition of mandatory corporate social responsibility committees in India and South Africa (Part III); workers' right to enforce directors' duties and to intervene in bankruptcy proceedings in South Africa (Part IV); the pioneering efforts to deracialize economic power by increasing ethnic diversity in corporate governance in Malaysia and South Africa (Part V); and the role of constitutional provisions and jurisprudence in the Global South in shaping a stakeholderist orientation in corporate law (Part VI). The Article then concludes by reflecting on how including Global South jurisdictions in comparative corporate governance expands our institutional imagination and enriches our understanding of the driving forces behind the evolution of corporate law around the world.

I. THE EROSION OF LIMITED LIABILITY TO PROTECT STAKEHOLDERS IN BRAZIL AND BEYOND[31]

Limited liability is the most distinctive and celebrated attribute of the corporate form,[32] having been famously hailed as "the greatest single discovery of modern times."[33] At the same time, shareholders' limited liability gets in the way of the prevailing modularity approach to law and economics, according to which concerns about stakeholder protection should be addressed not by corporate law, but by other areas of law.[34] Limited

31. This section draws heavily from Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 COLUM. J. TRANSNAT'L L. 1 (2019).

32. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 40 (1991) ("Limited liability is a distinguishing feature of corporate law—perhaps *the* distinguishing feature."); David Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1566 (1991) ("No principle seems more established in capitalist law or more essential to the functioning of the modern corporate economy [than the principle of limited liability]." (footnote omitted)).

33. Nicholas Murray Butler, *Politics and Economics*, 143d Annual Banquet of the Chamber of Commerce of the State of New York, New York: Press of the Chamber of Commerce, at 47 (1911).

34. On the modularity approach, see Pargendler, *supra* note 15.

liability clearly undermines the protection of stakeholders through tort law and regulations, making the corporation "the perfect externalizing machine."[35]

Mindful of these problems, law-and-economics scholars have long questioned the efficiency of shareholder limited liability vis-à-vis involuntary creditors, such as tort victims.[36] Even the fiercest opponents of veil piercing find that the case for limited liability is weaker in the context of tort liability in corporate groups.[37] Nevertheless, with some important exceptions,[38] progress toward overcoming limited liability for the benefit of involuntary creditors (such as tort victims) and non-adjusting creditors (such as workers and consumers)[39] has been glacial, if not completely stalled, in the Global North.[40] Contrary to law-and-economics prescriptions, U.S. courts are *less* likely to pierce the corporate veil in tort cases compared to contract cases and in the parent-subsidiary setting compared

35. CARSTEN GERNER-BEUERLE & MICHAEL ANDERSON SCHILLIG, COMPARATIVE COMPANY LAW 814 (2019).

36. *See*, *e.g.*, Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 519–20 (1976) (arguing that the creation of separate legal entities to evade tort liability permits the externalization of costs and is socially inefficient); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1879–81 (1991).

37. STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 293 (2016) ("from a policy perspective, the considerations justifying limited liability insofar as individual shareholders are concerned seem far less powerful when applied to corporate shareholders."). *See also* Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE 252 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018), for the broader argument that the costs of asset partitioning are greater, and the benefits are smaller, within the corporate group compared to outside of it.

38. *See*, *e.g.*, Cees van Dam, *Breakthrough in Parent Company Liability: Three Shell Defeats, an End of an Era and New Paradigms*, 18 EUR. CO. & FIN. L. REV. 714, 747 (2021) (describing how 2021 decisions in the U.K. and the Netherlands "have changed the course of parent company liability," confirming that parents may owe a duty of care with respect to the operational activities of subsidiaries). Interestingly, these recent bolder approaches by U.K. and Dutch courts can be interpreted as a form of reverse convergence to initiatives in the Global South described below, even if they remain narrower in imposing fault-based, rather than strict, liability on parent companies.

39. Scholars have also argued that non-adjusting creditors—that is, voluntary creditors that are unable to adjust their contract terms to account for the risk of default, such as workers and consumers—are analogous to tort victims with respect to their vulnerability to the externalization of risk. Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996). *See also* John Armour, Gerard Hertig & Hideki Kanda, *Transactions with Creditors*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 2, at 115–16 (discussing the distinction between adjusting and non-adjusting creditors in the context of limited liability).

40. *See*, *e.g.*, Pat Akey & Ian Appel, *The Limits of Limited Liability: Evidence from Industrial Pollution*, 76 J. FIN. 5, 9–10 (2021) (finding that, after the U.S. Supreme Court's restrictive interpretation of parent company liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in its 1998 decision in *United States v. Bestfoods*, there is an increase in toxic emissions by subsidiaries).

to other contexts.[41] Katharina Pistor has recently decried how limited liability has let shareholders off the hook for harm caused to stakeholders in case after case.[42]

Unbeknownst to most observers, the strongest challenges to limited liability as an obstacle to stakeholder protection have come from the Global South, particularly from Brazil. Brazil's attack on limited liability vis-à-vis involuntary and non-adjusting creditors provides a particularly vivid example of innovative, if potentially problematic, approaches to stakeholder protection in the developing world. Brazil has effectively eliminated limited liability for compensation of harm to consumers, workers, and victims of environmental harm, as well as for directors, officers and controlling shareholders of failed financial institutions.[43] Interestingly, stakeholder-friendly veil piercing in Brazil is a fairly recent phenomenon dating to the last few decades, not a remnant of antiquated laws, indigenous tradition or colonial history.

Just like in other jurisdictions, limited liability is a very traditional element of the corporate form in Brazil, recognized since its first corporations in the early nineteenth century and explicitly contemplated in all corporate statutes since the Commercial Code of 1850. If anything, Brazil historically offered stronger limited liability than other jurisdictions. U.S. banks imposed "double liability" on shareholders between the Civil War and the Great Depression.[44] Brazilian banks, by contrast, enjoyed full limited liability during the same period.[45]

The first significant encroachment to limited liability dates to Brazil's Labor Law of 1943 (*Consolidação das Leis do Trabalho*—CLT), which imposed joint and several liability on all entities belonging to an "economic group" for debts to workers. Although exceptions to shareholder liability for the benefit of workers also exist in other jurisdictions,[46] the Brazilian regime in the Labor Law was, and still is, far-reaching from a comparative perspective in imposing strict joint and several liability on companies belonging to the same economic group. In 1987, a statute on financial institutions broke new ground by making individual controlling

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41. *See*, *e.g.*, Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1038 (1991); John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1, 20 (2010).

42. Katharina Pistor, *Limited Liability Is Causing Unlimited Harm*, PROJECT SYNDICATE (Feb. 5, 2020), https://www.project-syndicate.org/commentary/limited-liability-corporate-shares-by-katharina-pistor-2020-02 [https://perma.cc/55R5-2E5E].

43. Pargendler, *supra* note 31, at 21–22.

44. Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 WAKE FOREST L. REV. 31, 31 (1992).

45. Pargendler, *supra* note 31, at 20.

46. *See*, *e.g.*, N.Y. BUS. CORP. LAW § 630 (LexisNexis 2019) (imposing joint and several liability for labor debts on the ten largest shareholders of close corporations).

shareholders liable in case of Central Bank intervention due to insolvency or wrongdoing in financial institutions.[47]

Yet arguably the most important step toward Brazil's strong challenge to limited liability in the stakeholder context was the enactment of the Consumer Protection Code of 1990 (*Código de Defesa do Consumidor*—CDC). The Consumer Protection Code grants judges the ability to pierce the corporate veil of an entity "whenever its personality is, in any way, an obstacle to the compensation of harm caused to consumers."[48] Surprisingly, this expansive rule was absent from the draft bill proposed by consumerist advocates, but was included in the legislative process by politicians of center-right parties.[49] In fact, the very promulgation of this rule was likely a result of a historical accident.[50] Scholars have argued that the rule in question was supposed to have been vetoed by Brazil's president, but the official veto message contained a typo and mentioned a different paragraph of the same article instead.[51] Nevertheless, courts ultimately ignored the scholarly denunciations of the typo and enforced the rule as written. The leading case imposing strict liability on shareholders for damages to consumers concerned a tragic explosion in a shopping mall, which killed numerous bystanders.[52]

Despite its serendipitous origin, the innovative provision in the Consumer Protection Code—the first statutory rule on "disregard of legal entity" in Brazilian law—came to spread and influence stakeholder protections in other areas of law. Labor courts used it by analogy to render shareholders (including minority shareholders of close corporations) jointly and severally liable for unpaid dues to employees.[53] Moreover, Brazil's environmental protection statute of 1998 adopts the same language used in the

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47. Pargendler, *supra* note 31, at 23 (describing how the 1997 statute extended to controlling shareholders a regime of strict liability and freezing of personal assets that applied to directors and officers of financial institutions under intervention since 1974).

48. Lei No. 8.078, de 11 de setembro de 1990, Diário Oficial da União [D.O.U.] de 12.09.1990 (Braz.), art. 28, § 5º.

49. Pargendler, *supra* note 31, at 24.

50. *Id.*

51. ADA PELLEGRINI GRINOVER, ANTÔNIO HERMAN DE VASCONCELLOS E BENJAMIN, DANIEL ROBERTO FINK, JOSÉ GERALDO BRITO FILOMENO, KAZUO WATANABE, NELSON NERY JÚNIOR & ZELMO DENARI, CÓDIGO DE DEFESA DO CONSUMIDOR: COMENTADO PELOS AUTORES DO ANTEPROJETO 237 (8th ed., 2005) (advancing the view that the Presidential veto message contained a typo). The text accompanying the veto message lends support to the "typo theory," as it argues that other provisions of the Code "already contain all the elements necessary for the application of veil piercing, which constitutes, according to widely dominant doctrine under national and foreign law, an *exceptional technique* of repression of *abusive practices.*" *Id.* (emphasis added).

52. S.T.J., Recurso Especial No. 279.273-SP, Relator: Min. Ari Pargendler, Relatora p/ Acórdão: Min. Nancy Andrighi, 02.12.2003, Diário da Justiça [D.J.] 03.03.2004 (Braz.).

53. BRUNO MEYERHOF SALAMA, O FIM DA RESPONSABILIDADE LIMITADA 208 (2014) (explaining how the Consumer Protection Code served to justify "the most varied—and increasingly aggressive—forms of rendering third parties liable for the labor debts of the firm").

Consumer Protection Code to authorize piercing the corporate veil of an entity "whenever its personality is an obstacle to the compensation of harm caused to the quality of the environment."[54]

The erosion of limited liability in Brazil is such that scholars have decried the "end of limited liability" in the country.[55] Importantly, however, the attack on limited liability does not apply uniformly across areas of law but is concentrated in contexts of vulnerable stakeholders and difficult regulation. Brazilian economists have argued that the imposition of liability on controlling shareholders and managers of banks may be a more effective regulatory option given the well-known shortcomings of command-and-control regulations.[56] Brazilian courts are much more reluctant to overcome limited liability for the benefit of contract counterparties in commercial transactions, which are subject to the Civil Code's restrictive provisions conditioning veil piercing on a finding of "commingling of assets" or "deviation of purpose."[57]

Since the 2010s, Brazil has witnessed several legal reforms seeking to constrain veil piercing. However, the various efforts are noteworthy for their limited scope in only restricting the most outlandish fact patterns. In 2015, a new Code of Civil Procedure created procedural safeguards for the application of veil piercing, by outlawing the then prevailing practice of attaching shareholders' assets without their prior participation in the judicial process.[58] A 2019 statute called the "Law on Economic Freedom," for its overtly libertarian bent, reformed the Civil Code's section on veil piercing to include a new provision stating that "the asset autonomy of legal persons is a lawful interest of allocation and segregation of risks, established by statute with aim of promoting enterprises, in view of the creation of jobs, tax payments, income and innovation for the benefit of all."[59]

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54. Lei No. 9.605, de 12 de fevereiro de 1998, Diário Oficial da União [D.O.U.] de 13.02.1998 (Braz.), art. 4º.

55. SALAMA, *supra* note 53.

56. GUSTAVO H.B. FRANCO, AS LEIS SECRETAS DA ECONOMIA 88 (2012); Gustavo H.B. Franco & Luiz Alberto C. Rosman, *A Responsabilidade Ilimitada em Instituições Financeiras no Brasil*, *in* A REFORMA DO SISTEMA FINANCEIRO AMERICANO (2009).

57. Pargendler, *supra* note 31, at 27. Despite criticism by Brazilian scholars, the disregard of asset partitioning in bankruptcy through the doctrine of substantive consolidation has run rampant in Brazil. *See* Sheila C. Neder Cerezetti, *Reorganization of Corporate Groups in Brazil: Substantive Consolidation and the Limited Liability Tale*, 30 INT. INSOLV. REV. 1, 26–27 (2021) (describing as "worrying" the "flexible" approach to substantive consolidation in Brazil, which "treats an exceptional measure as a day-to-day event, dramatically altering the rights of creditors and the obligations of debtors without regard to the limitation of liability").

58. Lei No. 13.105, de 16 março de 2015, Diário Oficial da União [D.O.U.] de 17.03.2015 (Braz.), arts. 133–37.

59. Lei No. 13.874, de 20 de setembro de 2019, Diário Oficial da União [D.O.U.] de 20.09.2019 (Braz.) (introducing new art. 49-A to the Civil Code).

Beyond the new rhetoric, however, the scope of the Civil Code's reform is modest. The changes are limited to defining the meaning of "commingling of assets" and "deviation of purpose" that applies to civil and commercial transactions under the Civil Code, but do nothing with respect to the broad approaches to veil piercing in consumer, environmental, and employment law.[60] The Brazilian Congress passed a more ambitious bill aiming to impose numerous procedural constraints on veil piercing in 2022, but then President Jair Bolsonaro vetoed the proposed legislation in its entirety as unconstitutional and contrary to the public interest.[61] The President's official veto message criticized, among other things, the proposed rule that would require plaintiffs to specify in the complaint the acts of shareholders that justified the piercing of the corporate veil.[62] It reasoned that such a change ran afoul of the strict regime in Brazil's environmental and consumer protection legislation allowing for veil piercing regardless of fault, and would effectively impede the use of veil piercing in consumer disputes by shifting the burden of proof to the most vulnerable party.[63]

Although Brazil's experience is particularly broad and extreme, the country is by no means alone in the Global South in embracing a more expansive approach to veil piercing to protect stakeholders. In the last decades, India has mitigated limited liability in corporate groups by recognizing a doctrine of enterprise liability for the benefit of tort victims of hazardous activities.[64] In the wake of the much-publicized Bhopal disaster of 1984, in which the leakage of toxic gas from a Union Carbide pesticide plant took thousands of lives, Indian courts came to embrace enterprise liability and hold parent companies liable for tort victims of hazardous activities.[65] Departing from earlier precedents, the Indian Supreme Court embraced an absolute version of enterprise liability in the 1987 *Mehta* case

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60. For doctrinal commentary on the reform, see Mariana Pargendler, *Comentários ao Art. 50 do Código Civil: A Desconsideração da Personalidade Jurídica*, *in* DIREITO PRIVADO NA LEI DA LIBERDADE ECONÔMICA: COMENTÁRIOS (Judith Martins-Costa & Guilherme Carneiro Monteiro Nitschke eds., 2022).

61. Mensagem de Veto No. 657, de 13 de dezembro de 2022.

62. *Id.*

63. *Id.*

64. *See*, *e.g.*, FRANCISCO REYES, LATIN AMERICAN COMPANY LAW, A NEW POLICY AGENDA: RESHAPING THE CLOSELY HELD ENTITY LANDSCAPE II 23 (2013) ("The influence of new political constitutions and constitutional courts in Latin American countries has led to the creation of various piercing-the-veil doctrines—most of which rely on grounds outside of the scope of company law. Additionally, various tax, labor and environmental regulations have established a basis to allow a plaintiff to request that a legal entity be disregarded.").

65. For a detailed discussion of Indian decisions on the matter, see Abhi Raghunathan, *The Grand Trunk Road from Salomon to Mehta: Economic Development and Enterprise Liability in India*, 100 GEO. L.J. 571 (2012).

resulting from an oleum gas leak in Delhi two years earlier.[66] The Court held that "[i]f the enterprise is permitted to carry on the hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident."[67]

The decision in *Mehta* contradicted the then dominant view about legal possibilities in developing countries. That year, Marc Galanter, one of the foremost scholars of law and development, had deplored the prevailing "legal torpor" in India following the Bhopal tragedy, denouncing the "absence of tort claims," the "absence of tort doctrines," and the "arid conceptualism" that prevented consideration of "problems of implementation or underlying policies."[68] Nevertheless, "[t]he sense of violation by a foreign malefactor" raised new expectations of new kinds of claims and potential redress.[69]

Indian courts then applied the new concept of enterprise liability for hazardous activities to the Bhopal case itself, after a U.S. court declined jurisdiction on the ground of *forum non conveniens*.[70] In 1988, the Madhya Pradesh High Court cited *Mehta* to recognize the liability of controlling shareholder Union Carbide for the harm caused in the Bhopal disaster by its Indian subsidiary.[71] The High Court rejected the parent company's argument that it did not exercise control over its subsidiary, reasoning instead that Indian law on limited liability and veil piercing had to adapt to modern economic conditions, such as "a mass disaster and in which on the face of it the assets of the alleged subsidiary company are utterly insufficient to meet the just claims of multitude of disaster victims."[72] The Bhopal case was ultimately settled for US$ 470 million based on estimates that turned out to greatly underestimate the number of fatalities and victims—an outcome that is widely regarded as undercompensatory and unfair.[73]

In 1996, the Indian Supreme Court once again reaffirmed its commitment to overcome limited liability within the corporate group for the

66. *Id.* at 590–91.

67. *M.C. Mehta v. Shriram Food and Fertilizer Industries*, 1 S.C.R. 819 (1987). For a discussion, see Raghunathan, *supra* note 65, at 590–91.

68. Marc Galanter, *Legal Torpor: Why so Little has Happened in India After the Bhopal Tragedy*, 20 TEX. J. INT'L L. 273, 275, 279 (1985).

69. *Id.* at 281.

70. Raghunathan, *supra* note 65, at 590–91.

71. Union Carbide Corp. v. Union of India, Civil Revision No. 26, (1988). For a discussion, see Raghunathan, *supra* note 65, at 591–92.

72. Union Carbide Civil Revision, *supra* note 71, at 378–79.

73. *See*, *e.g.*, Sheila Jasanoff, *Bhopal's Trials of Knowledge and Ignorance*, 42 NEW ENG. L. REV. 679, 684 (2008); Shruti Rajagopalan, *Bhopal Gas Tragedy: Paternalism and Filicide*, 5 J. INDIAN L. & SOC'Y 201, 209 (2014) (criticizing the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, which gave India's central government exclusive authority to represent the victims in court).

benefit of stakeholders in dangerous industries.[74] In a case involving the release of toxic chemicals that devastated local agriculture, the Court held that "the enterprise … alone has the resource to discover and guard against hazards or dangers" and criticized what it viewed as "contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialization and export earnings."[75] Interestingly, commentators—unaware of similar developments in other developing countries—have compared Indian law exclusively to the laws of Global North jurisdictions and concluded that it is "unique" and "revolutionary" from a comparative perspective.[76]

But India and Brazil are not the only countries in the Global South that have committed to overcome limited liability. In Colombia, shareholders of limited liability companies can be held liable for tax and labor obligations irrespective of fault.[77] Colombia's bankruptcy law also makes parent companies presumptively liable for obligations of subsidiaries.[78] In a ground-breaking 2001 decision, the Colombian Constitutional Court held the controlling shareholders of a liquidated company temporarily liable for the company's social security and pension liability.[79] The Court justified the exceptional measure as a response to the violation of the "fundamental right of protection of the vital minimum, of life in dignified conditions and of the protection of old age" concerning the liquidated company's pensioners.[80] On that occasion, the Court for the first time boldly extended the effects of its decision to third parties, so as to guarantee the equal treatment of the company's retired workers who did not take part in the lawsuit.[81]

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74. Indian-Council for Enviro-Legal Action v. Union of India, 3 S.C.C. 212, 38 (1996) (India). For a discussion, see Raghunathan, *supra* note 65, at 593.

75. *Id.* at 27, 1.

76. Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 226–27 (2009). *See also* Raghunathan, *supra* note 65, at 601 (claiming that India's "relatively isolated" stance in its "broad application of enterprise liability" may compromise foreign investment in the country).

77. Rep. of the Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31/Add.2 (May 23, 2011).

78. L. 1116, diciembre 27, 2006, DIARIO OFICIAL [D.O] (Colom.); L. 222, diciembre 20, 1995, DIARIO OFICIAL [D.O] (Colom.), art. 148.

79. Decision SU-1023 of 2001, Jaime Córdoba Triviño, J. (Jaime Araujo Rentería, J., concurring), Librada de Dios Viuda de Fajardo y Otros, contra la Compañía de Inversiones de la Flota Mercante S.A. y Otros (Librada de Dios Viuda de Fajardo v. The Merchant Fleet Investment Company).

80. *Id.* For an analysis of the decision, see REYES, *supra* note 64; ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 793 et seq. (2006).

81. Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOB. STUD. L. REV. 529, 573 (2004).

There are also prominent, though isolated, examples of attacks on limited liability in other Global South jurisdictions in cases that pitch the interests of foreign companies against local stakeholders. In the Deltec case of 1973, the Supreme Court of Argentina shocked the international community by finding a "unified socio-economic unit" and imposing liability on the Canadian parent company and other foreign affiliates for the debts of a bankrupt Argentine company.[82] Although the case concerned voluntary creditors, the legal challenge in question had been initiated by a small, likely non-adjusting, trade creditor.[83] The Court considered the "paramount interests of [Argentine] society" in relation to multinational enterprises,[84] and criticized the "excessive attachment to legal traditionalism" as one of the "most serious obstacles to the success of the promotion of economic expansion and social justice."[85]

II. MANDATORY CSR SPENDING IN INDIA, INDONESIA, AND MAURITIUS

Since Adolf Berle and Merrick Dodd's famous exchange in the 1930s, much of the debate on stakeholder protection has focused on the scope of directors' fiduciary duties.[86] Both developed and developing jurisdictions have opted for corporate purpose provisions that mention broader interests beyond shareholders. While Brazil's Corporations Law of 1976 grants an unusual amount of power to shareholders,[87] it requires directors and officers to act in the interest of the company, "subject to the public good and to the social function of enterprise," and imposes liability on controlling shareholders for orienting a company towards a purpose "harmful to the national interest" or favoring another company to the detriment of the "national economy."[88] India's Companies Act of 1956 allowed shareholders to complain that the affairs of the company "are being

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82. PHILLIP BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 187 (1993) (describing the *Deltec* case as "[t]he outstanding example of the exercise of host country extraterritoriality reflecting enterprise principles").

83. Reuven S. Avi Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 16 (2003) (while the Argentine creditors were largely voluntary, some of the creditors, including the US $4,000 creditor raising the legal challenge in *Deltec*, were "trade creditors and therefore closer to involuntary creditors").

84. BLUMBERG, *supra* note 82, at 188 (alteration in original).

85. M.W. Gordon, *Argentine Jurisprudence: The Parke Davis and Deltec Cases*, 6 U. MIAMI INTER-AM. L. REV. 320, 326 (1974).

86. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?* 45 HARV. L. REV. 1145, 1145 (1932).

87. Pargendler, *How Universal Is the Corporate Form?*, *supra* note 31, at 32 (describing the unusually broad competence of the shareholders' meeting and the binding effects of shareholder agreements on directors' votes).

88. Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.), arts. 154 and 117, § 1º.

conducted in a manner prejudicial to the public interest,"[89] with notions of public interest being "widely infused into company law."[90] India's more recent Companies Act of 2013 provides that directors "shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment," while its Code of Conduct for independent directors requires them to "safeguard the interests of all stakeholders, particularly the minority shareholders," and "balance the conflicting interest of the stakeholders."[91]

There are also manifestations of stakeholder-sensitive corporate purposes in the Global North, even though a bit blander. Under the U.K. Companies Act of 2006, directors must seek to promote the benefit "of its members as a whole, and in doing so [to] have regard (amongst other matters) to … the interests of the company's employees, … [and] the impact of the company's operations on the community and the environment."[92] Similarly, a 2019 French law reform provides that companies must be managed in view of their corporate interest, while also considering the social and environmental issues arising from their activities.[93] Various U.S. states contain constituency statutes permitting directors to consider the interests of employees, customers, the community, and even "the economy of the state and Nation."[94] At the same time, one may interpret Delaware law's greater focus on shareholders as beneficiaries of fiduciary duties as compensating for Delaware's status as "the least shareholder-centric jurisdiction" from the perspective of the allocation of corporate powers.[95] In this sense, Delaware lies on the opposite side of the spectrum from Brazil, where stakeholder-oriented fiduciary duties coexist with exceptionally

89. Cottrell, *infra* note 244, at 435. Since 1963, the Indian Companies Act itself has required that companies take account of the interests not only of their shareholders but also of the public (citing the amended section 398 of the Companies Act 1956).

90. Umakanth Varottil, *The Stakeholder Approach to Corporate Law: A Historical Perspective from India*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW, 387 (Harwell Wells ed., 2018).

91. Companies Act, 2013, § 166, Schedules IV, II(5)–(6) (India). For a discussion, see Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465, 467 (2017).

92. Companies Act 2006 § 172(1) (UK).

93. Code civil [C. civ.] art. 1833 as amended by Loi 2019-486 du 22 mai 2019, art. 169 [Law 2019-486 of May 22, 2019], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 24, 2019.

94. Pargendler, *supra* note 3, at 573 (citing the statutes of Kentucky, Minnesota, Nevada, Ohio, and Wyoming as examples).

95. John Armour, Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 2, at 58 (examining the apportionment of power between shareholders and boards from a comparative perspective).

strong shareholder power. Yet, given the dearth of enforcement mechanisms, there is no evidence suggesting that broader fiduciary duties to stakeholders make much difference where they exist.[96] This section, as this Article more generally, thus concentrates on distinct stakeholder-oriented innovations in the Global South, which, at least in theory, appear to have more teeth.

India's Companies Act of 2013 attracted significant attention by introducing a requirement that large companies have a corporate social responsibility (CSR) policy providing for spending of at least 2% percent of profits on CSR.[97] Absent from the initial drafts of the proposed legislation, the CSR provision was inserted in the aftermath of the major Satyam scandal in 2009, which created the need to rebuild trust in corporate India.[98] In the parliamentary debate preceding the adoption of the bill, economic inequality was a key consideration. The Minister of the State for Corporate Affairs justified the provision as offering a much-needed "perception correction" at a time of "big division in this country," as "the divide between the rich and the poor is getting bigger and bigger."[99] The provision was also expected to minimize protest movements and buttress the popularity of the government's pro-business policies.[100]

India's CSR spending regime initially applied on a "comply-or-explain" basis, but it became mandatory ("comply or be penalized") for large companies following an amendment in 2021,[101] thus showing a progressive hardening of heterodox stakeholderism. The statutory definition of CSR in the Companies Act is very broad in covering a wide range of social objectives involving external stakeholders, such as eradicating extreme hunger and poverty, reducing child mortality and improving maternal

96. Luca Enriques, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 2, at 98 ("[C]ourts are not well-placed to determine which policies maximize aggregate private welfare. This explains why, even where it is spelt out, a duty to pursue the corporation's interest (in this broad sense) is unenforceable."). *See also* Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions* (Eur. Corp. Governance Inst., Working Paper No. 664, 2022) ("[E]ven structural measures like employee co-determination hardly have detectable effects, let alone mere exhortations such as those in (unenforceable) nuances of (misunderstood) fiduciary duties.").

97. Companies Act, 2013, § 135(5) (India).

98. Varottil, *supra* note 90, at 392.

99. Damien Krichewsky, *CSR Public Policies in India's Democracy: Ambiguities in the Political Regulation of Corporate Conduct*, 19 BUS. & POL. 510, 532 (2017) (also arguing that such a correction "can only be done if the companies themselves move forward and show that they are responsible, sensitive and they want to give back to the society").

100. *Id.* at 532–33.

101. Michael R. Littenberg, *India Substantially Revamps CSR Requirements—The Impact on Compliance at Indian Subsidiaries of U.S.-Based Multinationals*, ROPES & GRAY (July 26, 2021), https://www.ropesgray.com/en/insights/alerts/2021/07/india-substantially-revamps-csr-requirements-the-impact-on-compliance-at-indian-subsidiaries [https://perma.cc/4ED7-FHPV].

health, combating the human immunodeficiency virus, acquired immune deficiency syndrome, malaria, and other diseases, ensuring environmental sustainability, and contributing to the Prime-Minister's National Relief Fund.[102] The 2021 amendment also explicitly excluded from the definition of CSR activities undertaken in the normal course of business or outside of India, sponsorships from which the company derives marketing benefits, and activities that benefit employees, among others.[103] The far-reaching welfare objectives of the CSR provisions, combined with the exclusion of benefits to employees, is indicative of a mode of heterodox stakeholderism in developing countries that overly aims to complement the state's role and compensate for government failures.[104] While philanthropic spending has greatly increased following the reforms in key areas such as health, education, and sanitation, India's CSR model under concentrated ownership has produced concerns about corruption and cronyism through contributions to government funds and has failed to solve the country's deep-rooted social and economic problems.[105]

Interestingly, India's approach to mandatory CSR is not alone in the developing world. In 2007, Indonesia became the first country to introduce mandatory corporate social responsibility requirements for corporations operating in the business of natural resources or impacting natural resources. This mechanism deviated from Global North practices and, therefore, was not captured by then existing comparative literature.[106] The mandatory provisions withstood constitutional scrutiny, with the Constitutional Court of Indonesia noting that the voluntary nature of CSR is not universal but rather depends on the culture of each country.[107] Pushed by NGOs and resisted by domestic elites, the CSR requirement in Indonesia is plagued by a lack of enforcement mechanisms.[108]

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102. Companies Act 2013, schedule VII (India).

103. Companies (CSR Policy) Amendment Rules, 2021 (India).

104. *See* Afra Afsharipour, *Lessons from India's Struggle with Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 377 (Elizabeth Pollman & Robert Thompson eds., 2021) (noting how critics in India describe the model as an "outsourcing of governance" that works by "taking the failure of the state and the corporates and trying to create a model out of it").

105. *Id.* at 367, 375, 377. *See also* Dhammika Dharmapala & Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013*, 56 INT. REV. L. ECON. 92, 104 (2018) (finding that firms with less than 2% on CSR increased their spending, while those spending more decreased their spending, following the introduction of the 2013 Companies Act).

106. For a discussion, see Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 416 (2013); Andrew Rosser & Donni Edwin, *The Politics of Corporate Social Responsibility in Indonesia*, 23 PAC. REV. 1, 2 (2010).

107. Constitutional Court Decision No. 53/PUU-VI/2008, point 3.19. *See also* Lin, *supra* note 12, at 455.

108. *See* Rosser & Edwin, *supra* note 106, at 8–9; Lin, *supra* note 12, at 456; Mahy, *supra* note 106, at 416 (noting that "there are still no strong sanctions for resources companies who fail to carry

Moreover, in 2009, Mauritius preceded India as the first jurisdiction to require the allocation of 2% of profits to CSR activities.[109] The move followed a "neoliberal" turn in Mauritius politics, with the government seeking to slash taxes while lowering social spending.[110] Government representatives viewed the rule as a "tax," though "an intelligent tax because government has left the management of this tax in the hands of the private sector."[111] A study on the Mauritius experiment found that, despite critiques, all respondents considered that CSR has a role to play in the development of Mauritius.[112] Similarly, in 2016 and 2020 statutes, Nepal adopted mandatory corporate social responsibility spending of 1% of annual profits for industrial enterprises and banks to be allotted to sectors ranging from community health services and schools to roads and sewage.[113] Nevertheless, commentators have criticized Nepal's mandatory CSR regime as "impracticable" given local constraints and the fact that it was "hastily legislated by replicating the Indian law."[114]

III. CORPORATE SOCIAL RESPONSIBILITY COMMITTEES IN INDIA AND SOUTH AFRICA

In addition to mandating corporate social responsibility and imposing minimum spending, developing jurisdictions have also pioneered the creation of governance arrangements designed to protect stakeholder interests in the form of dedicated board committees.[115] For example, South Africa's Companies Act of 2008 innovated by instituting a social and ethics committee, whose significance in giving legal backing to a stakeholder approach "cannot be gainsaid."[116] State-owned companies, listed companies, and companies meeting certain metrics of public interest must have

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out their CSR responsibilities," which "suggests that corporate power may have reasserted itself at the central level").

109. RENGINEE PILLAY, THE CHANGING NATURE OF CORPORATE SOCIAL RESPONSIBILITY, CSR AND DEVELOPMENT—THE CASE OF MAURITIUS 2 (2015) (describing Mauritius as "the first country in the world to have actually implemented an innovative CSR legislation).

110. *Id.* at 230; Lin, *supra* note 12, at 441.

111. RENGINEE, *supra* note 109, at 252.

112. *Id.* at 259.

113. Arhan Sthapit, *Corporate Social Responsibility in Nepal: Beset with the Syndrome of 'Who'll Bell the Cat?' as Philanthropic Views Dominate CSR Practices*, *in* CURRENT GLOBAL PRACTICES OF CORPORATE SOCIAL RESPONSIBILITY 786–88 (S. O. Idowu ed., 2021).

114. *Id.* at 787.

115. Corporate responsibility or similar committees are more recently making an appearance in the United States. *See* Brett H. McDonnell, *Stakeholder Engagement* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4262976 [https://perma.cc/8ZK9-T652] (finding that 22 of the S&P 100 companies have a special committee devoted to ESG, corporate social responsibility, or sustainability issues).

116. Companies Act of 2008 § 72 (S. Afr.); Tshepo H. Mongalo, *The Social and Ethics Committee: Innovating Corporate Governance in South Africa*, *in* CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 363 (2019).

a social and ethics committee with at least three members, one of whom must not be involved in the day-to-day management of the company.[117] The social and ethics committee, among other things, must monitor the company's activities in view of legislation and prevailing codes of best practices on social and economic development and good corporate citizenship, including the U.N. Global Compact Principles, the OECD recommendations regarding corruption, the Broad-Based Economic Empowerment Act, promotion of equality, environmental matters, consumer relationships, labor and employment matters.[118]

The social and ethics committee must draw matters to the attention of the board as appropriate, but, unlike typical board committees, it also reports directly to shareholders.[119] South African commentators have debated whether the new committee has the nature of a board committee, a shareholders' committee, or a sui generis organ of the company.[120] Despite open questions about its functioning and impact, the social and ethics committee is hailed as a "new and creative innovation[]"[121] that reflects a distinct "procedural approach" to the protection of stakeholders.[122]

Similarly, India's Companies Act of 2013 also requires a CSR Committee for companies subject to the CSR spending requirements.[123] The CSR Committee formulates and recommends the CSR policy to the board, suggests the amount of expenditures to be incurred, and monitors the CSR policy of the company from time to time.[124] The CSR committees of public companies must have at least three directors, one of whom must be an independent director.[125] Still, studies have denounced the CSR committee as "largely ineffective in practice," finding a tendency to favor contributions to the Prime Minister's National Relief Fund over other more labor-intensive efforts to conceive and implement CSR activities.[126]

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117. Regulations in Terms of The Companies Act No. 71 (2008) (as amended), § 43 (S. Afr.).

118. *Id.*

119. *Id.*

120. Irene-marié Esser & Piet Delport, *The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 2*, 2017 DE JURE 221, 223–24, 228 (describing the controversy and defending that it is a company committee in view of its right to report to shareholders); Mongalo, *supra* note 116, at 363 (arguing that it qualifies as a board committee).

121. Mongalo, *supra* note 116, at 361.

122. Irene-marié Esser & Piet Delport, *The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 1*, 2017 DE JURE 97, 100 (contrasting South Africa's "procedural approach" to the U.K.'s "rule approach" to stakeholder protection).

123. Companies Act, 2013, § 135(iii) (India).

124. *Id.*

125. *Id.*

126. Ninitha Koya & Juliet Roper, *Legislated CSR in Practice: The Experience of India*, 22 J. PUB. AFF. 1, 4–5 (2020).

IV. STAKEHOLDER EMPOWERMENT IN ENFORCING DIRECTORS' DUTIES AND BANKRUPTCY IN SOUTH AFRICA

Another strategy of stakeholder protection takes the form of stakeholder empowerment through the direct grant of governance rights to non-shareholder constituencies. The most paradigmatic manifestation of stakeholder empowerment is worker participation in company boards, a practice that is characteristic of the German model and widespread among continental European countries.[127] Allusions to worker participation in company management are more common in the constitutions of the Global South compared to Global North jurisdictions, with five and two constitutional texts of the largest economies in each group, respectively, referring to the concept.[128] Nevertheless, such exhortations are often soft and voluntary in the developing world, to the effect that significant worker participation in corporate boards remains much stronger in rich countries, particularly in Continental Europe.[129] Brazil, for instance, introduced a particularly timid version of employee board participation in 2010: it is limited to one worker representative in state-owned enterprises controlled by the federal government, and curiously such representative is not allowed to participate in discussions and voting concerning labor matters.[130]

However, the Global South has pioneered distinct strategies of worker empowerment in corporate governance beyond codetermination. South Africa's Companies Act of 2008 is "unusual" to a foreign observer in "the amount of power, including direct participation, it bestows on employee groups."[131] Not only shareholders, directors, and officers, but also trade unions representing employees may initiate proceedings to prevent the company from behaving inconsistently with the Act.[132] The Companies Act also empowers trade unions and employees to enforce directors'

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127. For a survey of the modes of codetermination in Europe, see generally Jens Dammann & Horst Eidenmueller, *Codetermination and the Democratic State*, 2022 U. ILL. L. REV. 963.

128. These are Italy, Art. 46 CONSTITUZIONE [Const.] (It.), and the Netherlands, STATUUT NED [Charter] art. 19, in the Global North, and China, XIANFA art. 16 (1982), India, India Const. art. 43A, Brazil, CONSTITUIÇAO FEDERAL [C.F.] [CONSTITUTION] art. 7, XI (Braz.), Argentina, Art. 14, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), and Egypt, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 42, 18 Jan. 2014.

129. The 2018 version of the U.K. Corporate Governance Code now also recommends some form of institutionalization of board engagement with the workforce through one of the following methods: a director appointed from the workforce, a formal workforce advisory panel, or a designated non-executive director. U.K. Corporate Governance Code 5 (2018) (Principle 1, Provision 5).

130. Lei No. 12.353, de 28 de dezembro de 2010, Diário Oficial da União [D.O.U.] de 29.12.2010 (Braz.), art. 2º, § 1º and 3º.

131. John F. Olson, *South Africa Moves to a Global Model of Corporate Governance but with Important National Variations*, *in* MODERN COMPANY LAW FOR A COMPETITIVE SOUTH AFRICAN ECONOMY 225 (Tshepo H. Mongalo ed., 2010).

132. Companies Act of 2008, § 20(4), (S. Afr.); *id.* (shareholders, directors, and officers also have this right).

duties under the statute by allowing them to initiate director delinquency and disqualification procedures, which are exceptionally broad in South Africa,[133] and to commence derivative actions.[134] A suit brought by the trade union South African Airways Pilot Association and the Organisation Undoing Tax Abuse (OUTA) resulted in the disqualification of a board chair of South African Airlines, a state-owned enterprise.[135] Interestingly, the court declared the director delinquent for her lifetime, an unusually draconian outcome.[136]

Concerns about unemployment and job savings played a significant role in the formulation of the new regime for business rescue proceedings.[137] South Africa has faced extraordinarily high levels of unemployment, even among developing countries.[138] The Companies Act gives a prominent role to labor by empowering trade unions and employees to ask the court to place the company in business rescue, requiring their consultation in the development of the business plan, and permitting them to address creditors at the meeting before the vote on the plan.[139] South Africa's Companies Act also gives employees enhanced information rights by

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133. *See* Rehana Cassim, *A Comparative Discussion of the Judicial Disqualification of Directors Under the South African Companies Act*, 65 J. AFR. L. 87, 90, 92 (2021) (describing how the director disqualification regime under the Companies Act is "wider, stricter, and more far-reaching" than its counterparts in the U.K., Australia, and the United States, including with respect to South Africa's "unique" solution of granting *locus standi* for trade unions and employee representatives).

134. Richard Croucher & Lilian Miles, *Corporate Governance and Employees in South Africa*, 10 J. CORP. L. STUD. 367, 372 (2010). Canada and Singapore grant courts discretion to allow derivative suits by stakeholders, though they remain rare. *See* Dalia Palombo, *The Future of the Corporation: The Avenues for Legal Change*, 10 J. BRIT. ACAD. 43, 64 (2022).

135. *Undoing Tax Abuse and Another v. Myeni and Others* (15996/2017) [2020] ZAGPPHC 169. For a discussion, see Refentse Chuene, Zainobia Demarthe & Stimela Mokoena, *Directors Beware! The Court Declares Dudu Myeni (Former SAA Chair) a Delinquent Director*, 20 WITHOUT PREJUDICE 14 (2020).

136. Rehana Cassim, *Declaring Directors of State-Owned Entities Delinquent: Organisation Undoing Tax Abuse v Myeni*, 138 S. AFR. L. J. 1, 1 (2021) (praising the decision's "strict stance against errant directors of state-owned companies"). This decision was also the first to recognize standing for a party acting in the public interest (in this case, OUTA) to bring delinquency proceedings. *Id.* at 7 (describing how the court justified OUTA's standing in its role representing taxpayers, "who partly foot the bill of SAA" and "have an interest in how a company such as SAA is run").

137. Anneli Loubser & Tronel Joubert, *The Role of Trade Unions and Employees in South Africa's Business Rescue Proceedings*, 36 INDUS. L. J. (JUTA) 21, 22 (2015).

138. Prinesha Naidoo, *South Africa Jobless Rate Drops to Third Highest in the World*, BLOOMBERG (Nov. 29, 2022), https://www.bloomberg.com/news/articles/2022-11-29/south-africa-jobless-rate-drops-to-third-highest-in-the-world [https://perma.cc/73SJ-LPWR] (describing how South Africa's unemployment rate has exceeded 20% for about two decades, hitting 33% in 2022).

139. Loubser & Joubert, *supra* note 137. The authors note that the right to initiate a business rescue is "a powerful instrument not only to prevent liquidation of the company by having it placed in business rescue but also to halt liquidation proceedings that have already begun since the mere making of an application for business rescue proceedings will suspend the liquidation proceedings until the court refuses the business rescue application or, if the court does grant the order, until the business rescue proceedings end." *Id.* at 29.

granting unions access to information for purposes of initiating a business rescue proceeding and requiring that unions receive notification if the company provides financial assistance to a director.[140]

Taken together, these employee rights are both distinctive and substantial compared to the norm in other jurisdictions, where workers' rights generally take the form of codetermination, workers' councils, or information and consultation rights in the context of corporate takeovers.[141] Here again, however, commentators have questioned whether these measures are effective and "likely to suffice to meet deep socio-economic challenges."[142]

While employee participation in business rescue proceedings appeared "surprisingly reticent" in the first years after the adoption of the Companies Act,[143] the high-profile bankruptcy of South African Airlines (SAA), a state-owned enterprise, paints a different picture. A union representing mostly white, Afrikaans-speaking employees filed a request for business rescue in late 2009 to avoid liquidation.[144] Subsequently, unions also successfully halted retrenchments prior to the proposal of a business rescue plan. A decision by the Labour Court of Appeal held that the best purposeful interpretation of section 136 of the Companies Act established that the presentation of a business rescue plan constituted a condition precedent for retrenchment, given that one of the main purposes of the business rescue procedure in South Africa is "the preservation of jobs."[145] The Court stated that this interpretation was consistent with the Constitution, which "recognises the rights of employers but simultaneously protects a range of rights of employees that are central to the democratic model promoted by the Constitution read as a whole."[146] International law firms have warned that the decision may deal a death knell to successful business

140. Companies Act of 2008, §§ 31(3), 45(5) (S. Afr.); Olson, *supra* note 131, at 226.

141. On worker rights in the takeover context, see Pargendler, *The Grip of Nationalism on Corporate Law*, *supra* note 3, at 543 and 551 (noting how workers' rights in the acquisition have emerged in France and the U.K. as a nationalistic response to foreign takeovers).

142. Croucher & Miles, *supra* note 134, at 369.

143. Loubser & Joubert, *supra* note 137, at 39 (noting that labor had initiated only one case of business rescue by 2015). *See also* WJC Swart, *Business Rescue: Do Employees Have Better (Reasonable) Prospects of Success? Commentary on* Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGI Operations Limited *(North Gauteng high court, Pretoria (unreported) 2012-05-16 Case no 6418/2011; 18624/2011; 66226/2011; 66226A/11)*, 35 OBITER 406, 410 (2014) (describing *Solar Spectrum* as a rare case of successful application for business rescue and the first case brought by employees).

144. *South Africa Union Files Court Case to Force SAA Rescue*, REUTERS (Nov. 21, 2019), https://www.reuters.com/article/safrica-saa-court/south-africa-union-files-court-case-to-force-saa-rescue-idUSL8N2812SS [https://perma.cc/38T4-X6U3].

145. *South African Airways (SOC) Limited v. National Union of Metalworkers of South Africa obo Members* 2020 JOL 47663 (LAC) at 13 para. 29 (S. Afr.).

146. *Id.* at 17 para. 39.

rescue in South Africa by issuing a moratorium against retrenchments until the adoption of a business rescue plan that expressly addresses them.[147]

V. Racial Inclusion and Diversity in Corporate Governance in Malaysia and South Africa

Racial and ethnic tensions have been particularly strong in shaping democracy and capitalism in the Global South.[148] Global South jurisdictions have also pioneered efforts at affirmative action in corporate governance as a means to ease ethnic tensions and redress historical economic inequities across racial lines. As noted by Howk-Aun Lee and Lumkile Mondi, "Malaysia and South Africa conduct two of the most extensive affirmative action programmes in the world, and perhaps most distinctively, the policy encompasses the corporate sphere."[149] This section examines Malaysia's pioneering policies to advance Bumiputera (Malay) ownership of corporations since the 1970s as well as South Africa's focus on Black economic empowerment through corporate governance since the end of the apartheid regime.

A. Malaysia

Following independence, Malaysia's constitution of 1957 explicitly provided for the reservation of quotas for the Bumiputera (Malays or "*sons of soil*") in public service, education, and business permits.[150] At the time, Malays accounted for over half of the population but for only 2.4% of the country's corporate assets, compared to the 27.2% owned by the Chinese,

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147. Hogan Lovells Publications, *COVID-19—NUMSA v SAA—The Death Knell to Successful Business Rescue?* HOGAN LOVELLS (May 11, 2020), https://www.hoganlovells.com/-/media/hogan-lovells/pdf/2020-pdfs/2020_05_11_alert_numsa_vs_saa.pdf [https://perma.cc/3KJV-3S3P].

148. Amy Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 5 (1998) ("Entrenched ethnic divisions permeate most developing countries, and these divisions bear a distinctive and potentially subversive relationship to the project of marketization and democratization").

149. Howk-Aun Lee & Lumkile Mondi, *Affirmative Action and Corporate Development in Malaysia and South Africa*, *in* HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF THE CORPORATION 229 (Andreas Nölke & Christian May eds., 2018).

150. Malaysia's Constitution of 1957, Art. 153 (article 153 (2) provides that "[n]otwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.").

who represented only 34.4% of the population.[151] Growing ethnic tensions led to violent anti-Chinese riots in 1969 and to Malays' fear of being "swallowed" by the Chinese.[152] In response to these tensions and the perception of endemic economic discrimination, the government adopted an ambitious New Economic Policy (NEP) in 1971, which placed a strong focus on affirmative action policies.[153]

The NEP was based on two pillars: (i) "to reduce and eliminate poverty irrespective of race" and (ii) "to restructure Malay society so as to correct economic imbalance and eliminate the identification of race with economic function."[154] Geared towards the improvement of the Malays' vulnerable economic position, the NEP set a specific target of achieving 30% Bumiputera corporate ownership by 1990. Starting in 1976, companies seeking a listing on the local stock exchange had to allocate 30% of the issued shares to the Bumiputera, a requirement that was later reduced to 12.5% in 2009.[155] Other legal and regulatory strategies harnessed to increase Bumiputera ownership included the use of public investment vehicles for the benefit of Bumiputera, the requirement that companies operating in the old industry have both a majority Bumiputera ownership and Bumiputera representation on the board and other key positions, as well as the allocation of at least 30% ownership during privatizations.[156]

Although there are significant controversies surrounding measurement, existing estimates suggest that Bumiputera ownership reached 19% in the 1990s and peaked at 23.4% in 2011 before falling to 16.2% in 2015, when there was a corresponding increase of foreign ownership at the expense of both Bumiputera and Non-Bumiputera ownership.[157] In 2015, the Eleventh Malaysia Plan expanded the scope of the 30% target by including

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151. GOVERNMENT OF MALAYSIA, MID-TERM REVIEW OF THE SECOND MALAYSIA PLAN: 1971-1975 23 (1973); K.S. Jomo, *The New Economic Policy and Interethnic Relations in Malaysia* 11 (United Nations Research Institute for Social Development, Identities, Conflict and Cohesion Programme, Paper No. 7, 2004).

152. Chua, *supra* note 148, at 43.

153. Donald R. Snodgrass, *Successful Economic Development in a Multi-Ethnic Society: The Malaysian Case* 6–7 (Harv. Inst. for Int'l Dev., Discussion Paper No. 503, 1995).

154. Gillian Hart, *The New Economic Policy and Redistribution in Malaysia: A Model for Post-Apartheid South Africa?*, 23 TRANSFORMATION: CRITICAL PERSPS. ON S. AFR. 44, 48–49 (1994).

155. Ahmad Hakimi Tajuddin, *Do Share Allocations to the Indigenous Investor Drive the Demand for IPOs?*, 11 ECONOMIES 1, 3 (2023).

156. *See* Nor Zalina Mohamad-Yusof, Danture Wickramasinghe & Mahbub Zaman, *Corporate Governance, Critical Junctures and Ethnic Politics: Ownership and Boards in Malaysia*, 55 CRIT. PERSP. ACCT. 33, 47 (2018); K. Paudyal, B. Saadouni & R.J. Briston, *Privatisation Initial Public Offerings in Malaysia: Initial Premium and Long-Term Performance*, 6 PAC-BASIN FIN. J. 427 (1998).

157. Chin Yee Whah & Benny Teh Cheng Guan, *Malaysia's Protracted Affirmative Action Policy and the Evolution of the Bumiputera Commercial and Industrial Community*, 32 SOUJURN: J. SOC. ISSUES SE. ASIA 336, 346 (2017) ("Bumiputera ownership of share capital in publicly listed companies increased to 19.3 per cent in 1990 and 21.9 per cent in 2008"); MINISTRY OF ECONOMIC AFFAIRS, SHARED PROSPERITY VISION 2030: RESTRUCTURING MALAYSIA'S DEVELOPMENT PRIORITIES 4–36 (2019).

a notion of "effective control" without, however, specifying its contours.[158] In 2019, Malaysia's "Shared Prosperity Vision 2030" decried the "crowding out" effect of rising foreign ownership, which "impedes Bumiputera ability to compete in equity ownership."[159]

The NEP also aimed to increase Malay presence in high corporate levels, though it did not impose specific legal requirements.[160] Board representation of Bumiputera increased significantly from their virtual absence at the time of independence to 11.74% in 1974 and 46.52% in 2010.[161] Initially, Bumiputera directors were not involved in management and their role was mostly symbolic.[162] Nonetheless, their presence was politically significant in securing corporate contracts and licenses from the state and arguably helped reduce their marginalization.[163] The NEP officially ended in 1990, but policies to promote Bumiputera inclusion continued through other programs.[164]

The original and successor policies of affirmative action for the Bumiputera in Malaysian corporate governance have been, and remain, highly controversial. Critics regard these policies as a form of institutional racism against the Chinese[165] and as an instrument of crony capitalism.[166]

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158. GOV'T OF MALAY.,EXECUTIVE SUMMARY ELEVENTH MALAYSIA PLAN 2016–2020: ANCHORING GROWTH ON PEOPLE 24 (2015). *See also* Hwok-Aun Lee, *Malaysia's New Economic Policy and the 30% Bumiputera Equity Target: Time for a Revisit and a Reset*, 36 ISESAS PERSPECTIVE 1, 8 (2021) (stating that "[t]he Eleventh Malaysia Plan added an emphasis to equity ownership, by specifying 30% equity ownership with effective control. What this means, though, is unclear.").

159. MINISTRY OF ECONOMIC AFFAIRS, *supra* note 157. For a broader discussion of the persistent influence of nationalism on corporate law and governance across jurisdictions, see Pargendler, *supra* note 3.

160. Nor Zalina Mohamad Yusof, Bumiputera Institution and the Development of Corporate Governance in Malaysia 135 (2012) (Ph.D. thesis, University of Manchester) ("The NEP did not explicitly specify the target for Malays representation on corporate boards. However, it was one of the policy's objectives to have more Malays involvement in top level management as a way to eliminate ethnic identification through profession or economic activities.").

161. Mohamad-Yusof, Wickramasinghe & Zaman, *supra* note 156, at 40.

162. *Id.* at 43.

163. *Id.*

164. Rahimah Abdul Aziz, *New Economic Policy and the Malaysian Multiethnic Middle Class*, 13 ASIAN ETHNICITY 29, 32 (2012).

165. *See, e.g.*, James Chin, *Racism Towards the Chinese Minority in Malaysia: Political Islam and Institutional Barriers*, 93 POL. Q. 451, 455 (2022) ("[t]he institutional racism imposed by the NEP reinforced the view that all non-Malays are members of the 'out group'."); *see also* WORLD BANK, MALAYSIA ECONOMIC MONITOR: BRAIN DRAIN 13 (2011) (explaining that Bumiputera affirmative action may be one of the factors behind brain drain in the country: "Discontent with Malaysia's inclusiveness policies is a key factor too—particularly among the non-Bumiputeras who make up the bulk of the diaspora.").

166. *See, e.g.*, Zainal Aznam Yusof & Deepak Bhattasali, *Economic Growth and Development in Malaysia: Policy Making and Leadership* 29 (Comm'n on Growth and Dev., Working Paper No. 27, 2008) (describing charges that implementation of the NEP is responsible for cronyism and corruption in Malaysia today, and therefore it should be abandoned."); *see also* Lilian Miles & Mohammad

Interestingly, Malaysia achieved its "economic miracle" in the decades from 1970 to 1990 while simultaneously attaining most of its affirmative action goals.[167] One interpretation is that "the NEP may actually have boosted the growth rate when sociopolitical factors are taken into account."[168] In warning South Africa against the risks of state intervention of the economy, the World Bank came to describe Bumiputera policies in Malaysia as "a case of redistribution via market mechanisms," a view that unduly downplays the degree of state involvement in the program.[169] While Malaysia's efforts at ethnic inclusion in corporate governance failed to eradicate poverty and to eliminate Chinese economic dominance, they helped create a significant Malay middle class and negotiate racial tensions that thwarted the development of a market-based democracy.[170]

B. South Africa

South Africa has also played a leading role in promoting racial diversity in corporate governance. Despite sharing a common background of past slavery and longstanding racial inequities with South Africa, the United States has only recently and timidly begun to discuss policies for racial inclusion in corporate governance.[171] By contrast, since the end of apartheid in South Africa and the beginning of the new constitutional

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Rizal Salim, *Corporate Governance Reform in Malaysia: An Institutional Theoretical Approach*, 5 J. COMPAR. L. 314, 324 (2010) ("[i]t is not surprising that it has been remarked that 'Malaysia's unique policy of affirmative action launched to pull Bumiputeras out of widespread poverty has become cronyism by another name.'").

167. *See* Snodgrass, *supra* note 153.

168. *See id.* (abstract); *see also* Jomo K. Sundaram, Khoo Boo Teik & Chang Yii Tan, *Vision, Policy and Governance in Malaysia* 20 (World Bank PSD Occasional Paper No. 10, 1995) ("[s]ome critics maintained that NEP's restructuring retarded the country's growth, although it is virtually impossible to prove whether the high-growth 1970s would have seen even higher growth without NEP's interethnic distribution.").

169. Hart, *supra* note 154, at 44 (noting that "[t]his neo-liberal interpretation neglects the heavy involvement of the Malaysian state in the economy, and the way in which relations between different capitalists and the state have shaped the outcomes of the New Economic Policy.").

170. Amy Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L. J. 287, 356 (2000).

171. For recent works on racial diversity and policies in U.S. corporate governance, see, e.g., Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 118 COLUM. BUS. L. REV. 118 (2022) (finding that corporations' actions often followed antiracist rhetoric in the aftermath of the killing of George Floyd in 2020); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022) (arguing that corporate fiduciaries must comply with antidiscrimination laws and that the business judgment rule encourages them to go beyond the legal minimum to increase diversity, equity, and inclusion); Subodh Mishra, *Russell 3000 Boards Becoming More Diverse*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 14, 2023), https://corpgov.law.harvard.edu/2023/03/14/russell-3000-boards-becoming-more-diverse/ [https://perma.cc/3LGV-29LE] (finding that minority directors for the first time occupy more than 20% of board seats, with the presence of Black directors increasing more than 90% since 2023 to 8.3%, though only around 1% of CEOs are Black).

order, corporate ownership and governance have been at the forefront of the country's ambitions for social transformation.

In a 1990 speech after his release from prison, Nelson Mandela denounced the concentration and racialization of economic power in post-apartheid South Africa, as illustrated by his statement that "less than ten conglomerates control almost 90 percent of the shares listed on the Johannesburg Stock Exchange," and that their directors would "almost exclusively be white males."[172] "If we are genuinely interested in ending the old social order and bringing in a new one, characterised by the notions of justice and equity," he contended, "it is quite obvious that the economic power relations represented by the reality of the excessive concentration of power in a few white hands have to change."[173] While conceding that international experience may counsel against tampering with the corporate power structure, Mandela pointed to the reality of South Africa, "with its own history, its own reality and its own imperatives"—one of which "is to end white domination in all its forms, to deracialize the exercise of economic power."[174] He also cautioned that "growth by itself will not ensure equity," noting "that any democratic government will have to respond to the justified popular concern about the grossly unequal distribution of economic power."[175]

In the 1994 Reconstruction and Development Programme of the African National Congress (ANC), a "central objective" was to "de-racialise business ownership completely through focused policies of black economic empowerment."[176] The incoming government perceived that continuing white economic power and racial inequality could create "social and racial tension" in the new regime at the risk of social and economic stability.[177] The first wave of Black economic empowerment (BEE) initiatives came from the private sector through sales of unissued stock to a Black person or Black-run company.[178] There were 231 such BEE deals by 1998, leading to Black businesses owning an estimated 10% of Johannesburg Stock Exchange companies.[179]

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172. Nelson Mandela, Address by Nelson Mandela at Options for Building an Economic Future Conference convened by the Consultative Business Movement attended by South African business executives (May 23, 1990) (transcript available at http://www.mandela.gov.za/mandela_speeches/1990/900523_econ.htm [https://perma.cc/LSF2-6KAH]).

173. *Id.*

174. *Id.*

175. *Id.*

176. Roger Tangri & Roger Southall, *The Politics of Black Economic Empowerment in South Africa*, 34 J. S. AFR. STUD. 699, 699 (2008).

177. *Id.* at 699–700.

178. DARON ACEMOGLU, STEPHEN GELB & JAMES A. ROBINSON, BLACK ECONOMIC EMPOWERMENT AND ECONOMIC PERFORMANCE IN SOUTH AFRICA 5 (2007).

179. *Id.* at 6.

Beyond transformational objectives, some commentators have posited that BEE served as a "populist" policy of appeasement that allowed the government to rely on existing white businesses to generate growth while "maintaining legitimacy in the eyes of trade unions and the impoverished masses."[180] Transfers from BEE initiatives were usually made to politically-connected Black individuals with strong ties to the ANC government but with little business experience.[181] Seeking to deflate pressure for unknown Black partners, companies sought politically-influential Black partners who could push for policies to the benefit of capital and who had networking capabilities to support the business.[182]

Although government financing also played a role, this first generation of BEE transactions was mostly financed by vendor loans and secured by future earnings of the company, often at a significant discount over the market price.[183] This strategy led to the indebtedness of Black investors and was compromised by the Asian stock market crash in 1998, which contributed to a decline in the number of empowerment transactions.[184] In view of concerns that the first wave of BEE only led to a "small wealthy black elite," the government proposed a more expansive initiative of "broad-based black economic empowerment" (B-BBEE) in 2003.[185] B-BBEE's foundational policy document justified the program as promoting social stability in a society characterized by entrenched inequalities. It noted that, in the context of South Africa, redressing racial discrimination was not only a "socio-political and moral imperative," but also "an imperative dictated by the need for sustainable growth."[186]

Under the Broad-Based Black Economic Empowerment Act of 2003, the Minister of Trade and Industry would issue a code of good practice creating indicators and qualification criteria for purposes of procurement and other economic activities.[187] Unlike its predecessor, which focused on transfers of stock ownership, B-BBEE promoted a "balanced scorecard" combining different metrics relating to Black equity ownership, Black people in senior management, procurement from Black firms, skills development, and socio-economic development.[188] The final score relies on a

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180. Tangri & Southall, *supra* note 176, at 700.

181. *Id.* at 701.

182. *Id.* at 710.

183. ACEMOGLU, GELB & ROBINSON, *supra* note 178, at 6.

184. DEP'T OF TRADE AND INDUST., SOUTH AFRICA'S ECONOMIC TRANSFORMATION: A STRATEGY FOR BROAD-BASED BLACK ECONOMIC EMPOWERMENT 10–11 (2003).

185. *Id.* at 18.

186. *Id.* at 4 ("Societies characterised by entrenched gender inequality or racially or ethnically defined wealth disparities are not likely to be socially and politically stable.").

187. Broad-Based Economic Empowerment Act of 2003 § 9(1)(b) (S. Afr.). The Act defines "black people" as "a generic term that means Africans, Coloureds and Indians." Section 1(a).

188. DEP'T OF TRADE AND INDUST., *supra* note 184, at 5, 25.

point-system for compliance with measures of Black empowerment, such as 25.1% stock ownership, 60% participation in senior management, and 50% procurement, among various others. Thus, this system allows different dimensions of inclusion to be traded off against each other.[189] Compliance with the B-BBEE scorecard is not mandatory, but encouraged by various benefits in public procurement and licenses that trickle down the supply chain.[190] A 2013 amendment to the Act criminalized misrepresentations of a company's compliance status (known as "fronting") and established the B-BBEE Commission as a monitoring body.[191]

Racial inclusion in corporate governance in South Africa has come a long way since the Apartheid era, when legislation such as the Labour Relations Act (1956) prohibited Blacks from holding directorships and management positions.[192] By 2011, 27.6% of board members were Black non-executive directors, and 9.5% of executive directors were Black.[193] According to the 2020 report by the B-BBEE Commission based on data from reporting entities, 43.6% of directorships were occupied by Black persons (23.08% male and 20.55% female) and 53.67% were occupied by white persons and foreign nationals.[194] Black ownership of reporting companies was 29% in 2019.[195] Although this percentage disappointingly reflects "a low level of economic transformation at the board level,"[196] racial inclusion in South Africa is highly favorable when compared to Brazil, where

189. Tangri & Southall, *supra* note 176, at 707 ("[t]o the chagrin of black business, there was the possibility of tradeoffs of one objective for another.").

190. *Id.* at 706 (despite pressures from Black businesses, "officials stressed that there would be no penalties for companies failing to achieve compliance with the scorecard other than when vying for government and parastatal contracts and licences, when they would be at a disadvantage."); Anthony Butler, *Black Economic Empowerment Since 1994: Diverse Hopes and Differentially Fulfilled Aspirations*, *in* AFTER APARTHEID: REINVENTING SOUTH AFRICA? 60 (Ian Shapiro & Kahreen Tebeau eds., 2011) (noting that the codes "are binding on all state and public entities and are applied in all decisions involving procurement, licensing, concessions, public-private partnerships," to the effect that "[n]o private company can escape the codes … because the requirements of the procurement component cascade down public sector supply chains.").

191. *See* Adri du Plessis, *The Legal Combatting of B-BBEE Fronting Practices in South Africa—Past And Present*, 33 STELLENBOSCH L. REV. 396, 396, 417 (2022) (finding that alternative measures of complaint resolution are more common and productive than criminal prosecution, which has been exceedingly rare).

192. Nadia Mans-Kemp & Suzette Viviers, *Investigating Board Diversity in South Africa*, 8 J. ECON. FIN. SCIENCES 392, 393 (2015).

193. *Id.* at 396.

194. B-BBEE COMM'N, NATIONAL STATUS AND TRENDS ON BROAD-BASED BLACK ECONOMIC EMPOWERMENT 56–57 (2020). However, the report notes that "only 42% of the listed entities complied with the mandatory reporting requirement." *Id.* at 48.

195. David Thomas, *Is South African Transformation Dead?* AFRICAN BUS., Aug./Sept. 2020, at 12.

196. B-BBEE COMM'N, *supra* note 194, at 56.

a recent survey found no Black board members and only 1.05% Brown members despite majority representation in the population.[197]

The B-BBEE Act of 2003 also paid attention to intersectionality by listing as one of its key objectives "increasing the extent to which black *women* own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training."[198] The statute also specifically allowed the code of good practice to "distinguish between black men and black women."[199] The B-BBEE scorecard came to measure Black women empowerment separately, with five out of twenty-five points in the ownership section and five out of nineteen points in the management control section concerning the inclusion of Black women.[200] Interestingly, the B-BBEE Act of 2003 was enacted in the same year that Norway promulgated its pioneering legislation mandating gender quotas for corporate boards. Nevertheless, while Norway's model for increased diversity in corporate governance has been widely celebrated and influential, South Africa's groundbreaking effort to promote racial and gender diversity has been largely neglected by the international literature.

While B-BBEE policies remain controversial and contested,[201] there is a consensus that the policies have fallen short of expectations of deep social transformation, at least for the time being.[202] In 2007, a study by Daron Acemoglu, Stephen Gelb, and James Robinson concluded that B-BBEE policies benefited a small African elite and had no noticeable impact on inequality, though they increased the national income share accruing to Black people.[203] The authors contend that among the potential social benefits of such empowerment policies is the avoidance of destructive

197. Carlos Portugal Gouvêa, *Corporate Governance and Racial Diversity in Brazilian Public Companies*, ECGI BLOG (June 7, 2022), https://www.ecgi.global/blog/corporate-governance-and-racial-diversity-brazilian-public-companies [https://perma.cc/2FP7-S73C].

198. Broad-Based Economic Empowerment Act of 2003 § 2(d) (S. Afr.) (emphasis added).

199. *Id.* § 9(4).

200. Francis Marimbe, *A Compulsory 100% Black Women Score on the B-BBEE Scorecard Is the Panacea to Women Empowerment Challenges*, INDEP. ONLINE (Feb. 22, 2023), https://www.iol.co.za/news/politics/opinion/a-compulsory-100-black-women-score-on-the-b-bbee-scorecard-is-the-panacea-to-women-empowerment-challenges-73bdfc15-a7dd-40c5-8044-7a48dae5ac79 [https://perma.cc/3LJR-6WL8].

201. Butler, *supra* note 190, at 52.

202. Ayabonga Cawe, Michael Sachs & Imraan Valodia, *Dancing in Concert?—Aligning Broad-Based Black Economic Empowerment to (B-BBEE) Sector Strategies, Structural Transformation and Growth*, 109 TRANSFORMATION: CRITICAL PERSPS. ON S. AFR. 139, 140 (2022) ("much of the public's opinion of B-BBEE is a mix of derision, despondency and the 'too-little-too-late' argument.").

203. ACEMOGLU, GELB & ROBINSON, *supra* note 178, at 17. The authors failed to find significant effects of BEE on firm investment, labor productivity or profitability, finding, if anything, "some weak evidence that BEE has a negative effect on investment and labor productivity." *Id.* at 34.

forms of populism that could otherwise gain ground in South Africa due to high inequality.[204]

There is little question that South Africa's empowerment measures are heterodox and avant-garde manifestations of policies for the democratization of capital more recently proposed in the Global North. In discussing Piketty's book Capital and Ideology, scholars have cited B-BBEE as evidence that "the well-intentioned, even radical policies that have been proposed by Piketty have been already proposed and implemented in South Africa."[205] While B-BBEE illustrates a sort of implementation avant la lettre of Piketty's proposal for "participatory" socialism initiatives, South Africa's experience shows "how difficult it has been for policies to have substantial impact in this inequality regime."[206]

Finally, South Africa's experience with Black economic empowerment illustrates how the international legal order can restrict heterodox stakeholderism in the Global South. Italian investors initiated investment arbitration against South Africa under a bilateral investment treaty in the *Foresti* case in 2010, claiming that the Mining Charter's requirement of a transfer of 26% of mining assets to historically disadvantaged South Africans constituted indirect expropriation and violated the obligation of fair and equitable treatment.[207] Although the case was settled before a final decision on the merits, the investor's challenge played a key role in South Africa's decision to terminate various bilateral investment treaties and adopt the Protection of Investment Act of 2015. The act provides for dispute resolution in domestic courts and aims to grant the government policy space to address "historical, social and economic inequalities" and "achieve the progressive realization of socio-economic rights."[208] Even in the absence of international investment remedies, the need to attract foreign investment also moderates the impulse for radical forms of heterodoxy. A far more extreme version of Black economic empowerment in Zimbabwe under Mugabe aimed to transfer 51% shareholdings of foreign-owned companies to Black Zimbabweans. However, the initiative faced

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204. *Id.* at 22.

205. Fabio Andrés Díaz Pabón, Murray Leibbrandt, Vimal Ranchhod & Michael Savage, *Piketty Comes to South Africa*, 72 BR. J. SOCIOL. 106, 114 (2021).

206. *Id.*

207. Foresti v. Republic of South Africa ICSID Case No. ARB(AF)/07/01. For discussions, see Malebakeng Agnes Forere, *The New South African Protection of Investment Act: Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies*, *in* RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2017); *and* Mmiselo Freedom Qumba, *South Africa's Move away from International Investor-state Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?* 52 DE JURE L.J. 358, 360 (2019).

208. Forere, *supra* note 207, at 252.

challenges of enforcement and was ultimately toned down to attract investment.[209]

VI. GLOBAL SOUTH CONSTITUTIONS AND STAKEHOLDER PROTECTION IN CORPORATE LAW

Constitutional provisions and judicial review also play a part in heterodox stakeholderism in the Global South. In recent decades, scholars of comparative constitutional law have drawn attention to the rise of "transformative constitutionalism" or "constitutionalism of the Global South" in certain developing jurisdictions, such as Colombia, South Africa, and India.[210] The literature on transformative constitutionalism explores the perceived activism of Global South constitutional courts in actualizing the bold promises of their countries' new constitutions to promote social and economic rights and reduce inequality. While constitutional scholars have documented distinct approaches to the realization of social rights in the Global South, especially in Latin America,[211] the implications for the evolution of corporate law remain largely unexplored.[212]

The texts of Global South constitutions are more likely to adopt a stakeholderist orientation in corporate law. Courts have likewise

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209. Tangri & Southall, *supra* note 176, at 701; *Zimbabwe Deadline for Firms to Be Black-Owned Passes*, BBC (Apr. 1, 2016), https://www.bbc.com/news/world-africa-35942598 [https://perma.cc/AK6P-CCDB]; *Zimbabwe to Change Black Empowerment Law to Reassure Investors*, REUTERS (Oct. 6, 2016), https://www.reuters.com/article/ozabs-uk-zimbabwe-mugabe-idAF-KCN1261G2 [https://perma.cc/U8YJ-NCA3].

210. *See, e.g.*, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013) (examining how the highest courts in Brazil, Colombia, and South Africa give effect to social rights recognized in their constitutions); CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., 2013); Philipp Dann, Michael Riegner & Maxim Bönnemann, *The Southern Turn in Comparative Constitutional Law*, *in* THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020). To be sure, the dichotomy between the transformative character of Global North and Global South constitutions can easily be exaggerated. *See* Michaella Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527, 528 (2017).

211. Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2017, 2021 (2020).

212. For notable exceptions, see Jedediah Kroncke & Michael Riegner, *Corporations*, *in* MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Oxford Univ. Press, 2020) (describing the liberal, social-democratic, socialist-authoritarian and postcolonial-transformative types of corporate constitutionalism that evolved over time); Michael Riegner, *Canonizing the Corporation: Liberal, Social and Transformative Varieties of Corporate Constitutionalism*, *in* GLOBAL CANONS IN AN AGE OF UNCERTAINTY: DEBATING FOUNDATIONAL TEXTS OF CONSTITUTIONAL DEMOCRACY AND HUMAN RIGHTS (Sujit Choudhry, Michaella Hailbronner & Mathias Kumm eds., forthcoming) (on file with the author) (positing the existence of (i) liberal, (ii) social-democratic, and (iii) transformative varieties of corporate constitutionalism, and suggesting that the 2018 decision of the Supreme Court of Ecuador in the environmental law case against Chevron is evidence of the latter).

considered the constitutionality of legislation relating to corporations in light of constitutional values. To begin with, the constitutions of large Global South economies regulate business organizations more explicitly and with a clear stakeholderist bent. As described in Table 1 in the Annex, a comparison between the constitutional texts of the ten largest Global North and Global South economies shows that the constitutions of Global South jurisdictions are more likely to have corporate law provisions with a stakeholderist connotation. [213]

Eight of the largest Global South economies have constitutional provisions on cooperative organizations, compared to only two large economies in the Global North.[214] Not only are the differences in the existence of provisions on cooperative organizations in constitutions significant, but the variation in the number of provisions is also striking: there are over 100 mentions of cooperatives in the constitutions of the largest developing economies, compared to only three of the largest developed economies.[215] This contrasts with earlier findings of forty-four mentions of "corporation" and sixty-nine mentions of "corporate bodies" (most of which are public entities) in constitutions currently in force.[216] Moreover, four of the largest Global South jurisdictions have provisions on workers' profit sharing— a type of rule that is absent from the constitutions of the largest economies

213. The analysis focuses on the largest economies by GDP according to World Bank data and to the English version of constitutions available at the website of the Constitute Project. *See GDP (Current US$)*, WORLD BANK https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true [https://perma.cc/KCV4-5K6F] *and Constitute: The World's Constitutions to Read, Search, and Compare*, CONSTITUTE, https://www.constituteproject.org/ [https://perma.cc/R84V-JETT]. The selected Global South jurisdictions are classified as developing countries by the United States Conference on Trade and Development (UNCTAD) and as low- or middle-income countries by the World Bank. This led to the non-inclusion of the following borderline cases in neither grouping: Russia (not classified as a developing country by UNCTAD and never part of the Group of 77); South Korea (not classified as a developing country by UNCTAD and a high income country); Turkey (never part of the Group of 77); Saudi Arabia, the United Arab Emirates, and Singapore (all classified as high income countries). *See World Bank Country and Lending Groups*, WORLD BANK, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups [https://perma.cc/49A5-GPKH]; *Country Classification*, UNCTAD, https://unctadstat.unctad.org/EN/Classifications.html [https://perma.cc/8WKG-6P35].

214. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL 1988] art. 174, §2º (Braz.). The law shall support and stimulate cooperative activity and other forms of association; 3º. The State shall favor organization of cooperatives for prospecting and placer-mining activity, taking into account protection of the environment and the socio-economic promotion of the prospectors and miners"); Constitution of the Kingdom of Thailand, 2017, section 258 ("National reform in various areas shall be carried out to at least achieve the following results: (…) f. Economy: 4. establishing a mechanism to promote cooperatives and business operators of all sizes to ensure their appropriate competitiveness and to promote social enterprises and environment-friendly enterprises, as well as establishing a mechanism to increase opportunities for employment and occupation of the people").

215. *See* Table 1, Annex.

216. Kroncke & Rieger, *supra* note 212, at 3.

of the Global North.[217] While no jurisdiction from the Global North mentions the goal of "economic democracy" like Indonesia does, the expression is found in three other Global South jurisdictions: Bolivia, Cape Verde, and Nicaragua.[218]

A focus on express provisions on "cooperatives" is also likely to underestimate the extent of their regulation by constitutions, as exemplified by the case of Indonesia. The Constitutional Court of Indonesia declared a 2012 statute unconstitutional because of its "individualistic" and "capitalistic" nature, which it found to violate the Indonesian constitutional principles of "kinship" in economic organization and "economic democracy."[219] Strikingly, among other things, the Court took issue with the statutory language providing that a cooperative was a "legal entity" formed by "natural persons" as proof of its individualistic connotations that violated the constitutional rule providing that the economy should be structured "as a common endeavor based on familial principles."[220] As a result, the 1992 cooperatives statute was reinstated, though commentators have argued that this version also violates cooperative principles.[221]

In environments of high inequality and market failures where the status quo appears illegitimate, the cooperative form of association may hold

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217. *See* Table 1, Annex.

218. *See The World's Constitutions to Read, Search, and Compare*, *supra* note 213.

219. Decision of the Constitutional Court No. 28/PUU-XI/2013 (Indonesia). For commentary, see Lauddin Marsuni, Salle Salle, Syarifuddin Syarifuddin & La Ode Husen, *Legal Examination of the Constitutional Court Number 28/PUU-XI/2013 Concerning the Case of Judicial Review of Law Number 17 of 2012 Concerning Cooperatives*, 16 ASIAN SOC. SCI. 42, 42 (2020) ("Cooperatives are a means of gathering together with the principle of joint efforts to create welfare conditions for citizens so that with these conditions, social justice for all Indonesian citizens as the ideals of the nation can be realized"). The relevant provisions are paragraphs (1) and (4) of Article 33 of the 1945 Constitution of Indonesia, for which there are different translations. In the unofficial English translation available on the Constitutional Court's website: "Art. 33 "(1) The economy shall be structured as a joint enterprise by virtue of the principles of kinship; (…) (4) The national economy shall be conducted by virtue of economic democracy under the principles of togetherness, efficiency with justice, sustainability, environment insight, autonomy, as well as by safeguarding the balance of progress and national economic unity." Interestingly, according to Indonesian scholars, Article 33 *explicitly* regulates cooperatives. *See* Suparnyo, Universitas Muria Kudus, *Cooperatives in the Indonesian Constitution and the Role in Empowering Members: A Case Study*, 22 J. LEGAL ETHICS & REGUL. ISSUES, 1, 1(2019). ("In Indonesia, cooperatives are the only body specifically referred to in the national constitution. In one of the most well-known articles in the constitution, namely Article 33 of the 1945 Constitution, it is stated that the national economy is structured as a joint effort based on the principle of kinship.") (citations omitted). The Indonesian Constitution refers to *asas kekeluargaan*, which are often translated as "principles of kinship," "familial" or "joint efforts."

220. Marsuni, Salle, Syarifuddin & Husen, *supra* note 219, at 45. The authors also note that the phrase "natural person" in the statute violates Article 33(1) of the constitution "because that definition leads to individualism." *Id.* at 55; *see also* M. Sofyan Pulungan & Agus Sardjono, *Principio de la familia y las ideas cooperativas en las disposiciones económicas de la Constitución de Indonesia*, 137 REVESCO. REVISTA DE ESTUDIOS COOPERATIVOS 1 (2021) (Spain).

221. Cinantya Kumaratih & Tulus Sartono, *Cooperative Law Policy: Historical Study of Cooperative Settings in Indonesia*, 7 JURNAL HUKUM PRASADA 34, 43 (2020).

greater appeal for its promise of equality and economic democracy. Indonesian commentators explicitly link cooperatives to social justice.[222] At the same time, constitutional provisions may be more rhetorical or expressive than truly consequential and transformative, as is the case in Brazil.

Constitutional challenges of corporate and bankruptcy legislation that threaten stakeholder protection appear to be common in the Global South, even if they are not always successful. In two separate decisions, the Constitutional Court of Colombia declared that statutory provisions recognizing shareholders' limited liability vis-à-vis workers do not violate constitutional rules on the social state, dignified work, and human dignity, among others.[223] The Court reasoned that the option for limited liability aimed to "permit the flux of capital, investment, and stimulus to the business development of the country," while the statute and broader legal system provide for reasonable protection for workers, such as veil piercing in the case of abuse and other types of remedies.[224] Interestingly, both decisions mention the rules imposing parent company liability during insolvency, discussed in Part I, as one of the countervailing mechanisms for worker protection.[225]

In the insolvency context, the Brazilian Supreme Court heard a challenge to the country's new bankruptcy statute enacted in 2005, which reduced the priority enjoyed by workers' debts—to be ranked higher than claims by secured creditors—to 150 minimum (monthly) wages. Interestingly, the Court justified the constitutionality of the provision in view of stakeholder and distribution considerations, arguing that it seeks to preserve jobs as well as "the patrimony of workers, especially the most vulnerable from an economic perspective."[226]

India's 2016 Bankruptcy and Insolvency Code (IBC) has suffered numerous constitutional challenges, including claims of arbitrary discrimination for favoring financial creditors over operational creditors and of restricting the priority of workers' dues.[227] The Indian Supreme Court

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222. Marsuni, Salle, Syarifuddin & Huse, *supra* note 219, at 50.

223. Corte Constitucional [C.C.] [Constitutional Court], septiembre 7, 2004, Sentencia C-865/04 (Colom.) (regarding provisions of the Commercial Code); Corte Constitucional [C.C.] [Constitutional Court], febrero 19, 2014, Sentencia C-090/14 (Colom.) (regarding the statute on simplified corporations).

224. Sentencia C-090/14, *supra* note 223.

225. Sentencia C-865/04; Sentencia C-090/14, *supra* note 223 and accompanying text. In the case of Sentencia C-090/14, the reference to parent company liability appears only in the description of the opinion by the Ministry of Labor in support of the constitutionality of the statute.

226. S.T.F., Ação Direta de Inconstitucionalidade (ADI) 3934, Relator: Min. Ricardo Lewandowski, 27.05.2009, D.J. 06/11/2009 22 (Braz.).

227. For an overview, see Umakanth Varottil & Rahul Sibal, *Constitutional Conundrums Involving Corporate Insolvency*, *in* CONSTITUTIONAL IDEALS: DEVELOPMENT AND REALISATION THROUGH COURT-LED JUSTICE (Shruti Vidyasagar, Sandhya P. R., Anindita Pattanayak & Harish Narasappa eds., 2023).

adopted a non-interventionist approach to these challenges, arguably inspired by the view that the legislation promotes the public interest.[228] Similarly to its counterpart in Brazil, the Indian Supreme Court upheld the constitutionality of the IBC rule limiting the priority of workers' dues to twenty-four months prior to insolvency (ranked equally with secured creditors), which "should be seen in the overall objective of the Code, which is to explore whether the corporate debtor can be revived so that jobs are not lost."[229]

The Indonesia Supreme Court resolved an apparent conflict between the bankruptcy and labor statutes about whether tax debts or workers' wages enjoyed first priority in bankruptcy in favor of the latter. It found that workers' wages constitute constitutional rights under Article 28D paragraph 2 of the 1945 Constitution, which provides that "[e]very person shall be entitled to work as well as to obtain reward and just and decent treatment in work relationship."[230]

Another example of the intersection between stakeholderism and corporate law concerns the issue of corporate constitutional rights as a shield against regulation. In its controversial 2010 decision in *Citizens United v. FEC*, the U.S. Supreme Court invalidated a statute limiting corporate campaign expenditures as a violation of the constitutional guarantee of free speech, prompting strong critiques by constitutional and corporate law commentators alike.[231] Leo Strine Jr., then Chief Justice of the Delaware Supreme Court, and Nicholas Walter argued that, by unleashing corporate wealth to influence elections, this U.S. Supreme Court decision hampered legislation to protect stakeholders from externalities generated

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228. *Id.* at 204–05 (describing the Indian's Supreme Court "light-touch" approach as one in which "pragmatism trumps doctrine," in view of the "socioeconomic implications of the novel legislation").

229. Moser Baer Karamchari Union Through President Mahesh Chand Sharma v. Union of India, (2023) SCC OnLine SC 547 (India), (also noting the importance of the economic health of financial institutions "for the general public as well as the national economy").

230. Constitutional Court Decision No. 67/PUU-XI/2013. *See* 1945 Constitution of the Republic of Indonesia, art. 28D(2), https://en.mkri.id/download/constitution/constitution_1_1625426222_4c1e13f466840d7ed721.pdf [https://perma.cc/8GJG-JK5D] (unofficial English translation in the Constitutional Court's website). For a description of the decision, see Supri Yono, Adi Sulistiyono, Anis Mashdurohatun & Ratih Mega Puspa Sari, *Reconstruction of Separate-Creditor Positions in the Process Declaring Bankruptcy in Indonesia Based on Justice Value*, 11 SCH. INT'L J. L. CRIM. JUS. 334 (2020). According to the author, by providing that "[e]veryone has the right to work and to receive fair and proper compensation and treatment in a work-related relationship," Article 28D paragraph (2) of the 1945 Constitution "clearly states that workers/laborers who are part of the development of the State have the right to work and receive compensation in order to fulfill the basic needs of life for themselves and their families because human interests in themselves and their lives must be a priority." *Id.* at 338. At present, the legal basis for the priority of worker's wage over tax lien is Art. 95(1)-(2) of Law No. 13 of 2003 on Manpower, as amended by Law No. 6 of 2023 on the Enactment of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law.

231. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 393 (2010).

by corporate profit seeking.[232] It was therefore inconsistent with conservatives' resistance to the incorporation of stakeholder protections through corporate law, an approach that relied on legislation to curb externalities and risk.[233]

Brazil's Supreme Court took a different stance in a 2015 decision that concerned corporate campaign contributions (not independent campaign expenditures, as in *Citizens United*).[234] The 2015 majority decision in Direct Action of Unconstitutionality 4650 held that the statutory provision *permitting* legal persons to make campaign contributions was unconstitutional as a violation of the constitutional principles of equality and democracy. Consideration of the "current state of inequality of social economic forces" in Brazil's stage of development played a major role in the Court's decision.[235] Justice Luis Roberto Barroso argued that "the role of law in society is, subject to individual freedoms, to aim at minimizing the impact of money in the creation of social inequalities."[236] As put by Justice Marco Aurélio, "we do not live in an authentic democracy, but in a plutocracy—political system in which power is exercised by the wealthiest group, implying the exclusion of the least fortunate."[237]

The relationship to constitutional values may also appear explicitly in the corporation's statute. South Africa's Companies Act lists as its first purpose "to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law."[238] Other purposes listed include the promotion of the "development of the South African economy by encouraging entrepreneurship and enterprise efficiency" to "reaffirm the concept of a company as a means of achieving economic and social benefits" and "the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all

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232. Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 383 (2015).

233. *Id.* at 342 (arguing that the Citizens United decision is inconsistent with conservative corporate theory in that it "undermines conservative corporate theory's reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally").

234. S.T.F., Ação Direta de Inconstitucionalidade (ADI) No. 4650, Relator: Min. Luiz Fux, 17.9.2015, D.J. 24.2.2016 (Braz.) [hereinafter ADI 4650]. The Brazilian Supreme Court distinguished its decision from the U.S. Supreme Court opinion in *Citizens United* in that the latter concerned independent corporate campaign expenditures rather than corporate political contributions. *Id.* at 31. For an analysis of the decision, see Diego Werneck Arguelhes, *Judicial Populism and Arguments from "Legislative Dysfunctions" in Brazil* (unpublished working paper, 2022) (arguing that ADI 4650 fits a broader pattern of "judicial populism" by which the Brazilian Supreme Court raises arguments of legislative dysfunction).

235. ADI 4650, *supra* note 234 at 168.

236. *Id.* at 125 (opinion by Justice Luis Roberto Barroso).

237. *Id.* at 171–72.

238. Companies Act 71 of 2008 § 7(a) (S. Afr.).

relevant stakeholders."[239] South African courts have relied on the Bill of Rights for purposes of statutory interpretation under the Act,[240] though not yet in ways that represent heterodox stakeholderism. Scholars have argued that "[t]he Act requires courts to develop the common law in a manner that advances the foundational values of the Constitution, such as human dignity, equality, and freedom,"[241] and have advocated for greater infusion of the constitutional value of *ubuntu*—concept of "social justice and fairness"—in South African corporate law.[242] Resorting to the concept of *ubuntu* has produced heterodox equality-oriented outcomes in South Africa's contract law.[243]

Global South courts have also resorted to constitutional values in the interpretation of corporate legislation in the absence of explicit prompts by the statute. In the 1983 decision in *Ramakrishnan*, the majority of the Supreme Court of India found that workers had standing to be heard in a petition for the winding up of the company, even though the Companies Act did not contemplate workers' participation in the process.[244] The case concerned the winding up of a company having 1,000 workers and thirteen shareholders from the same family due to a deadlock between two groups of shareholders.[245]

A 1976 amendment to the Indian constitution described India in the preamble as a "sovereign *socialist* secular democracy" and inserted a new Directive Principle providing that "the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry."[246] Finding a worker's right to be heard despite the silence of the statute, Judge Bhagwati notes that "[t]he constitutional mandate is therefore clear and undoubted that the management of the enterprise should not be left entirely in the hands of the suppliers of capital but the workers should also be entitled to participate in it. In a socialist

239. *Id.* § 7(b), (d), (k).

240. Brighton M. Mupangavanhu, *Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the Companies Act 71 of 2008*, 22 PER / PELJ 1, 2 (2019) (citing various cases in which "courts have confirmed that the interpretation of provisions of the Act has to comply with the normative framework of the Constitution").

241. *Id.* at 21.

242. Aubrey Sibanda, *Shareholder Oppression as Corporate Conduct Repugnant to Public Policy: Infusing the Concept of Ubuntu in the Interpretation of Section 163 of the Companies Act 71 of 2008*, 24 PER / PELJ 1, 5–6 (2021).

243. Davis & Pargendler, *supra* note 19, at 1506–12.

244. Nat'l Textile Workers' Union v. P.R. Ramakrishnan, AIR 1983 750 (India). For commentary on the case, see Jill Cottrell, *Indian Judicial Activism, The Company and the Worker: A Note on* National Textile Workers' Union v. Ramakrishnan, 39 INT'L & COMPAR. L. Q. 433 (1990).

245. Cotrell, *supra* note 244, at 442.

246. *Ramakrishnan*, *supra* note 244.

pattern of society the enterprise which is a centre of economic power should be controlled not only by capital but also by labour."[247]

Further, Judge Chinnappa Reddy pointed to other Directive Principles in the constitution requiring the state "to make provision for securing the right to work, for securing just and humane conditions of work and for securing the right to an adequate means of livelihood," to the effect that "[t]he State is enjoined to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."[248] He noted that "[t]he public interest element is now quite a predominant factor in the Companies Act itself," contending that "there is no sanctity attached to the age of a judgment or to the circumstance that the decision is that of an English Court from where we have borrowed most of our company law" as the English precedent cited "was decided in the heydays of laissez faire at a time when individualism dominated every field and the public interest was but a slow runner."[249] "Now," Judge Chinnappa Reddy argued, "the position is reversed," as "[l]aissez faire has long been dethroned and all interests are increasingly subordinated to the public interest."[250] As Judge Bhagwati potently concludes by defending deviation from English precedent, the law "must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation," and "[w]e have to build our own jurisprudence."[251]

Finally, Brazilian courts have occasionally applied constitutional principles to reach decisions that *weaken* the protection of stakeholders. Brazil's Supreme Court has invalidated a statutory provision imposing joint and several liability on members of limited liability companies (*sociedades limitadas*) for unpaid social security contributions on both

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247. *Ramakrishnan*, *supra* note 244, at 5. Also adding:

> It is therefore idle to contend thirty-two years after coming into force of the Constitution and particularly after the introduction of Article 43A in the Constitution that the workers should have no voice in the determination of the question whether the enterprise should continue to run or be shut down under an order of the court. It would indeed be strange that the workers who have contributed to the building of the enterprise as a centre of economic power should have no right to be heard when it is sought to demolish that centre of economic power.

Id.

248. *Id.* at 33.

249. *Id.*

250. *Id.* He concludes that "[c]orporations are themselves assuming a public character and function like mini States but surely they will not be allowed to function as slave States where the voice of the slave may never be heard." *Id.*

251. *Id.* at 28.

procedural and substantive grounds.[252] The Court argued that the imposition of shareholder liability was unreasonable; unduly restrictive of prior enterprise; and a violation of the constitutional right to freedom of trade, occupation and profession, and the free exercise of economic activity.[253] Moreover, various Brazilian courts have invoked the constitutional principle of freedom of association in justifying minority shareholders' exceptionally broad right to withdraw from close corporations by seeking a partial dissolution at will.[254] While partial dissolutions of corporations weaken capital lock-in—a critical legal attribute of the corporate form that protects stakeholders—can be interpreted as a functional adaptation to other weaknesses or heterodoxies of the institutional environment.[255] Both the weak legal protection of minority shareholders through corporate law and the erosion of limited liability (including for minority shareholders, at least in the labor context) significantly strengthen the case for minority shareholders' withdrawal rights compared to the case in the Global North.[256]

CONCLUSION

The study of corporate governance, including comparative corporate governance, has been plagued by a too narrow substantive focus on agency costs and a too narrow geographical focus on a handful of "usual suspects," mostly from the Global North. By expanding the scope of analysis to incorporate concerns about externalities and inequality in corporate law and experiences from Global South jurisdictions, a different picture emerges. Rather than merely providing blind or imperfect copies of developed countries' institutions, Global South jurisdictions have pioneered various institutional innovations to protect stakeholders and curb inequality. Yet, because developing countries are understudied and mostly analyzed in isolation, if at all, these important patterns have been largely ignored.

Appreciating the different manifestations of heterodox stakeholderism in the Global South not only expands our institutional imagination, but also sheds light on the driving forces behind the evolution of corporate law. I suggest that problems of state capacity in fighting inequality and mitigating externalities through other areas of law create both political and

252. *See* S.T.F., Recurso Extraordinário No. 562.276-PR, Relatora: Min. Ellen Gracie, 03.11.2010, D.J. 10.2.2011 (Braz.).

253. *Id.*

254. For a discussion, see Pargendler, *How Universal Is the Corporate Form?*, *supra* note 31, at 17.

255. *Id.* at 45–47.

256. *See id.* (for an expanded version of this argument alluding to other institutional complementarities).

functional pressure on corporate law to address broader welfare objectives. In environments of rampant inequality and significant social and environmental degradation, the view that corporate law should focus exclusively on shareholder wealth maximization tends to lose legitimacy, if not economic justification. These pressures, which have long been felt in the Global South, are now reaching the Global North, bringing about the surprising prospect of "reverse convergence" in comparative corporate governance—with institutions of the developed world coming to resemble their developing country counterparts.

Heterodox stakeholderism in the Global South also responds to the distributional consequences of corporate law rules across jurisdictional boundaries, which are significant but have been thus far neglected. Upholding the limited liability of parent companies for environmental harm caused in developing countries is not only questionable on efficiency grounds but also has perverse distributive implications in enriching wealthy Global North companies and their investors at the expense of poor Global South victims. The erosion of limited liability of parent companies in developing countries likely responds not only to failures of their regulatory state in preventing harm but also to the South-North distribution dynamics that limited liability entails.

The experience of developing countries reveals a broader array of institutional arrangements aimed at protecting stakeholders and reducing inequality. It shows that institutional change is possible, but that corporate law reform is no panacea for deep economic and social problems. While well-intentioned reforms are less transformational than hoped for, they are likely not as catastrophic as one might have feared. For good or for bad, heterodox stakeholderism also faces problems of enforcement. The jury is still out on which heterodoxies, if any, may be worth embracing in developing and developed country contexts. Yet the time has come to incorporate the Global South's experiences and innovations into the conversation.

ANNEX

Table 1. Explicit Mentions of Cooperatives and Workers' Profit Sharing in National Constitutions

Large Developed Economies	**Cooperatives**	**Profit Sharing**
United States (1789, rev. 1992)	0	0
Japan (1946)	0	0
Germany (1949, rev. 2014)	0	0
United Kingdom (1215, rev. 2013)	0	0
France (1958, rev. 2008)	0	0
Canada (1867, rev. 2011)	0	0
Italy (1947, rev. 2020)	2	0
Australia (1901, rev. 1985)	0	0
Spain (1978, rev. 2011)	1	0
Netherlands (1814, rev. 2008)	0	0
Total	**3**	**0**
Large Developing Economies		
China (1982, rev. 2018)	3	0
India (1949, rev. 2016)	57	0
Brazil (1988, rev. 2017)	9	2
Mexico (1917, rev. 2015)	21	4
Indonesia (1945, reinst. 1959, rev. 2002)	0	0
Argentina (1853, reinst. 1983, rev. 1994)	0	1
Thailand (2017)	3	0
Nigeria (1999, rev. 2011)	1	0
Egypt (2014, rev. 2019)	5	1
Bangladesh (1972, reinst. 1986, rev. 2014)	2	0
Total	**101**	**8**