



# Corporate Law in the Global South: Heterodox Stakeholderism

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# Corporate Law in the Global South

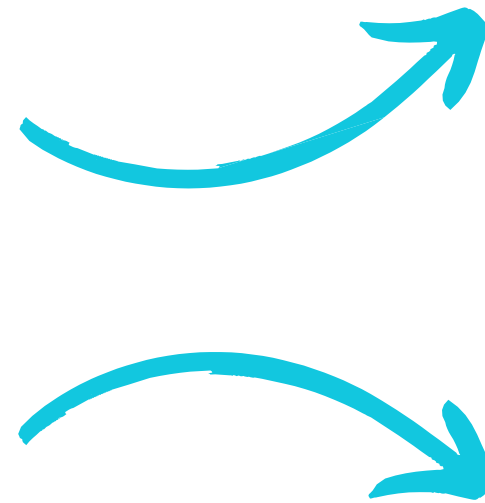
- ✘ **Antiquated**
- ✘ **Failed foreign transplants**
- ✘ **Problems of enforcement**

Plus China: “the world’s most stakeholder oriented system of corporate governance” (Gilson & Milhaupt, 2022)




# This project: a different picture

Global South  
jurisdictions as  
pioneers in  
**heterodox**  
**stakeholderism**



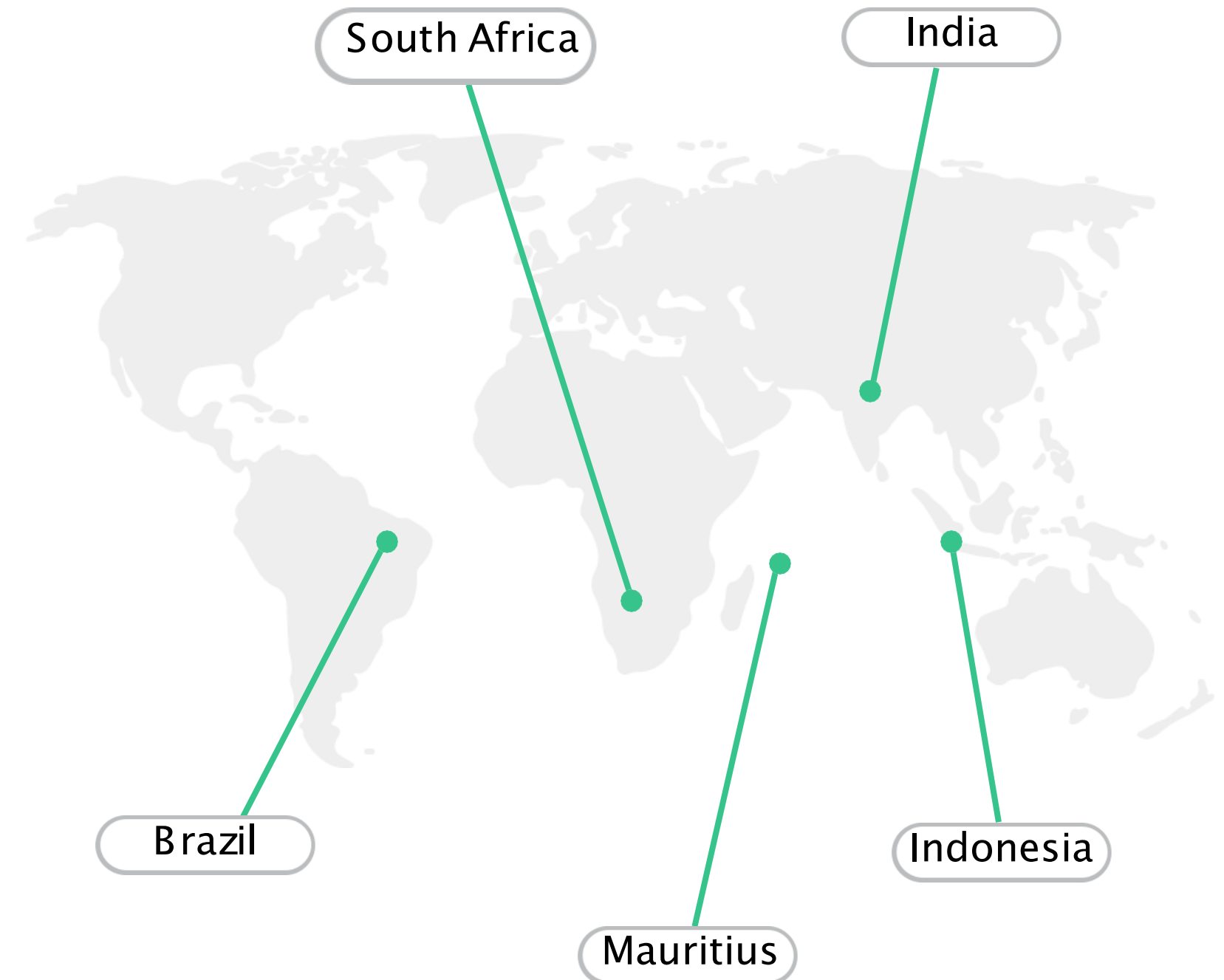
Distinct from Global  
North approaches

Broader focus on  
externalities and  
inequality (policy  
channeling)



# Varieties of heterodox stakeholderism

1. Erosion of **limited liability** to the benefit of stakeholders in Brazil (also in India)
2. **Mandatory CSR spending** (India, Mauritius, Indonesia)
3. **Mandatory CSR committees** (South Africa, India)
4. **Workers' governance rights** (South Africa)
5. Promoting **racial and ethnic diversity in corporate governance** (South Africa and Malaysia)
6. **Stakeholderist orientation in national constitutions**



# Erosion of limited liability

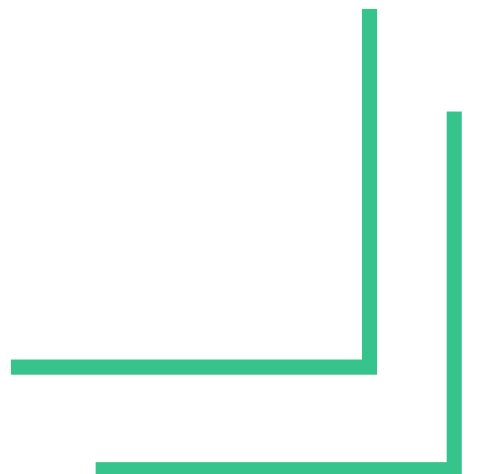
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Recent elimination of limited liability in the context of:

- ✓ Labor law
- ✓ Consumer protection law
- ✓ Environmental law Financial
- ✓ regulation

## 📍 Brazil

E.g.: **Environmental Law** (1998): “Art. 4. **Veil piercing** may apply whenever legal personality is an obstacle to the compensation of harms caused to the quality of the environment.”



# In other jurisdictions

## 📍 India

**Indian courts:** enterprise liability after major Bhopal scandal caused by multinational (1985, 1988)

Adaption 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.**”

## 📍 Colombia

**Colombian constitutional court:** imposed liability on controlling shareholders of liquidated company for social security and pension liability (2001)

Court justified the exception based on the violation of the “**fundamental right of protection of the vital minimum**, of life in dignified conditions and of the protection of old age”

# Mandatory CSR Spending

- ✓ Indonesia
- ✓ India
- ✓ Mauritius
- ✓ Nepal

## 📍 India, 2013

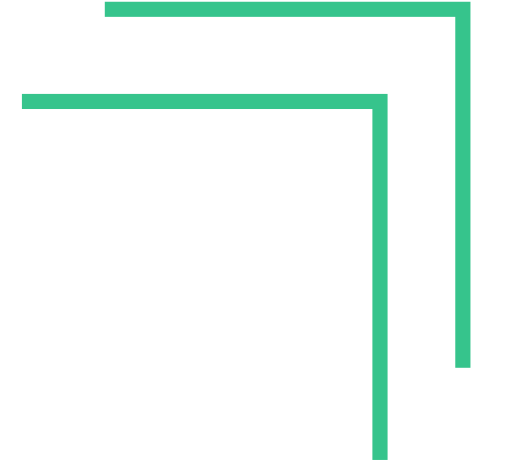
**Justification:** “perception correction” at a time of “big division in this country,” as “the divide between the rich and the poor is getting bigger and bigger”

**Wide range of objectives:** fighting poverty, extreme hunger, child mortality, HIV etc.

Initially on a comply-or-explain basis, later mandatory

# Mandatory CSR committees

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## 📍 South Africa

**(CA 2008): mandatory social and ethics committee for large companies**

Compliance & best practices, including re U.N. Global Compact, OECD

Anticorruption, promotion of equality, environmental matters, B-BBEE, labor etc.

## 📍 India

**(CA 2013): mandatory CSR committee**

Recommends CSR policy and spending to the board



# Stakeholder empowerment

**Codetermination (workers on boards) is rare in the Global South**

More references in GS constitutions compared to GN, but much less in practice compared to Continental Europe



**But there are other forms of stakeholder empowerment**

South Africa: Workers' and unions' rights to enforce CA (delinquency suits, derivative suits etc.), to initiate bankruptcy proceedings and to opine on plans

# Deracialization of corporate governance



**Mandela (1990):** “less than 10 conglomerates control almost 90% of shares in the JSS;” directors almost all “white and male”

## 📍 South Africa

Beyond international models in attending to South Africa’s “own history, reality and imperatives”

Imperative to “end white domination in all its forms, to **deracialize the exercise of economic power**”

# Black Economic Empowerment (1994)

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1994 ANC Programme: “central objective” to “**deracialize business ownership completely**” through BEE

Notion that continuing white economic domination could create “social and racial” tension and breed **social and economic instability**

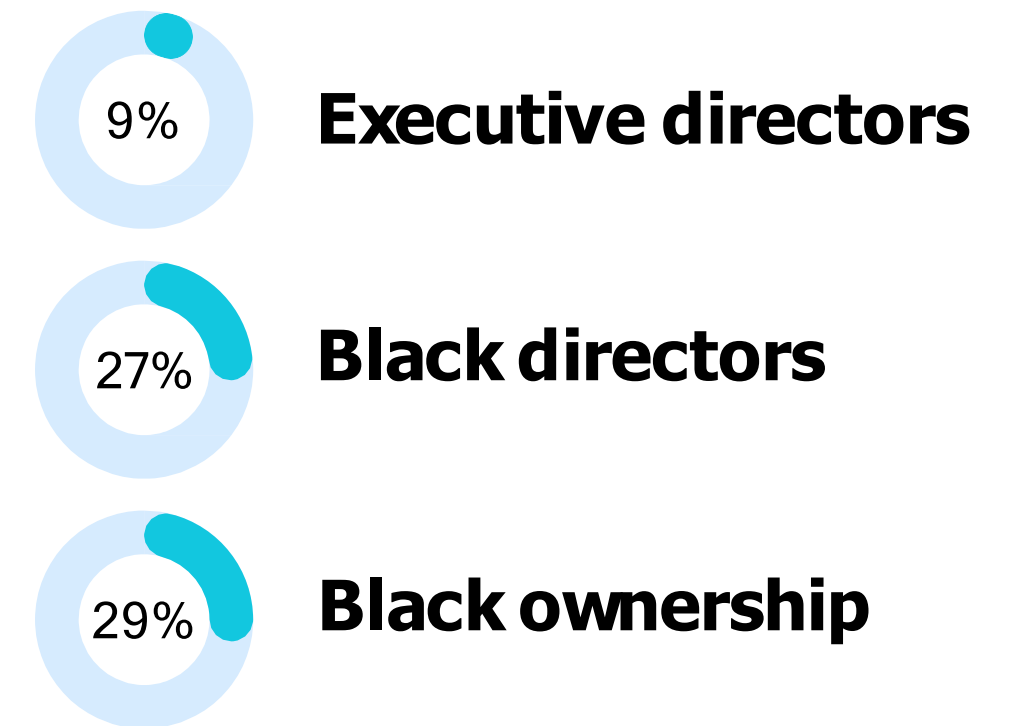
First wave of voluntary BEE transactions in the 1990s: transfer of shares to **politically-connected Blacks**

# Broad-Based Black Economic Empowerment (2003)

**B-BBEE Act (2003):** not only a “socio-political imperative” but also “an imperative dictated by the need for sustainable growth”

- **“Balanced scorecard”** leads to advantages in procurement and licenses:
  - Variables such as Black ownership, Black participation in boards and management, procurement from Black firms, skills and socio-economic development
  - Requirement trickle down supply chain
  - B-BBEE Commission (2013) monitors “fronting”

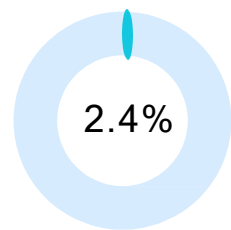
**As of 2021 (JSE):**



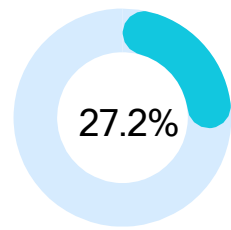
“Highly disappointing” but compares favorably to Brazil (0%) (Portugal Gouvêa, 2022)

# Malaysia

## After independence in 1957:



**Bumiputera ownership**



**Chinese ownership**

- **NEP (New Economic Policy)**
  - Response to ethnic tensions and anti-Chinese riots
  - Target of 30% Bumiputera corporate ownership to be achieved by 2030
  - Requirement of minimum 12.5% Bumiputera ownership for exchange listing

Estimates suggest that **Bumiputera ownership peaked at 23.4% in 2011.**

# Stakeholderism in Global South constitutions

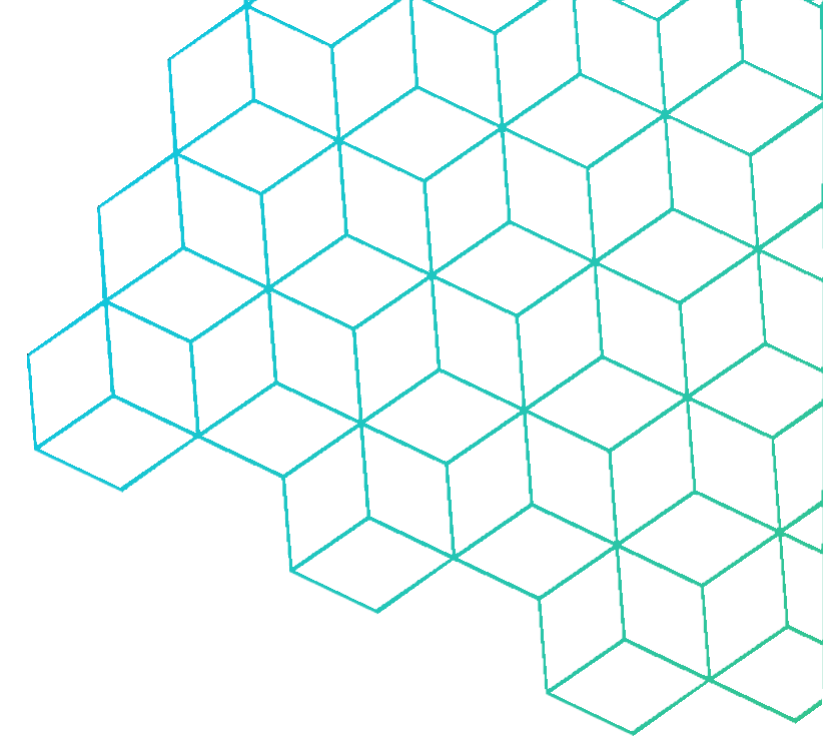
## Corporate law dimensions of transformative constitutionalism

Type of provision	Global South	Global North
Cooperatives	7	2
Workers profit sharing	4	0

- Judicial review of corporate and **bankruptcy** legislation
- Brazil's statute allowing corporate political spending deemed **unconstitutional** as a violation of principles of equality and democracy
  - Role of law in “minimizing the impact of money in the creation of *social* inequalities”

# Why #1?

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**Challenge (or corollary)** of the “**modularity approach**” to law and economics: each area of law has one narrow efficiency objective (Pargendler, 2020)

But: (i) if **economic problems** rise + (ii) other areas of law **do not tackle** them, then there is **growing pressure on corporate law** to address them

# Implications for the evolution of corporate law

Surprising **reverse convergence** in comparative corporate governance

Rising economic crises and policy channeling in the **Global North** are making it look more like the **Global South**





# Why #2?

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- **North-South** distribution
- There are **interjurisdictional externalities** and **distributional implications** of corporate law rules

E.g.: limited liability of parent companies often benefits Global North companies and investors but harms Global South jurisdictions



# Conclusion

Payoffs to examining  
GS experiences



Challenge to “**World Series Syndrome**” (Hirschl) in CCG



Challenge to “**odd duck syndrome**” in CCG



# New perspectives on the evolution of corporate law

- 1 **Social** and **economic** challenges put pressure on corporate law – even if rhetorically
- 2 Surprising trend of “**reverse convergence**” as policy channeling grows in the GN
- 3 Appreciation of **distributional implications** (including GN-GS) of corporate law rules

**Thank you!**