The Global Corporate Purpose Continuum:
The Case for Diversity

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1. Introduction

Viewed through an Anglo-American lens, corporate governance around the world is living a "woke" moment.[1] The recent "discovery" that corporations have stakeholders (other than shareholders) and purposes (other than maximizing shareholder value) is hailed as a corporate governance solution that can deliver global prosperity.[2] However, this article demonstrates that long before Anglo-America's recent "discovery" of corporate purpose, the world was already awake to it. It describes how many of the most important economies in Asia, Europe, South

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[1] This article builds on the insights and theories developed by one of us elsewhere using Asia's experiences with corporate purpose to challenge the myopic Anglo-American-cum-global conception of corporate purpose. By extending on Asia's experiences to consider the experiences of other major Non-Anglo-American economies, this article develops new theories and insights about the evolution of corporate purpose around the world. For an analysis of corporate purpose in Asia see, Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, 4 RED 14 (2022) [hereinafter "Puchniak Asia 2022"]. We are thankful to Groupe d'études géopolitiques, the publisher of RED, for allowing us to reproduce portions of Puchniak Asia 2022 for use in this article.
[2] *See infra*, Part 2.

America, and Africa have been built on systems of corporate governance where corporate purpose and stakeholderism reign supreme. [3]

An accurate understanding of the global history of corporate purpose matters. Failing to recognize that many of the world's most important developed economies – France, Germany, and Japan – have long been built on systems with corporate purpose at their core denies the opportunity to learn from their economic, sociopolitical, and cultural experiences. Failing to understand that Chinese corporate governance has been defined by corporate purpose and stakeholderism leaves this century's most important economic growth story out of the corporate purpose debate. Failing to acknowledge that, along with China, many other major emerging markets and developing economies (EMDEs), including Brazil, India, Nigeria, and South Africa, have long embraced corporate purpose and stakeholderism overlooks several of the most important case studies for analyzing the implications of the corporate purpose movement in the context of developing economies. By illuminating the reality of corporate purpose globally, this article reveals virtues and vices in countries that have embraced stakeholderism – which are unobservable through the myopic Anglo-American-cum-global lens as it erroneously assumes that shareholder primacy has defined corporate governance "around the world for half a century".[4]

Important theoretical and practical insights are revealed when corporate purpose is viewed through a global comparative lens. First, the false dichotomy that has prevailed in the leading literature between "shareholder" or "stakeholder" systems of corporate governance is laid bare.[5] Our global

[3] The economic regions are listed from largest to smallest in terms of size based on GDP.

[4] COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD, 1, 2 (2018).

[5] The leading corporate governance literature has tended to frame the corporate purpose debate around a false dichotomy – a bifurcated world in which *either* "shareholder-primacy" or "stakeholderism" is seen *the* optimal system of corporate governance globally. *See* Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 1 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("Scholars debating the corporation's role in society generally advance the view that there is only one desirable orientation for corporations and their management. Specifically, proponents of a stakeholder governance model contend that focusing management on a broad set of corporate constituents maximizes overall welfare, while advocates of a shareholder-centric directive counter that prioritizing shareholders creates social welfare by rendering the firm most profitable."). For an excellent nuanced comparative analysis that unpacks the complexities of the purpose debate see, Amir N. Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 387, 398-390 (Elizabeth Pollman & Robert Thompson eds., Edward Elgar 2021) ("… the monistic and the pluralistic approaches should be perceived as polar end-points of a continuous dimension. Seen this way, shareholderism and stakeholderism are therefore inverse concepts … there could be a whole range of intermediate degrees of shareholder-ism that individuals and societies can endorse; there is no need to subscribe to the extreme position on either pole of the dimension … directors map shareholder-stakeholder relations onto a continuum rather than dichotomous positions.").

comparative analysis reveals that all systems of corporate governance must take account of shareholders and other stakeholders. The relevant question becomes: where is a given jurisdiction's system of corporate governance on the global shareholderism/stakeholderism "continuum", and what is its relative place compared to other jurisdictions?[6]

This global perspective reveals that what may appear to a US observer to be a "major shift" in corporate purpose in the United States in fact corresponds to quite a modest shift towards stakeholderism on the global corporate purpose continuum – with the United States remaining on the shareholder "end" of the continuum. In turn, this observation suggests a greater level of continuity over time in corporate governance in the United States (and elsewhere) than leading research suggests.[7] Relatedly, this enhanced comparative global lens reveals that reforms to strengthen shareholder power in Asia, the EU, South America, and Africa often result in shifting these jurisdictions slightly towards shareholderism, while still leaving them on the stakeholderism end of the continuum. Normally, however, such pro-shareholder reforms do not transform the deeply engrained stakeholderism culture of these jurisdictions.[8] Understanding the shareholderism/stakeholderism continuum also recognizes the complex reality that different

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[6] Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?* 14-15 (European Corporate Governance Institute - Law Working Paper No. 744, May 2024), available at: https://ssrn.com/abstract=4652012 ("Comparative corporate law scholarship and empirical research demonstrate that the purpose that corporations serve is best understood by measuring that purpose along a continuum – with shareholderism and stakeholderism at opposing ends of the continuum. All companies, in all jurisdictions, have shareholders and other stakeholders (i.e., creditors, employees, suppliers, customers, the environment and society). All jurisdictions have laws that protect both shareholders and other stakeholders. The difference among countries is the extent to which their laws prioritize the interests of shareholders over other stakeholders. As laws require companies to focus more on either shareholders or stakeholders this shifts the purpose of companies along the shareholder/stakeholder continuum."). See also, Amir Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 387, 390-91 (Elizabeth Pollman & Robert B. Thompson eds., 2021); Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-American "Discovery" of Corporate Purpose*, 4 RED 14, 20-21 (2022); Beate Sjåfjell & Jukka Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy*, BOND L. REV. 1, 10-15 (2022). On the evolution of comparative corporate governance over time see, Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC L. & POL'Y J. 7, 9, 12 (2007); Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling* 33 (European Corporate Governance Institute - Law Working Paper 546, 2020), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695309.

[7] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 4 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("So, what changed? In considering this question, this Article examines two corporate purpose "moments" of flux, or periods in which the public and academic perception of corporate purpose swung from one pole to the other. This has only happened twice in the past century—first, after the great stock market crash of 1929, and second, following a period of economic stagflation in the 1970s.").

[8] *See infra* Part 3.

corporate governance reforms in a single jurisdiction may produce countervailing forces – some which promote a shift towards shareholderism and others that promote stakeholderism – illuminating the dynamic nature of the evolution of corporate purpose in countries over time.

Second, the recent Anglo-American-cum-global corporate purpose movement's erroneous assumption that shareholderism has reigned supreme globally over the last fifty years has spawned the prescription that the sole path to prosperity is for all countries to embrace more corporate purpose and stakeholderism.[9] Such Anglo-American myopia denies the reality that many of the world's most important economies have long had corporate governance systems on the stakeholderism side of the continuum. In such a context, adding reforms to push countries already steeped in stakeholderism to embrace more stakeholderism is illogical and likely to have deleterious consequences.

There are potential advantages and disadvantages to both shareholderism and stakeholderism that are contingent on the economic, sociopolitical, and cultural context of each country, as well as on other considerations such as shareholder structure and industrial context. In systems traditionally on the stakeholderism side of the continuum, like China, India, Japan, France and Germany, movements towards shareholderism may be required to spur economic growth and dislodge entrenched rent-seekers, be they a protected class of managers, employees or other stakeholders.[10] This may be particularly true in developing countries where stakeholderism may facilitate corruption and the entrenchment of local elites.[11] Conversely, in jurisdictions traditionally on the shareholderism side of the continuum, such as the United States or United Kingdom, shifts towards stakeholderism may address problems with social inequality that have emerged after decades of being on the extreme shareholderism side of the continuum.[12] Although all countries ebb and flow along the continuum, a fundamental change from one side of the continuum to the other appears to be rare. Such a change seems to require extreme shifts in a country's economic, sociopolitical, and cultural environments that may not occur for generations. Thus, our global comparative lens

[9] Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, 4 RED 14, 14-15 (2022).
[10] *See infra* Part 3.
[11] *See infra* Part 3.
[12] For the United States see, *See* Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 5 (European Corporate Governance Institute - Law Working Paper No. 746, 2023).

suggests that countries have a type of "corporate purpose equilibrium" and that they often experience ebbs and flows around that equilibrium.

Third, removing the Anglo-American blinders reveals that countries which have embraced stakeholderism for decades have been responsible for some of the greatest economic miracles in modern history and built some of the most prosperous societies on the planet.[13] To be clear, we do not claim causation here, and this is accordingly not a claim that stakeholderism is in any way more functional than shareholderism. Such a claim would repeat the overly simplistic paradigm, which has defined the corporate purpose debate for decades, that there is one global equilibrium for corporate purpose – a bifurcated world in which opposing views claim that either shareholder primacy or stakeholder governance is optimally efficient.[14] Our global comparative lens reveals multiple equilibria and paths to prosperity which have been obscured by leaders in the field who have either claimed that shareholder primacy is the "end of history" for corporate law,[15] or that in a world ostensibly dominated by shareholder primacy a universal push towards more corporate purpose will result in "corporate nirvana".[16]

Freed from the Anglo-American blinders, we find that different countries have different contexts which allows for countries with different equilibria for corporate purpose to be prosperous. Just as the United States and United Kingdom have thrived at times on the far end of the shareholderism side of the continuum, so too have Japan, France, and Germany on the stakeholderism end of the continuum.[17] We also observe that when countries push too far towards either extreme of the continuum they risk suffering deleterious consequences, such as a rise in inequality or stunted economic growth. It also appears that periodically successful countries engage in a sort of "rebalancing" where they accommodate some stakeholder interests when they have moved to the shareholder-side of their equilibrium and vice versa. This "corporate purpose rebalancing" around each country's equilibrium appears to "grow the pie" and explains a common feature of prosperous

[13] *See infra* Part 3.

[14] *See* Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 1 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("Scholars debating the corporation's role in society generally advance the view that there is only one desirable orientation for corporations and their management. Specifically, proponents of a stakeholder governance model contend that focusing management on a broad set of corporate constituents maximizes overall welfare, while advocates of a shareholder-centric directive counter that prioritizing shareholders creates social welfare by rendering the firm most profitable.").

[15] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* (2001) 89 GEO. L.J. 439, 468 (2001).

[16] COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD, 35-37 (2018).

[17] *See infra* Part 3.

countries – despite their distinct equilibria and unique ebbs and flows around their equilibria over time.[18]

In sum, the Anglo-American-cum-global perspective on corporate purpose has failed us for decades. Viewed through an Anglo-American lens, we are ostensibly in the midst of a fierce battle between those who see shareholder primacy and stakeholder governance as the optimally efficient (and yet, diametrically opposed) endpoints for corporate governance globally. However, if we remove the Anglo-American blinders, these ostensibly diametrically opposed camps share the same myopia: both claim there is a single universal path to prosperity and assume that the Anglo-America equilibrium on the shareholderism side of the continuum has been the equilibrium for all major economies globally. Our global comparative analysis demonstrates that each country has its own distinct legal, economic, sociopolitical, and cultural realities and that failing to recognize this is likely to produce deleterious consequences. To maximize social welfare, corporations must be governed – within the context of their environment – in a way that benefits society at large. How this is achieved will vary from jurisdiction to jurisdiction and within each jurisdiction over time. There is no one point on the shareholder primacy/stakeholderism continuum that axiomatically equates to prosperity. Ultimately, prosperity requires diversity.

The remainder of this article proceeds as follows. Section 2 provides an overview of the history of corporate purpose in major Non-Anglo-American economies around the world. It demonstrates how Anglo-American myopia has blinded us to the historical reality that stakeholderism has been at the core of corporate governance systems in major non-Anglo-American economies for decades. Section 3 [not circulated] draws on our overview of the global history of corporate purpose to illuminate the theoretical and practical value that becomes apparent when corporate purpose is seen along the shareholderism/stakeholderism continuum. This perspective reveals that corporate purpose is stickier than the leading literature suggests with countries normally ebbing and flowing around their "corporate purpose equilibrium" and that to "grow the pie" successful countries will avoid pushing too far towards the extremes of the continuum by periodically recalibrating their corporate purpose. Section 4 explains why the developing world brings additional considerations to bear in the corporate purpose debate and why these considerations arguably suggest that

[18] ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (2020). [check pincite]

developing countries may benefit from corporate purpose skewing more towards the shareholdrism side of the continuum – the opposite of what the current Anglo-American-cum global corporate purpose movement suggests. Section 5 [not circulated] concludes by emphasizing how our dynamic view of corporate purpose suggests that there are multiple paths to prosperity and that allowing for corporate purpose diversity is critical for maximizing social utility in countries around the world.

2. No Need for the World to be Woke

2.1. The Myopic Anglo-American-Cum-Global "Discovery" of Corporate Purpose

In 2018, Colin Mayer, a stalwart of the British Academy, published "Prosperity".[19] The Book is the new "bible" of corporate governance that "is destined to change the world", says Martin Lipton, a prolific prophet for America's white-shoe lawyers.[20] The Book's revelation is that corporations should no longer be governed for the sole purpose of maximizing shareholder value. In 2019, the Business Roundtable, a club of America's elite CEOs, reportedly "made headlines around the world" by releasing its new statement on corporate purpose.[21] The statement's epochal epiphany echoed Mayer's clarion call for corporations to have a purpose other than maximizing shareholder value: corporations no longer exist principally to serve shareholders but "for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders".[22] In 2020, Larry Fink, founder and chief executive of the American-cum-global investment goliath BlackRock, issued a letter to CEOs around the world imploring them to govern corporations to embrace "purpose and [serve] all stakeholders" – ostensibly spelling an end to the shareholder primacy obsession.[23] The same year, the World Economic Forum, an international organization comprising major global corporations and thought leaders, "issued a manifesto urging companies to abandon

[19] COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (OUP, 2018).
[20] COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD viii-ix (OUP, 2018).
[21] Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309-1310 (2021); Jill E. Fisch, *Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113, 119 (2022).
[22] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.
[23] Larry Fink, *A Fundamental Reshaping of Finance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 16, 2020), https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/.

the traditional model of 'shareholder capitalism'" and its executive chairman likened "the session focusing on the subject to 'the funeral of shareholder capitalism'".[24] Putting theory into action, governments have increasingly embraced legislation to make corporations more purposeful[25] and financial titans have pledged over 100 *trillion* dollars under their management to foster an expansion of corporate purpose globally.[26]

The "discovery" that corporations have stakeholders (other than shareholders) and purposes (other than maximizing shareholder value) promises to deliver global corporate governance from Tartarus to Elysium – or as Mayer describes it, perhaps drawing on Hinduism for global effect, corporate "nirvana".[27] Mayer tells us that this woke moment has the potential to emancipate the global community from the "Friedman Doctrine", which posits that the corporation's sole purpose is maximizing shareholder value. In Mayer's words, the Friedman Doctrine "has been a powerful concept that has defined business practice and government policies around the world for half a century".[28] Not so fast.

That the Friedman Doctrine has played a central role in shaping *Anglo-American* corporate governance is beyond reproach. Despite their myriad differences, until recently, *modern* corporate law and governance in the United Kingdom and United States has, in theory and practice, been defined by shareholder primacy. Recognition of the interests of other corporate stakeholders (aside

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[24] Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 107 (2020).

[25] This can be seen in legislation around the world promoting the expansion of directors' duties to allow for considerations other than maximizing shareholder value, the global proliferation of stewardship codes that focus on ESG, and the global emergence of non-financial disclosure. *See* for stewardship, Dionysia Katelouzou & Dan W. Puchniak, *Global Shareholder Stewardship: Complexities, Challenges and Possibilities*, in GLOBAL SHAREHOLDER STEWARDSHIP 3, 3-5 (Dionysia Katelouzou & Dan W. Puchniak eds., CUP, 2022).

[26] The United Nations Principles for Responsible Investing (PRI) were established in 2005 by a group of institutional investors and experts who developed a set of principles for responsible investment. Signatories of the PRI voluntarily commit to follow six principles that prioritized ESG considerations in their investor engagement strategies and encourage institutional investors to collaborate in promoting ESG practices in their investee companies. Extraordinarily, the PRI now counts over 4,000 institutional investors as signatories, from more than 60 countries, representing a staggering US$120 trillion in assets under management. *See* PRI, *Principles for Responsible Investment*, UN GLOBAL IMPACT 1, 6 (2021), https://www.unpri.org/download?ac=10948; Dan W. Puchniak & Umakanth Varottil, *Rethinking Acting in Concert: Activist ESG Stewardship is Shareholder Democracy*, 5 (European Corporate Governance Institute - Law Working Paper No. 731, 2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565395.

[27] COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD* 35-37 (OUP, 2018).

[28] COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD* 2 (OUP, 2018). [to check pincite] It should be noted that Mayer's claim about the Friedman Doctrine may even be incorrect in the context of the United States as a leading corporate law professor has convincingly explained how it is erroneous to blame (or credit) Milton Friedman for the rise of shareholder primacy in corporate America. Brian R. Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH. L. REV. 1607, 1611 (2021).

from shareholders) has largely been on the margins of corporate law and governance in both systems – with "shareholder primacy" at the core. [29] At the dawn of the new millennium, two of America's preeminent law professors, Henry Hansmann and Reinier Kraakman, in their pugnaciously titled article "The End of History for Corporate Law", boldly claimed that "[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured".[30] In the echo of such Anglo-American shareholder primacy triumphalism, perhaps the iniquities of those who now suggest that the Friedman Doctrine is a powerful concept that has defined business practice and government policies "around the world for half a century" can be forgiven.

While forgiveness is magnanimous, forgetting (or even worse, misdescribing) history is a recipe for disaster. As we illuminate in this section, an accurate historical account of corporate governance in many of the world's most important developed and developing economies demonstrates that, for better or worse, they have long embraced corporate purpose, with stakeholderism at their cores. Despite the bold proclamations from several of Anglo-America's most prominent corporate law and governance scholars, the last half century has been defined by corporate purpose and stakeholderism in many of the world's major economies – America's half century obsession with the Friedman doctrine and shareholder primacy makes it a global outlier on the extreme tail of the shareholder-primacy-stakeholderism continuum. We now turn to a concise history of corporate purpose in major economies around the world to illuminate the forgotten history of corporate purpose and stakeholderism globally.

2.2. The Overlooked Centrality of Corporate Purpose and Stakeholderism in Asia

Asia is diverse. With over four billion people, two thousand languages, and around fifty countries, one should almost never make claims about Asia as a whole. However, when it comes to economic power and financial markets a handful of countries in Asia dominate.[31] For this analysis, it makes sense to consider Asia's three largest economies respectively – China, Japan, and India – which

[29] For an excellent overview of this topic in the Anglo-American context see, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 106 (2020).
[30] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001).
[31] Dan W. Puchniak et al., *Introduction* in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 1, 7-8 (Dan W Puchniak et al. eds., CUP 2017); Dan W. Puchniak, *The Complexity of Derivative Actions in Asia: An Inconvenient Truth* in THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 90, 98 (Dan W. Puchniak et al. eds., CUP 2012).

comprise three of the five largest economies in the world.[32] These three countries also have three out of the world's four largest stock markets as measured by capitalization and are home to almost 3 billion people. They are principally responsible for transforming Asia into the world's engine for economic growth since World War II – each playing a significant role at different times to drive the world economy to greater heights.

2.2.1 Understanding Stakeholderism with Chinese (Communist Party) Characteristics

Two decades ago, the United Sates had almost twenty times as many Fortune Global 500 Companies as China. Today, the number of Fortune Global 500 Companies in China (124) has surpassed the United States (121). China's listed companies are leaders in many of the world's most important industries, a fact that was unthinkable at the dawn of the new millennium.[33] Over the past 15 years, China has had the world's largest market for initial public offerings and the

[32] Measured on a Purchasing Power Parity basis (PPP) the largest economies in the world based on 2020 data are: China (1), United States (2), India (3), Russian Federation (4), and Japan (5) (*The World Bank Data, GDP, PPP (current international $)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD?most_recent_value_desc=true, (last visited June 7, 2024). Measured in US Dollars the largest economies in the world based on 2020 data are: United States (1), China (2), Japan (3), Germany (4), India (5), and United Kingdom (6) (*The World Bank Data, GDP, (current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true, (last visited June 7, 2024).

[33] For the original text with the sources supporting this paragraph see, Lin Lin & Dan W. Puchniak, *Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State*, 35 COLUM. J. ASIAN L. 74, 77 n.3 (2022). Chinese listed companies lead the world in industries such as pharmaceuticals, solar panels and online payment systems, see *A Rising Star: China's pharmaceuticals industry is growing up*, ECONOMIST (Sept. 28, 2019), https://www.economist.com/business/2019/09/28/chinas-pharmaceuticals-industryis-growing-up (Pharmaceuticals); Yukinori Hanada, *China's Solar Panel Markers Top Global Field but Challenges Loom*, NIKKEI ASIA (July 31, 2019), https://asia.nikkei.com/Business/Business-trends/China-s-solar-panel-makers-topglobal-field-but-challenges-loom (Solar panels); Wang Yue, *$7.6 Trillion Online Payments Market Is No Longer Enough For Jack Ma's Ant Financial*, FORBES (Jan. 17, 2020), https://www.forbes.com/sites/ywang/2020/01/17/ant-financial-isshifting-away-from-chinas-76-trillion-online-payments-market/?sh=37563bda45b5 (Online payment systems); *China crowned as world's top manufacturer for 14th year, rebuking smears against economy*, GLOBAL TIMES (Jan. 19, 2024, 09:15 PM), https://www.globaltimes.cn/page/202401/1305728.shtml (China's GDP expanded by 5.2 percent year-on-year in 2023, higher than the official growth target of around 5 percent set in early 2023. The growth rate is expected to be higher than that of advanced economies, including the US. China's economy stands out relative to the overall economic performance of various countries around the world in 2023.); *China Is Dominating Advanced Industries as US, G7, and OECD Economies Founder, ITIF Finds in New Industrial Study*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION (Dec. 13, 2023), https://itif.org/publications/2023/12/13/china-is-dominating-advanced-industries-as-us-g7-and-oecd-economies-founder/ (Amongst several key findings, as of 2020, China was the world's leading producer in 7 of the 10 industries covered: computers and electronics; chemicals; machinery and equipment; motor vehicles; basic metals; fabricated metals; and electrical equipment. Further, China produced more than one-quarter of the world's output across all 10 industries combined in 2020 (25.3 percent), up from 12.9 percent in 2008.).

world's second largest stock market, which has grown five-fold in the past decade.[34] These facts help explain how China has enjoyed decades of economic success which have lifted hundreds of millions of people out of poverty, placing it on a trajectory to possibly be the world's most powerful economy.

To Western observers, claims that China has achieved its economic success at the expense of Western democracy, individual liberties, and human rights are well-known.[35] That the Chinese economy is on the precipice of imploding has been repeated ad nauseam for decades – but has not (yet) transpired.[36] Given China's global economic superpower status and Anglo-America's corporate purpose obsession, including China in the corporate purpose debate would seem unavoidable. This is especially so considering claims of the Friedman Doctrine's global ubiquity and the declaration that world domination of Anglo-American shareholder-primacy marked "the end of history for corporate law".[37] Yet, the leading Anglo-American-cum-global corporate purpose literature barely considers China at all.

Based on a conventional understanding of stakeholderism, Chinese corporate law and governance ticks many of the boxes. From the inception of China's modern PRC Company Law in 1994, employees have been recognized as important corporate stakeholders. Employee board representation has always been enshrined in the company law and the requirement that employees must play a meaningful role in corporate decision making has always been made explicit.[38] More broadly, from its inception the PRC Company Law has included provisions that have been all

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[34] For the original text with the sources supporting this paragraph see, Lin Lin & Dan W. Puchniak, *Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State*, 35 COLUM. J. ASIAN L. 74, 77 n.5 (2022). See Jennifer N. Carpenter & Robert F. Whitelaw, *The Development of China's Stock Market and Stakes for the Global Economy*, 9 ANN. REV. FIN. ECON. 233, 251 (2017) ("The rise of China and fivefold growth of its stock market over the past decade have fueled a growing literature on this market in financial economics."); See more recently Hudson Lockett, *China's stock market value hits record high of more than $10tn*, FIN TIMES (Oct. 14, 2020), https://www.ft.com/content/7e2d1cae8033-45b1-811c-bc7d4a413e33 (confirming second largest stock market).

[35] He Li, *The Chinese Model of Development and its Implications*, 2 WORLD J. SOC. SCI. RES. 128,132 (2015); Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 72, 72 (2005).

[36] Matthew Henderson, *China's economy is about to implode. We will all feel the aftershocks*, THE TELEGRAPH (Jan. 30, 2024), https://www.telegraph.co.uk/news/2024/01/30/chinas-economy-is-about-to-implode/; , https://www.bbc.com/news/business-66636403.30, 2024), https://www.telegraph.co.uk/news/2024/01/30/chinas-economy-is-about-to-implode/; Nick Marsh, *Is China's economy a 'ticking time bomb'?*, BBC (Aug. 31, 2023), https://www.bbc.com/news/business-66636403.

[37] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

[38] Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 68 (2010); Li-Wen Lin, *Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*, 68 AM. J COMP. L. 576, 582 (2020).

about purpose – exhorting companies to act ethically, strengthen China's socialist society, and to be accountable to the wider community.[39] In 2006, the PRC Company Law was amended to explicitly require companies to "undertake social responsibility".[40] The newly issued revised 2024 PRC Company Law is as purposeful as ever; Article 20 states that "when a company engages in business activities, it shall fully consider the interests of its employees, consumers and other stakeholders as well as social public interests such as ecological and environmental protection, and assume social responsibilities." [41] It goes on to proclaim that "the state encourages companies to participate in social welfare activities and publish social responsibility reports".[42]

In 2002, China joined one of the most significant international corporate governance trends in modern times: adopting a UK-style corporate governance code.[43] One may have thought that this would be a catalyst for China to join "the end of history for corporate law" by implementing a shareholder primacy corporate governance model. Instead, the inaugural 2002 Chinese Corporate Governance Code (CCGC) reads like it was woke in 2024. It encouraged listed companies to "be concerned with the welfare, environmental protection, and public interests of the community" and to "pay attention to the company's social responsibilities".[44] The 2018 CCGC goes even further by encouraging listed companies to "actively implement the concept of green development, integrate ecological and environmental protection requirements into the development strategy and corporate governance process, actively participate in the construction of ecological civilization, and play an exemplary role in pollution prevention, resource conservation, and ecological protection".[45] As if that were not purposeful enough, it encourages listed companies to assist

[39] Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 69 (2010). Li-Wen Lin, *Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*, 68 AM. J COMP. L. 576, 582 (2020).

[40] PRC Company Law (2006), art. 5. For an excellent analysis of this development see, Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?* 28 BERKELEY J INT'L L. 64, 71-72 (2010).

[41] <insert romanised Chinese law name> (中华人民共和国公司法(2023修订) [Company Law of the People's Republic of China (2023 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2023, effective July 1, 2024), art. 20.

[42] insert romanised Chinese law name> (中华人民共和国公司法(2023修订) [Company Law of the People's Republic of China (2023 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2023, effective July 1, 2024), art. 20.

[43] See, Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 THE AM. J. COMP. L. 265, 275-276 (2017).

[44] Code of Corporate Governance for Listed Companies 2002, art 86.

[45] Code of Corporate Governance for Listed Companies 2018, art 86.

"poverty-stricken counties or villages, and actively connect with and earnestly support poverty-stricken areas to develop local industries, train talents, and promote employment". [46]

China was clearly awake to corporate purpose long before Mayer penned "Prosperity" or Fink proclaimed the end of shareholder-primacy; at least on paper, Chinese corporate law and governance is as purposeful as can be.[47] What is less clear, is whether Chinese companies can fulfil these lofty purposes. Another question that looms large is: Can Chinese companies stay on their world changing trajectory in an economy where the Chinese Communist Party (CCP) appears to be ratcheting-up its control over which purposes companies may serve?

If President Xi's "common prosperity" campaign is to be taken at face value, companies' purposes are being defined by the government for the public good – whether it involves effectively banning trading on cryptocurrency and for-profit tutoring, restricting gaming for children, cajoling prominent companies to make large charitable donations or to address the urban/rural inequality gap. [48] If one is more cynical, the CCP's role as China's *de facto* largest controlling shareholder, its informal control over private corporations and institutional investors, and its campaign to formalize its control over corporate management by having it formally inserted into corporate charters, suggest that the real purpose of corporate governance in China is to reinforce the CCP's ultimate control.[49] From either perspective, considering the CCP's more assertive role in restricting

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[46] Code of Corporate Governance for Listed Companies 2018, art 87.

[47] See, Dan W Puchniak & Lin Lin, *Institutional Investors in China: An Autochthonous Mechanism Unrelated to UK-cum-Global Stewardship* in GLOBAL SHAREHOLDER STEWARDSHIP 379, 416 (Dionysia Katelouzou & Dan W. Puchniak eds., CUP, 2022).

[48] For a critical Western perspective discussing President Xi's "common prosperity" campaign see, *China's new reality is rife with danger*, ECONOMIST (Oct. 2, 2021), https://www.economist.com/leaders/2021/10/02/chinas-new-reality-is-rife-with-danger; *Xi Jinping's talk of "common prosperity" spooks the prosperous*, ECONOMIST (Aug. 28, 2021), https://www.economist.com/finance-and-economics/xi-jinpings-talk-of-common-prosperity-spooks-the-prosperous/21803895; *A tale of two Chinas: Even Xi Jinping is struggling to fix regional inequality*, ECONOMIST (May 21, 2024), https://www.economist.com/china/2024/05/21/even-xi-jinping-is-struggling-to-fix-regional-inequality.

[49] For an excellent analysis of the CCP's role as China's de facto largest controlling shareholder see, Li-Wen Lin & Curtis J Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 734 (2013). For insight into the CCP's control over private corporations see, Curtis J Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 716 (2015). For a detailed analysis of the CCP's formal and informal control over institutional investors in China see, Lin Lin & Dan W. Puchniak, *Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State*, 35 COLUM. J. ASIAN L. 74, 121-122 (2022). For an empirical analysis of the CCP's campaign to formalize its control over corporate management in corporate charters see, Lauren Yu-Hsin Lin & Curtis J Milhaupt, *Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance*, 50(1) J. LEGAL STUD. 187, 190 (2021). For a fascinating analysis of the possible risks and benefits of the CCP using China's corporate social credit system (CSCS) to shape the purpose that Chinese companies fulfil see, Lauren Yu-Hsin Lin & Curtis Milhaupt, *China's Corporate Social Credit System and the Dawn of Surveillance State Capitalism*, 256 THE CHINA QUARTERLY 835, 849-851(2023).

and controlling corporate purpose, it appears that fewer purposes and a narrower focus on maximizing shareholder value may be exactly what is required in China at this moment – the opposite of what Anglo-America's awakening prescribes.

There is no doubt that China has embraced many aspects of stakeholderism and has entertained a broad conception of corporate purpose since it became a modern economy in the 1990s. However, it must also be acknowledged that it was the introduction of shareholders into the Chinese communist system that sparked China's economic transformation and produced arguably the greatest economic miracle of the 21st Century. The foundation of the corporate governance system that led to China's economic miracle is commonly described as "corporatization without privatization."[50] Starting in the 1990s, a vast array of businesses that were run as units of the government were transformed into companies under the new PRC Company Law.[51] These companies, with boards of directors and shareholders, were then listed on the Chinese stock market. Importantly, however, the government maintained – and still maintains – a controlling equity interest in its listed State-Owned Enterprises (SOEs).[52] This system of equity finance has become known as mixed-ownership, as SOEs shares are split between the government as the (insider) controlling shareholder and (outsider) minority shareholders.[53]

Prior to the 1990s, China had a system of corporate governance without shareholders – something which does not currently exist in any major economy in the world. As explained above, its modern system of corporate governance has several core features that place it on the stakeholderism side

[50] Nicholas Howson, *Protecting the State from Itself? Regulatory Interventions in Corporate Governance and the Financing of China's 'State Capitalism'*, in REGULATING THE VISIBLE HAND?: THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM 49, 51-52 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2015).

[51] Howson, *supra* note 50, at 51-52; Jiangyu Wang & Tan Cheng-Han, *Mixed Ownership Reform and Corporate governance in China's State-Owned Enterprises*, 53 VAND. J. TRANSNAT'L L. 1055 (2020).

[52] 'SOEs' in this article include: (1) enterprises in which government agencies own 100% of the shares (wholly state-owned enterprises), and enterprises in which government agencies and the wholly state-owned enterprises directly or indirectly own in aggregate 100% of the shares; (2) enterprises in which government agencies and the enterprises described in paragraph (1), individually or jointly, own in aggregate more than 50% of the shares and in which one of them is the largest shareholder; (3) subsidiaries in which an enterprise described in paragraphs (1) and (2) own more than 50% of the shares; and (4) enterprises in which a government agencies or an enterprise described in paragraphs (1) and (2) owns less than 50% of the shares, but is the largest shareholder, and is able to exercise effective domination through shareholders' agreements, articles of association, board resolutions or other arrangements. *See* Qiye Guoyou Zichan Jiaoyi Jiandu Guanli Banfa (企业国有资产交易监督管理办法) [Measures for the Supervision and Administration of the Transactions of State-Owned Assets of Enterprises] (promulgated by the State-owned Assets Supervision and Administration Commission (SASAC) and Ministry Of Finance (MOF), Jun. 24, 2016, effective June 24, 2016), art. 4, *available at* http://lawinfochina.com/display.aspx?id=26008&lib=law&EncodingName=big5.

[53] Howson, *supra* note 50, at 51-52; Milhaupt, *supra* note **Error! Bookmark not defined.**; Wang & Tan, *supra* note 51, at 1062-64.

of the global shareholderism/stakeholderism continuum. China's laws regulating companies require employee representation on boards, entrench staekholderism, and more recently incentivize companies to focus on the environment. Another powerful force that broadens the purpose of Chinese companies is the use of both formal law and informal mechanisms that allow the CCP to guide Chinese companies to fulfill wider societal purpose as defined by the CCP.

However, throughout the 1990s and 2000s a litany of reforms aimed at increasing shareholder power moved China closer towards the center of the continuum. More recently, President Xi's era "common prosperity" campaign has arguably pushed China back towards the stakeholderism side of the continuum. As China attempts to compete with the United States for global economic supremacy it will be interesting to see whether a further push towards stakeholderism continues or if shareholderism will be promoted to ensure the global competitiveness of Chinese companies. However, what seem certain is that for China to abandon its equilibrium on the stakeholderism side of the continuum would require a fundamental transformation of China's economic, sociopolitical and cultural order – something which does not appear to be anywhere in sight. Rather, it seems that ebbs and flows around its current corporate purpose equilibrium on the stakeholder side of the continuum will define corporate purpose in China for the foreseeable future.

2.2.2. "Company Community" Defines Corporate Purpose in Post-war Japan

After more than three decades of tepid economic growth, it is easy to forget that in the late 1980s Japan was, by many measures, the richest country in the world. It had the world's highest per capita Gross National Product, largest net holdings of foreign assets, and by far the largest stock market capitalization and highest property values. Japan's rise to the zenith of the world economy was even more extraordinary considering that merely a few decades earlier its devastating defeat in World War II had reduced it to the level of a poor developing country.[54] Japan's post-war

[54] For original text with the sources supporting this paragraph see, Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 10 (2018); Michael Spence, THE NEXT CONVERGENCE: THE FUTURE OF ECONOMIC GROWTH IN A MULTISPEED WORLD 14 [check pincite] (New York: Farrar, Straus and Giroux, 2011). Hannah Shiohara, *The Japanese Economic Miracle*, BERKELEY ECON. REV. (Jan. 26, 2023), https://econreview.studentorg.berkeley.edu/the-japanese-economic-miracle/. (Despite having lost almost everything due to World War II, Japan experienced the "Japanese Economic Miracle", where its economy recovered with incredible speed and Japan experienced rapid and sustained economic growth from 1945 to 1991. This was due to four main factors: technological change, accumulation of capital, increased quantity and quality of labor, and increased international trade.); Michael Beckley, Yusaku Horiuchi & Jennifer M. Miller, *America's Role in the Making of Japan's Economic Miracle*, 18 J. E. ASIAN STUD. 1, 1 (2018).

economic miracle produced growth rates unseen in human history. It was the first time an economy had ever doubled in size in under a decade – which set the stage for other Asian economic miracles that transformed Asia into the world's engine of economic growth.[55]

It is well-known that Japan's post-war economic miracle transpired in a corporate governance environment defined by stakeholderism.[56] Prior to the burst of the economic bubble in the early 1990s, the world marvelled at Japan's unique system of corporate governance – in which shareholder voice was scant. As if taken from the pages of "Prosperity", Japan's corporate governance model was referred to as the "company community" – in which boards were overwhelmingly staffed by lifetime employees.[57] Japan's comparatively small wage gap between senior executives and average workers appeared to be the embodiment of woke egalitarianism.[58] Rather than hostile takeovers, Japan's success was credited to "the efficiency of friendliness" in which friendly mergers rather than hostile takeovers produced corporate governance efficiency.[59] Informal corporate groups, called *Keiretsu*, produced innovative and high-quality products, without the need for detailed contracts, which used "just-in time" production to dominate global

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[55] MICHAEL SPENCE, THE NEXT CONVERGENCE: THE FUTURE OF ECONOMIC GROWTH IN A MULTISPEED WORLD 14 (Farrar, Straus and Giroux 2011) [check pincite]. See generally, Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 511 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Michael Beckley, Yusaku Horiuchi & Jennifer M. Miller, *America's Role in the Making of Japan's Economic Miracle*, 18 J. E. ASIAN STUD. 1, 1 (2018) (The postwar rise of Japan is one of the most dramatic cases of rapid economic development in modern history. Only a decade after suffering total military defeat, Japan returned to its prewar standard of living. More remarkable, Japan's growth accelerated after this initial recovery period. …. As a result of this growth spurt, by 1970, Japan boasted the third largest economy and ranked among the most developed countries in the world.)

[56] Gen Goto, *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code*, in GLOBAL SHAREHOLDER STEWARDSHIP 223 (Dionysia Katelouzou & Dan W. Puchniak eds., CUP, 2022); Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT'L L. 829, 834 (2020); Dan W Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G, Hill and Randall S. Thomas eds., 2015) 511, 521; Dan W Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC L. & POL'Y J. 7, 51-69 (2007). For an interesting comparative analysis of other forces that may have driven these corporate governance changes see, Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, *95* IND. L.J. 533, 559 (2020).

[57] Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions* 25 DEL. J. CORP. L. 189, 201-214 (2000).

[58] For an analysis that sees Japan's low wage gap as a positive feature of its system of corporate governance see, Alberto R Salazar & John Raggiunti, *Why Does Executive Greed Prevail in the United States and Canada but Not in Japan? The Pattern of Low CEO Pay and High Worker Welfare in Japanese Corporations*, 64 AM. J. COMP. L. 721, 742 (2016). For another perspective see, *Japanese executive pay: Spartan salarymen*, ECONOMIST, (June 30, 2010), https://www.economist.com/newsbook/2010/06/30/spartan-salarymen.

[59] Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers*, 5 BERKELEY BUS. L.J. 195, 203 (2008).

product markets.[60] Shares were held between *Keiretsu* members and their "main bank" (a feature coined "cross-shareholding") as informal symbols of commitment to the *Keiretsu* members and to act as a defence against hostile takeovers – but not to reap profits by maximizing their value.[61] When things went wrong in companies, the main bank (not shareholders) would efficiently sort things out.[62] Researchers and pundits wondered whether the world would converge on Japan's woke model of corporate governance.[63] But, then, in the early 1990s, Japan's economic bubble burst.

In the post-bubble period, an era of American hegemony transpired in which legions of academics and pundits predicted that Anglo-American-style shareholder-primacy would emerge as the dominant corporate governance model in Japan.[64] These predictions were not without reason. Japan's post-war corporate law had (and still has) strong legal protections for minority shareholders that lay moribund for decades before the bubble burst.[65] At least empirically, the shareholding in Japan's large public companies was (and still is) as widely dispersed as in the United Kingdom and United States – a fact that is often overlooked because historically a majority of the "dispersed-shares" were held in informal cross-shareholding arrangements.[66] In the decades following the bubble's burst, economic stagnation forced banks and *keiretsu* members to "unwind"

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[60] For an overview of how the Keiretsu were seen to improve corporate governance, contracting and productive efficiency see, Ronald J Gilson & Mark J Roe, *Understanding the Japanese Kieretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 884 (1993).

[61] Dan W Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 17 (2018)

[62] For an explanation of the classic Japanese main bank model see, Masahiko Aoki, Hugh Patrick & Paul Sheard, *The Japanese Main Bank System: An Introductory Overview*, in THE JAPANESE MAIN BANK SYSTEM: ITS RELEVANCE FOR DEVELOPING AND TRANSFORMING ECONOMIES 3 (Masahiko Aoki & Hugh Patrick eds., OUP 1994).

[63] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 521 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Dan W Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC. L. &. POL'Y J. 7, 17-18 (2007).

[64] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed* in, RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 521-522 (Jennifer G Hill & Randall S Thomas eds., 2015).

[65] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 521 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. J. PRIV. EQUITY & VENTURE CAP. L. 125, 131 (2014). For an analysis of how the derivative action lay moribund before Japan's economic bubble and exploded after the burst see, Dan W Puchniak and Masafumi Nakahigashi, *Japan's Love for Derivative Actions: Irrational Behavior and Non-economic Motives as Rational Explanations for Shareholder Litigation*, 45 VAND. J. TRANSNAT'L L. 1, 2 (2012).

[66] Dan W Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 10 (2018); Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed* in, RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 524 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

their cross-shareholdings and the main bank system of monitoring management slowly withered. Foreign ownership of Japanese listed companies spiked, and activist shareholder campaigns emerged.[67] A bevy of legal reforms that appeared as if they would usher in American-style shareholder primacy were enacted, including making derivative actions less costly,[68] providing companies with the option to adopt American-style boards with independent directors,[69] and ostensibly developing a Delaware-style regulatory framework for hostile takeovers.[70]

Over the three decades following the burst of Japan's economic bubble, economic stagnation continued to stimulate repeated pro-shareholder reforms, but American-style shareholder primacy did not emerge. Until the 2010s, independent directors were absent on the boards of most Japanese listed companies and even though the number of independent directors has increased in recent years due to reforms promoting them, lifetime employees still cling to their dominance in corporate boardrooms.[71] Despite a wave of shareholder activism in the 2000s, Japan remained an oddity among large-developed-economies as the only one without a successful hostile takeover – until its first occurred in 2021.[72] Although some cross-shareholding has unwound and foreign shareholders have increased, the regulatory regime for hostile takeovers has turned out to look nothing like Delaware and Japan's company community, in which lifetime employees hold the reigns of

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[67] Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. J. PRIV. EQUITY & VENTURE CAP. L. 125, 145 (2014); Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 20 (2018).

[68] Dan W. Puchniak & Masafumi Nakahigashi, *Japan's Love for Derivative Actions: Irrational Behavior and Non-economic Motives as Rational Explanations for Shareholder Litigation*, 45 VAND. J. TRANSNAT'L L. 1, 34-36, 64-65 (2012) (explaining the legal changes that lowered the cost of derivative actions after Japan's economic bubble burst and how irrational behaviour and non-economic forces must also be understood to accurately understand derivative actions in Japan).

[69] Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 135, 138 (Dan W. Puchniak et al. eds., CUP, 2017); Dan W. Puchniak, *The 2002 Reform of the Management of Large Japanese Corporations: A Race to Somewhere?*, 5 THE AUSTL. J. ASIAN L. 42, 43 (2003).

[70] Dan W Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 38-41 (2018).

[71] Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis* in, INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL CONTEXTUAL AND COMPARATIVE APPROACH 135, 146 (Dan W. Puchniak et al. eds., CUP 2017) (showing the percentage of independent directors in Japanese listed companies); Dan W Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 38-41 (2018) (explaining the resilience and importance of lifetime employees in Japanese corporate governance).

[72] Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware* 15 Berkeley Bus. L.J. 4, 14-22 (2018) (explaining why Japan was an outlier with no hostile takeovers); Stephen Givens, *Murakami vindicated by Japan's first successful hostile takeover*, NIKKEI ASIA, (Aug. 11, 2021), https://asia.nikkei.com/Opinion/Murakami-vindicated-by-Japan-s-first-successful-hostile-takeover.

corporate governance power, has maintained far more intact than almost any expert would have predicted.[73]

It is noteworthy that in the 2010s, as part of former Prime Minister Abe Shinzo's hallmark economic policy to revitalize the Japanese economy after two "lost decades", Japan adopted UK-style Stewardship and Corporate Governance Codes, but with Japanese characteristics.[74] The goal of these codes was to shift Japan's traditional stakeholder-oriented corporate governance system to a more shareholder-oriented system – but this has not yet fully materialized. Prime Minister Abe's successor, the current Prime Minster, Kishida Fumio, was elected in 2021 under the slogan of "new capitalism". After his election he waxed eloquently "about the importance of other stakeholders in businesses, such as workers and customers, evoking the Edo-era merchant philosophy of *sanpō-yoshi*, or "three-way good" for buyers, sellers and society".[75] Pundits feared that Prime Minster Kishida would use the Anglo-American-cum-global corporate purpose movement as an excuse to rollback Japan's three-decade-long slow movement towards increased protection for shareholders.[76] However, most recently, Japan's stock market has been reinvigorated by a spat of successful hostile takeovers and a spike in shareholder activism. Although lifetime employees still hold the balance of power in most Japanese boards, independent directors have gained power. It has taken over three decades, but it appears that Japan may be entering a new stage in its corporate governance history where shareholder voice can compete with that of lifetime employees. If this shift finally transpires it would be the opposite of what the Anglo-American-cum-global corporate purpose movement prescribes – but, ironically, this move towards

[73] Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware* 15 BERKELEY BUS. L.J. 4, 22 (2018). However, it should be noted that recently there has been an increase shift towards more shareholder activism and a unique environment triggering more hostile takeover activity in Japan. See, Leo Lewis & Kana Inagaki, *Japan's Icy Climate for Hostile Takeovers Starts to Thaw*, THE FIN. TIMES (Dec. 22, 2020), https://www.ft.com/content/fc4ea0f4-d54e-4b59-ae4b-da2e32fce286; Stephen Givens, *Murakami Vindicated by Japan's First Successful Hostile Takeover*, NIKKEI ASIA (Aug. 11, 2021), https://asia.nikkei.com/Opinion/Murakami-vindicated-by-Japan-s-first-successful-hostile-takeover.

[74] Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., CUP, 2017) (discussing independent directors and Japan's corporate governance code); Gen Goto, *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code*, in GLOBAL SHAREHOLDER STEWARDSHIP (Dionysia Katelouzou & Dan W. Puchniak eds., CUP, 2022) (discussing Japan's stewardship code).

[75] *Kishida Fumio's "new capitalism" is many things, but it is not new*, ECONOMIST (Feb. 12, 2022), https://www.economist.com/asia/2022/02/12/kishida-fumios-new-capitalism-is-many-things-but-it-is-not-new.

[76] *Kishida Fumio's "new capitalism" is many things, but it is not new*, ECONOMIST (Feb. 12, 2022), https://www.economist.com/asia/2022/02/12/kishida-fumios-new-capitalism-is-many-things-but-it-is-not-new.

more shareholderism is precisely what many Japan experts suggest has recently reinvigorated the Japanese economy.[77]

Viewing the evolution of corporate purpose in Japan through a global comparative lens provides several insights. Japan's postwar economic miracle was marked by decades of economic prosperity resulting from the effectiveness of its government regulatory model and low levels of inequality, which prior to the burst of the bubble often made it the envy of the world.[78] According to Dorothy Lund's corporate purpose theory, postwar Japan *should* have been a bastion for shareholder primacy as she pontificates that shareholderism tends to flourish in times of effective government regulation and low inequality.[79] However, as we have seen, what occurred in postwar Japan was precisely the opposite: stakeholderism remained the entrenched norm for decades in a country renowned for its regulatory effectiveness and low inequality. Conversely, after Japan's bubble burst its rise in inequality, growing disdain for its corporate old guard, and its increasingly ineffective government, inspired a wave of reforms to enhance shareholderism to shift corporate power away from entrenched lifetime employees – the opposite of the shift to stakeholderism that Lund's theory would suggest in a second-best regulatory environment with rising inequality.[80] Moreover, based on Lund's theory the enormity of the economic collapse caused by the burst of Japan's economic bubble should have caused Japan to "[swing] from one pole to the other" on the

[77] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 521 (Jennifer G. Hill & Randall S. Thomas eds., 2015); [check formatting for speeches]Prime Minister Shinzo Abe, *A New Vision from a New Japan, World Economic Forum 2014 Annual Meeting* (Jan. 22, 2014), https://japan.kantei.go.jp/96_abe/statement/201401/22speech_e.html; Gen Goto, *The Japanese Stewardship Code*, in GLOBAL SHAREHOLDER STEWARDSHIP 222, 226 (Dionysian Katelouzou & Dan W. Puchniak eds., CUP, 2022); Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, 4 RED 14, 17 (2022).

[78] Dan W. Puchniak, No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose, 4 RED 14, 16 (2022); Dan W. Puchniak, The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law, 9 ASIAN-PAC L. & POL'Y J. 7, 69 (2007).

[79] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 8 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("By contrast, when externality regulation and corporate competition are robust and inequality is low, concerns about efficient corporate growth and profitability, as well as management rent seeking, likely outweigh these social concerns and suggest a shareholder-oriented mandate for corporate governance would be welfare enhancing…")

[80] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 8-9 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("… when inequality, corporate concentration, and political dysfunction hit extremes, as they have in the past decade, calls for a shift toward a stakeholder governance model will increase ... Specifically, it argues that when externality regulation is inadequate, corporate competition is weak, and inequality is high, shareholder primacy theory is on its weakest footing—not just in terms of societal acceptance but also normative desirability.")

shareholderism/stakeholderism continuum.[81] However, for over three decades, despite a litany of reforms to enhance shareholder power – and to the bemusement of a cadre of experts – Japan stubbornly maintained its lifetime employee system in which shareholders had limited power.

The inability of Lund's theory to capture Japan's experience is unsurprising as it is derived solely from a historical review of the evolution of corporate purpose in the United States. Cross-shareholding in Japan has made its postwar corporate governance system functionally more like countries with concentrated shareholding than dispersed shareholding – of which the United States is the paradigm. As explained below, concentrated shareholding environments lend themselves to stakeholderism, explaining the stickiness of stakeholderism in Japan, which only lessened as Japan's cross-shareholding unwound.[82] After the burst of the bubble, the need and direction for reform in Japan was obvious – it was already on the far end of the stakeholderism-side of the continuum. As such, reforms enhancing shareholderism to displace its entrenched bubble era lifetime employee model were obvious given Japan's corporate purpose equilibrium. Even with Japan's litany of post-bubble pro-shareholder legal reforms and the watershed economic and sociopolitical change resulting from the bubble's burst, corporate purpose in Japan did not "[swing] from one pole to the other" as Lund's theory would suggest – reinforcing the idea that countries have a "corporate purpose equilibrium" that rarely resets.[83]

2.2.3. A Long History of Stakeholderism in India – But Still a Work in Progress

With the rapid rise of China, India's economic importance is sometimes erroneously overlooked. As the world's fourth largest economy, with 1.4 billion people, and growth reported to be the highest among all major economies in 2024, what happens in India clearly has global

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[81] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 41 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("As these debates have taken place, the dominant view of corporate purpose has swung from one pole to the other, affecting both the conduct of business and the path of law … Specifically, it describes two corporate purpose "moments" of flux in the U.S.—one that occurred after the great stock market crash of 1929, and another following a period of economic stagflation in the 1970s —in which the pendulum swung from one governance model to the other, impacting scholarship, business practice, and law.")

[82] Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. J. PRIV. EQUITY & VENTURE CAP. L. 125, 145 (2014); Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 20 (2018).

[83] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 41 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("As these debates have taken place, the dominant view of corporate purpose has swung from one pole to the other, affecting both the conduct of business and the path of law." "Specifically, it describes two corporate purpose "moments" of flux in the U.S.—one that occurred after the great stock market crash of 1929, and another following a period of economic stagflation in the 1970s —in which the pendulum swung from one governance model to the other, impacting scholarship, business practice, and law.")

consequences.[84] With approximately 5 million people working in tech, about 100 unicorns (unlisted start-ups worth over US $1 billion), the world's fourth largest stock market (behind only the United States, China and Japan), India's future appears bright.[85] Distinct from China and Japan, India is a common law country and is part of the Commonwealth. As the most cited empirical scholarship in comparative corporate law posits that common law countries provide stronger protection for minority shareholders than civil law countries, one may anticipate that India has been a bastion for shareholder primacy.[86]

To the contrary, stakeholderism has a long history in India that has accelerated in recent times.[87] Several age-old business groups have long inculcated broader corporate responsibility as part of their business motto over more than a century.[88] However, in recent decades, the push towards a stakeholder orientation in corporate governance has been driven largely by the government. In the years following India's independence in 1947, and consistent with the socialist economic policies of the time, company law underwent amendments that incorporated the requirements for

[84] Measured on a Purchasing Power Parity basis (PPP) the largest economies in the world based on 2020 data are: China (1), United States (2), India (3), Russian Federation (4), and, Japan (5) (*The World Bank Data, GDP, PPP (current international $)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD?most_recent_value_desc=true (last visited June 5, 2024); Rajiv Biswas, *India seizes crown of fastest growing G20 economy*, S&P GLOBAL MARKET INTELLIGENCE (Dec. 08, 2023), https://www.spglobal.com/marketintelligence/en/mi/research-analysis/india-seizes-crown-of-fastest-growing-g20-economy-dec23.html. ("As 2023 draws to a close, India is set be the fastest growing economy in the G20 grouping of large nations. After rapid economic growth of 7.2% in the 2022-23 fiscal year, India's GDP growth rate in the fiscal year 2023-24 is forecast to be 6.9%. GDP growth remained buoyant in the July-September quarter of 2023, at 7.6% year-over-year (y/y), after growth of 7.8% y/y in the April-June quarter."); Diksha Madhok & Hanna Ziady, *The world's fastest-growing big economy is living up to its billing*, CNN (Mar. 1, 2024), https://edition.cnn.com/2024/02/29/economy/india-gdp-growth-economy/index.html. (As the world's fastest growing major economy, India's GDP surged 8.4% in the final three months of 2023 compared with a year prior, up from growth of 7.6% in the June-to-September period. The pace of growth was the strongest among major economies last quarter.).

[85] India is likely to be the world's fastest-growing big economy this year, ECONOMIST (May 14, 2022), https://www.economist.com/briefing/2022/05/14/india-is-likely-to-be-the-worlds-fastest-growing-big-economy-this-year.

[86] For the most cited literature claiming that common law countries provide stronger protection for minority shareholders than civil law countries, which has a significant impact on economic development and stock markets see, Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1132-1133 (1998); Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J FIN. ECON. 430, 461 (2008). For critiques of this scholarship see, Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 REV. FIN. STUD. 467 (2010); Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUS. L.J. 1, 9 (2020).

[87] The following five paragraphs have been reproduced with permission from the author: Umakanth Varottil, *Responsible Capitalism and Corporate Purpose: The India Way*, ECGI BLOG (Apr. 26, 2022), https://ecgi.global/blog/responsible-capitalism-and-corporate-purpose-india-way.

[88] COLIN MAYER, FIRM COMMITMENT 195-197 (Oxford University Press, 2013). [check pincite]

companies to act not only in the interest of their shareholders, but also in the "public interest".[89] In the 1980s, the Supreme Court of India enunciated that "a company is now looked upon as a socio-economic institution wielding economic power and influence on the life of the people".[90] No longer was the company a private contractual construct between the entity and its shareholders, but one that took on wider form given its larger societal impact.

If there was even any doubt regarding the purpose focus for Indian companies, that has been set to rest with the enactment of the revamped Companies Act in 2013. Section 166(2) imposes duties on directors of a company to act "in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment".[91] As evident, shareholders are only one among several constituencies that deserve the attention of directors. This embodies the pluralist approach which places the interests of all stakeholders (whether shareholders or others) on par without creating any hierarchy among them.[92]

The judiciary too has rendered an expansive reading of the duty. For instance, the Supreme Court's interpretation of the expression "environment" in section 166(2) is adequately capable of accommodating the risks corporations face due to climate change.[93] Hence, a consideration of matters such as climate risk and sustainability is not merely an option for directors on Indian companies that they may account for on a voluntary basis, but it is an obligation, which they can afford to ignore only at risk of liabilities for breach. Overall, the jurisprudence surrounding corporate law in India suggests that directors ought to consider the long-term interests of the company. Conduct that involves sacrificing the long-term interests of the company in favour of short-term profitability would militate against the statute.[94]

It is clear, therefore, that the legislative duties and responsibilities of directors clearly define the corporate purpose for Indian companies that is altogether stakeholder oriented. At the same time,

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[89] Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L L. REV. 253, 278-280 (2016).
[90] National Textile Workers v. P.R. Ramakrishnan, (1983) 1 S.C.R. 9 (India).
[91] The Companies Act, 2013, s 166(2) (India).
[92] Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L L. REV. 253, 315-316 (2016).
[93] M.K. Ranjitsinh v. Union of India, (2021) SCC Online SC 326, as discussed in Shyam Divan, Sugandha Yadav & Ria Singh Sawhney, *Legal Opinion: Directors' obligations to consider climate change-related risk in India* (Sept. 7, 2021), https://ccli.ubc.ca/wp-content/uploads/2021/09/CCLI_Legal_Opinion_India_Directors_Duties.pdf.
[94] UMAKANTH VAROTTIL, DIRECTORS' LIABILITY AND CLIMATE RISK: WHITE PAPER ON INDIA, COMMONWEALTH CLIMATE AND LAW INITIATIVE (Oct. 4, 2021).

it is worth noting that the corporate purpose debate in the Indian context tends to be enmeshed with the statutorily mandated corporate social responsibility (CSR) requirements under corporate law. This requires companies to spend at least two percent of their average net profits made during three immediately preceding financial years towards earmarked social purposes.[95] However, this generates some amount of conceptual murkiness in the context of the corporate purpose debate as the CSR provisions in India veer towards corporate philanthropy through mandatory spending rather than the all-inclusive view that company managements must adopt on how their business operations impact society.[96] In that sense, while the CSR regime supplements the corporate purpose stance in India, it ought not to drive the discourse.

The government has trained its focus largely on ensuring compliance with the CSR requirements in terms of corporate spending rather than addressing the broader questions of corporate purpose. Despite the perceived lucidity in aspirations of the Indian corporate legal system towards stakeholder capitalism, there could be several hurdles in operationalizing the idea. First, there is a lack of clarity regarding the enforcement of directors' duties to consider stakeholder interests.[97] Second, the government has trained its focus largely on ensuring compliance with the CSR requirements in terms of corporate spending rather than addressing the broader questions of corporate purpose.[98]

In sum, India appears to be a textbook case of a major economy that has been on the stakeholderism side of the corporate purpose continuum since its independence over 75 years ago. India has been plagued by a poor regulatory environment and high levels of corruption – an unfortunate example of a country mired in an extreme second-best world despite its enormous potential. Inequality has been another problem that has plagued India throughout its history. Again, using Lund's corporate purpose theory, this should have driven India towards shareholderism.[99] Yet, as explained, its 2013

[95] The Companies Act, 2013, s 166(2) (India).

[96] See Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465, 469-470 (2017).

[97] Mihir Naniwadekar & Umakanth Varottil, *The Stakeholder Approach towards Directors' Duties under Indian Company Law: A Comparative Analysis*, in THE INDIAN YEARBOOK OF COMPARATIVE LAW 2016 (Mahendra Pal Singh ed., OUP 2016). [check pincite]

[98] Akshaya Kamlnath, *A Post Pandemic Analysis of CSR in India*, 16 J. COMP. L. 714, 728-729 (2021).

[99] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 8-9 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("when inequality, corporate concentration, and political dysfunction hit extremes, as they have in the past decade, calls for a shift toward a stakeholder governance model will increase…. Specifically, it argues that when externality regulation is inadequate, corporate competition is weak, and inequality is

Companies Act, which was decades in the making, doubled down on stakeholderism in the extreme by making it clear that shareholders were on par with other stakeholders and requiring large companies to spend two percent of their net profit on CSR activities – the opposite of what Lund's theory would suggest.[100]

Obviously, India does not need to be woke by Mayer's prophesy that purpose can be the path to "nirvana".[101] In fact, it appears that pushing India further towards the extreme stakeholder side of the continuum would likely have deleterious consequences. There is evidence that India's mandatory CSR requirement has resulted in companies engaging in CSR activities primarily for reputational benefits rather than genuine social impact and CSR funds being diverted for activities that primarily benefit corporate insiders or for purposes unrelated to social welfare.[102] Increasing the percentage of profits companies must contribute to CSR is the medicine that the Anglo-American purpose movement would appear to prescribe – but such medicine seems likely to only exacerbate India's corporate governance maladies.

Indian corporate governance experts have noted how implementing stakeholderism to work in practice has been a challenge for India and influential rhetoric about stakeholderism – undermining

high, shareholder primacy theory is on its weakest footing—not just in terms of societal acceptance but also normative desirability.")

[100] Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose* 8-9 (European Corporate Governance Institute - Law Working Paper No. 746, 2023) ("… when inequality, corporate concentration, and political dysfunction hit extremes, as they have in the past decade, calls for a shift toward a stakeholder governance model will increase…. Specifically, it argues that when externality regulation is inadequate, corporate competition is weak, and inequality is high, shareholder primacy theory is on its weakest footing—not just in terms of societal acceptance but also normative desirability.").

[101] Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, 4 RED 14, 19 (2022); COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD, 35-37 (OUP, 2018).

[102] ~~Shalina Sharma and Dr. Manjit Singh?~~ Seema G. Sharma, *Corporate Social Responsibility in India: An Overview*, 43 THE INT'L LAW. (2009) (This paper published in the International Journal of Management Research and Reviews discusses various aspects of CSR in India, including challenges related to CSR implementation, such as the diversion of CSR funds for activities unrelated to social welfare.); "Corporate Social Responsibility: A Study of CSR Disclosure Practices in Indian Companies" by Dr. Vandana Sharma and Dr. Deepa Awasthi: This research paper, published in the International Journal of Management, focuses on CSR practices in Indian companies and highlights concerns about the misuse of CSR funds for activities benefiting corporate insiders."Corporate Social Responsibility in India: Evaluating the Millennium Development Goals" by Santanu Sarkar and Madhuchhanda Sarkar: This paper, published in the Journal of Management and Public Policy, discusses the alignment of CSR initiatives with national development goals in India and highlights the need for greater transparency and accountability in CSR spending to ensure genuine social impact. "Corporate Social Responsibility in India: Issues and Challenges" by Dr. Navjot Kaur and Dr. Sandeep Singh: This paper, published in the International Journal of Research in Commerce and Management, discusses various challenges related to CSR implementation in India, including concerns about the effectiveness of CSR spending and the need for better monitoring mechanisms to prevent misuse of CSR funds. [REFERENCES to be checked]

the focus on protecting minority shareholders in India's concentrated shareholder environment – may well exacerbate India's corporate governance challenges.[103] As discussed in Section 3, it appears that a movement towards a more shareholder-oriented approach, with a focus on minority shareholders, may be what is required for India to address its most pressing corporate governance issues as a developing economy.

2.3. Europe

The European landscape of corporate law and governance today is largely influenced by policy initiatives driven by the European Union. The EU is pioneering a sustainability-oriented disclosure regime[104] and supply-chain obligations,[105] hoping for a repeat of the so-called "Brussels effect" – the process of unilateral regulatory globalization where it de facto exported its legal standards to many other jurisdictions around the world.[106] Arguably, this push to being the first mover in global standard-setting has accelerated since the departure of the UK from the EU on January 31, 2022 ("Brexit"). However, the agenda to promote and to export a stakeholder-oriented agenda has also met with criticism and is viewed, in some quarters, as a new version of economic colonialism.[107]

The legal, economic, and political controversies around this agenda obfuscate the fact that many European countries, notably Germany and France, have long pursued a stakeholder-friendly

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[103] For an excellent in-depth analysis of this risk see, Afra Afsharipour, *Lessons from India's Struggles with Corporate Purpose*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 363, 368 (Elizabeth Pollman & Robert Thompson eds., Edward Elgar Publishing, 2021).

[104] Most notably, through the Corporate Sustainability Reporting Directive (CSRD): Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, [2022] OJ L322/15. Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?* 14-15 (European Corporate Governance Institute - Law Working Paper No. 744, May 2024), available at: https://ssrn.com/abstract=4652012

[105] See the Corporate Sustainability Due Diligence Directive (CSDDD): [insert reference when available].

[106] Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?* 14-15 (European Corporate Governance Institute - Law Working Paper No. 744, May 2024), available at: https://ssrn.com/abstract=4652012 .The term "Brussels effect" was coined by Anu Bradford, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020) and has most widely been discussed in the context of EU data protection laws.

[107] Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?* 14-15 (European Corporate Governance Institute - Law Working Paper No. 744, May 2024), available at: https://ssrn.com/abstract=4652012

approach in corporate governance on the national level. Corporate law, at its core, remains within the competence of individual EU Member States, despite various efforts of EU lawmakers to pursue some degree of legal harmonization.[108]

These legal traditions matter, in particular as Germany and France are the two largest economies in the EU (respectively about 25% and 17 % of the EU GDP post Brexit); they usually hold significant sway over policy-making at the EU level, and even more so post Brexit. What is more, these two countries stand for two strands in an important legal "family" – the civil law legal tradition – that has influenced lawmaking in many other parts of the world, sometimes (but not always) through colonial rule or through economic influence.[109] As these national standards matter for determining the gist of European model(s) of corporate governance, it is important to understand the evolution of corporate purpose and the move to promote stakeholderist ideas in these national regimes.

2.3.1. The (long) history of stakeholderism in Germany

In Germany, corporate law has traditionally embraced a stakeholder approach, rejecting a pure "shareholder value" paradigm. The historical roots of this discussion go back to the 19th century and have since then developed along four dimensions.

First, when state oversight of private firms was replaced by private autonomy in 1870, a two-tier board system was adopted that was to monitor the activities of the management in the interests of all stakeholders including the investors, workers, the state, and others. To this day, German public companies are characterized by its two-tier board structure, comprising the management board (*Vorstand*) and the supervisory board (*Aufsichtsrat*).[110] This important governance feature of

[108] See Luca Enriques, *EC Company Law Directives and Regulations: How Trivial Are They?*, 27 U. PA. J. INT'L L.1 (2006); John Armour & Wolf-Georg Ringe, *European Corporate Law 1999-2010: Renaissance and Crisis*, 48 COMMON MKT. L. REV. 125 (2011).

[109] Cf. the influential "Law and Finance" literature, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, Law and Finance, 106 J. Pol. Econ. 1113 (1998).

[110] Reinier Kraakman et al., *The Basic Governance Structure: The Interests of Shareholders as a Class,* in THE ANATOMY OF CORPORATE LAW – A COMPARATIVE AND FUNCTIONAL APPROACH 49, 50-51 (3rd ed., OUP, 2017); Paul Davies & Klaus J. Hopt, *Corporate Boards in Europe—Accountability and Convergence*, 61 AM. J. COMP. L. 301, 310-311 (2013); Klaus J. Hopt & Patrick Leyens, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, in COMPARATIVE CORPORATE GOVERNANCE 116 (Afra Afsharipour & Martin Gelter, eds., 2021). [check pincite for last citation]

German law evidently weakens the influence of shareholders as members of the management board are appointed and removed by the supervisory board only. The role of the supervisory board thereby is to monitor the management board and to mitigate the conflicts resulting from a separation of ownership and control. Mandating two separate boards may have served the goal to insulate the management from too strong shareholder influence, given the tradition of concentrated ownership and large cross-shareholdings among German firms.[111] Another justification could relate to the concept of the board serving as a "mediating hierarch", in the sense that the board as an institution brokers the relationships between the different constituencies affected by the corporation, and does not or should not exclusively serve the shareholders alone.[112]

The second ingredient to the stakeholder orientation of German firms is the strong role of the employees.[113] Today, half of the members of the supervisory board in large German companies are representatives of the workforce, thus ensuring that the management is attentive to the interests of the employees. This development roots in a 1951 law known as *Montan-Mitbestimmungsgesetz*, which mandated such employee co-governance at first only for firms active in the coal and steel industries. Two decades later, in 1976, the Co-determination Act (*Mitbestimmungsgesetz*) expanded this requirement to all public firms above 2000 employees. To its supporters, this arrangement improves the involvement of employees in the governance of the firm, strengthens information flows within the firm, and also leads to the employees' stronger identification with the firm, resulting in higher productivity levels. The effectiveness of co-determination is, however, severely contested.

A third hallmark of the traditional corporate governance system is the relatively concentrated ownership structure.[114] At least historically, groups of strategically oriented blockholders such as banks, family owners, or other corporations have exercised strong influence over many firms in

111 Barca and Becht 2001.

112 Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 319 (1999); Margaret M. Blair and Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 408 (2001).

113 Katharina Pistor, *Co-determination in Germany: A Socio-Political Model with Governance Externalities*, in EMPLOYEES AND CORPORATE GOVERNANCE 163, 163-164 (Margaret M. Blair & Mark J. Roe, eds., 1999); Paul Davies, *Efficiency Arguments for the Collective Representation of Workers: A Sketch*, in THE AUTONOMY OF LABOUR LAW (Alan Bogg et al., eds., Edward Elgar Pubishing, 2015). [check pincite]

114 Compared to countries with stronger developed capital markets, such as the US or the UK. See Steen Thomsen, Torben Pedersen & Hans Kurt Kvist, *Blockholder Ownership: Effects on Firm Value in Market and Control Based Governance Systems*, 12 J. CORP. FIN. 246, 254 (2006).

Germany.[115] Arguably, such significant shareholders tend to show greater commitment to the strategic interests of a particular firm than to the interests of other investors. One of the most influential owners were banks, which were said to show greater involvement in a firm's strategic decision-making than other financial investors because they were interested in stable and long-term relationships with a firm to keep a vital creditor relationship alive.[116] Both of these traditional arrangements, however, are presently in decline: Germany's large firms are all moving towards more dispersed ownership patterns, and the strong role of the banks is receding.[117] Also, state ownership is no longer widespread in German firms, with the notable exception of Volkswagen.[118] Family ownership, in contrast, is still common within some large firms and very common among SMEs.[119] As family firms often involve the confluence of management and ownership in the same (family) hands, the interests of family owners generally go beyond short-term profits to include a more sustainable perspective on firm control, development, and survival.[120] Family firms are also characterized by close relationships to stakeholders and strong embeddedness in networks of local communities.[121] Similar to family firms, SMEs are traditionally strongly rooted in stakeholder relations and exhibit quite strong commitment to different stakeholders.[122]

Even though ownership patterns are changing, strategic owners are still common in many segments of the German market where they are often involved in a firm's strategic planning and decision making and tend to emphasize long-term interests. The slowly dissolving but still existing network of overlapping relations in the German market (known as "Deutschland AG" or "Germany

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[115] Anja Tuschke & Marius Luber, *Corporate Governance in Germany: Converging Towards Shareholder Value-Orientation or Not So Much?*, in THE CONVERGENCE OF CORPORATE GOVERNANCE : PROMISE AND PROSPECTS 75, 79-81(Abdul A. Rasheed & Toru Yoshikawa eds., Palgrave Macmillan UK, 2012).

[116] Gregory Jackson & Andreas Moerke, *Continuity and Change in Corporate Governance: Comparing Germany and Japan*, 13 CORP. GOVERNANCE: AN INT'L REV. 351, 354-355 (2005).

[117] Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493, 508, 522-524 (2015).

[118] Still today, Volkswagen is governed through an unusual hybrid of family control, government ownership, and labor influence, and the German state of Lower Saxony holds 20% of the voting shares.

[119] Christian Andres, *Large shareholders and firm performance—An empirical examination of founding-family ownership*, 14 J. CORP. FIN. 431, 432 (2008).

[120] Robert W. Hutchinson, *The Capital Structure and Investment Decisions of the Small Owner-Managed Firm: Some Exploratory Issues*, 7 SMALL BUS. ECON. 231, 234 (1995); Harvey S. James, *Owner as Manager, Extended Horizons and the Family Firm*, 6 INT'L. J. THE ECON. BUS. 41, 42-43 (1999).

[121] Luis R. Gomez-Mejia, Cristina Cruz, Pascual Berrone & Julio De Castro, *The Bind That Ties: Socioemotional Wealth Preservation in Family Firms*, 5 ACAD. OF MGMT. ANNALS 653, 681-683 (2011).

[122] Hartmut Berghoff, *The end of family business? The Mittelstand and German capitalism in transition, 1949-2000*, 80 BUS. HIST. REV. 263, 272-275 (2006).

Inc."[123]) was frequently associated with a long-term alignment of the firms' strategic goals, higher levels of cooperation, and protection against external interventions such as hostile takeovers.[124]

But the fourth and possibly most relevant aspect of the stakeholder orientation for the purpose of this article is the explicit and/or implicit endorsement of a broad corporate purpose in the law. Perhaps surprisingly, the first version of such a legislative approach was introduced during the Nazi rule in Germany. Hitler's government enacted a new business corporation act in 1937, requiring the "managing board […] to manage the corporation as the good of the enterprise and its retinue and the common weal of folk and realm demand".[125] After the war, the legislature was quick to revise this emotionally-loaded language, and a draft law from 1958 clarified the section in a sense that the management board should run the company "as the benefit of the enterprise, its employees and shareholders and the benefit of the general public require".[126] However, the final version of the law (adopted in 1965) did not include this text; in fact the law (as it stands until today) deliberately chose not to include a clause on corporate purpose. The legislative materials of the 1965 reform still explain that it is "self-evident" that the management board is to respect the interests of the shareholders as well as the employees and also the general public; therefore, any specific mention of this obligation was deemed unnecessary.[127] During the parliamentary deliberations, the majority took the view that the inclusion in the law of a public interest clause, according to which the company must operate the company with due regard for the welfare of its employees, shareholders and the general public, was also considered superfluous, because in a state founded on a social market economy and the rule of law, consideration of the three factors of

[123] See Ringe, *supra* note 117.

[124] Paul Windolf & Jürgen Beyer, *Co-operative capitalism: Corporate networks in Germany and Britain*, 47 BRIT. J. SOCIO. 205, 207-210 (1996); Anja Tuschke & Marius Luber, *Corporate Governance in Germany: Converging Towards Shareholder Value-Orientation or Not So Much?*, in THE CONVERGENCE OF CORPORATE GOVERNANCE : PROMISE AND PROSPECTS 75, 79 (Abdul A. Rasheed & Toru Yoshikawa eds., Palgrave Macmillan UK, 2012).

[125] § 70 AktG 1937. See Detlev F. Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 40 (1966); Mark G. Robilotti, *Recent Developments, Codetermination, Stakeholder Rights, and Hostile Takeovers: A Reevaluation of the Evidence from Abroad*, 38 HARV. INT'L. L.J. 536, 550 n.87 (1997). In German language see Fleischer ZGR 2017, 411 (412 ff.).

[126] „… wie das Wohl des Unternehmens, seiner Arbeitnehmer und der Aktionäre sowie das Wohl der Allgemeinheit es fordern". See Gerald Spindler, *§ 76 Aktiengesetz*, in MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ (Wulf Goette & Matthias Habersack, eds., 5th ed. 2019), § 76 para. 64.

[127] Begr. RegE Kropff S. 97; see in detail Bruno Kropff, *Reformbestrebungen im Nachkriegsdeutschland und die Aktienrechtsreform von 1965*, in AKTIENRECHT IM WANDEL 670 (Walter Bayer & Matthias Habersack eds., 2007); Jens Koch, *Der Vorstand im Kompetenzgefüge der Aktiengesellschaft*, in 50 JAHRE AKTIENGESETZ 65, 73-74 (Holger Fleischer et al., eds., 2015). See also Sylvester Wilhelmi, in AKTIENGESETZ VOM 6. SEPTEMBER 1965 § 76 paras. 5-7 (Freiherr von Godin & Hans Wilhelmi eds., 4th ed. 1971).

capital, labor and public interest is a self-evident duty.[128] It was also considered questionable to establish a specific order of these interests by law; the weighing of the interests to be taken into account should rather be left to the board's dutiful discretion in individual cases.[129]

Accordingly, even though the text of the German Stock Corporation Act remains silent on this, it is the general consensus amongst scholars, courts, and public officials that German corporations are subject to a "public interest clause". In other words, the management is accountable to all stakeholders of the enterprise and must balance the different interests with the overarching objective of a sustainable creation of value.[130] This is corroborated by Article 14(2) of the German constitution, according to which all property "entails obligations. Its use shall also serve the public good". Accordingly, the German Corporate Governance Code in its 2009 version restated the general understanding that "[t]he Management Board is responsible for independently managing the enterprise with the objective of sustainable creation of value and in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders".[131] A more recent reform of the Code moved the explanation of the corporate purpose to the Preamble, which now explains that the Board is required

> "[…] – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour (the "reputable businessperson" concept, *Leitbild des Ehrbaren Kaufmanns*). With their actions, the company and its governing bodies must be aware of the enterprise's role in the community and its responsibility vis-à-vis society. Social and environmental factors influence the performance of the company, and its activities have an impact on people and the environment. The Management Board and the Supervisory Board take this into account when

[128] Ausschussbericht Kropff S. 97, 98.
[129] Wilhelmi, *supra* note 127.
[130] Jens Koch, AKTIENGESETZ (2022), § 76 paras. 28-34.
[131] <insert German code name> [CODE ABBREVIATION] [GERMAN CORPORATE GOVERNANCE CODE], date of enactment, <insert name of Gazette of promulgation>, as amended, section 4.1.1 (Ger.).

exercising their respective management and supervisory roles in the company's best interests".[132]

It is therefore not surprising that the current global discussion around the proper "corporate purpose" leaves many German commentators puzzled and uncertain as to its relevance.[133] The general view is that the "Anglo-Saxon debate" around corporate purpose is trying to sell new wine in old bottles, in particular given that Germany has endorsed a broader corporate purpose for so long – sometimes even thereby being heavily criticized by international (in particular, Anglo-American) commentators. The German consensus therefore varies between "we've been here before" and "finally, the US is coming around".

Quite a distinct debate is whether the long experience in Germany with the broad concept of corporate purpose can teach us anything about the value of the concept. In particular, one may wonder as to whether the German experience yields any message as to the welfare implications of the public interest paradigm. At this point, the German story becomes somewhat disappointing. Taking stock with decades of a stakeholder-oriented corporate governance paradigm, it is sobering to conclude that there is virtually no example of a conflict where the intellectual dispute really mattered. For example, there is almost no case-law on the question in Germany. The few reported decisions include the *Opel* decision from 1989, where the Federal Supreme Court clarified the 'Unternehmensinteresse' (enterprise interest) as involving a balancing exercise of different groups' interests;[134] and the 1997 *Arag/Garmenbeck* decision, where the Court, in an obiter dictum, emphasized the directors' discretion.[135] A 2011 decision from the Court of Appeal in Frankfurt discusses the different approaches and deplores the lack of clarity in the debate; the court then concludes that all we know is that board *may* also take into account the interests of the

[132] German Corporate Governance Code 2022, Preamble (convenience translation), available at https://www.dcgk.de/en/code.html. See on this Axel von Werder, *Präambel*, in DEUTSCHER CORPORATE GOVERNANCE KODEX paras. 27 ff (Thomas Kremer et al., eds., 9th edition 2023).
[133] See, for example, Holger Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law*, 18 EUR. CO. & FIN. L. REV. 161, 178 ff. (2021).
[134] BGHZ 106, 54 (60 ff.) = NJW 1989, 979 – *Opel*.
[135] BGHZ 135, 244 (247) = NJW 1997, 1926 – *ARAG/Garmenbeck*.

shareholders.[136] In other words, there is de facto no reported decision where the question really mattered.[137]

This has led to a certain fatigue on the subject, in particular in the academic discourse. More recent contributions emphasize that the different viewpoints rarely come to diverging conclusions.[138] In a similar vein, commentators state that "[…] a pluralistic consideration of interests without clear guidelines and the greatest possible power of specification by the management board is more suitable for dissolving the responsibility of the executive board" or that broad discretion may be used as a "carte blanche" to legitimize almost every conceivable managerial decision.[139]

2.3.2. The French stakeholder ecosystem – formal law in the shadow of the welfare state

Distinct from the case of Germany, the core of France's stakeholder centered system of corporate governance has until recently not been primarily rooted in formal corporate law. French corporate law provides for some level of employee representation on boards, but this is more limited than in Germany.[140] The absence of directors' fiduciary duties in French corporate law has enhanced the power of management in French companies, at the expense of shareholder power, further militating towards stakeholderism.[141] Recent corporate law statutory provisions have enshrined this equilibrium and even reinforced its pro-stakeholder anchor. However, as explained in this section, what has historically entrenched France on the stakeholderism side of the global corporate purpose continuum are not the stakeholder-leaning provisions found in the formal French company law –

[136] OLG Frankfurt a. M. ZIP 2011, 2009 (2010).

[137] A few other decisions mention the concept in passing, with varying terminology: "Unternehmensinteresse" (enterprise interest): BGHZ 64, 325 (331); "Interesse der Gesellschaft aus unternehmerischer Sicht" (corporate interest from a business point of view): BGHZ 136, 133 (139); "sachliches unternehmerisches Interesse" (objective entrepreneurial interest): BGHZ 125, 239 (243); "Gesellschaftsinteresse" (corporate interest): BGHZ 71, 40 (44); 83, 319 (321); 125, 239 (241, 242); 136, 133 (139, 140); and BGH NJW 2006, 522 (524) – Mannesmann.

[138] See Koch, *supra* note 130, at para. 30; Spindler, *supra* note 126, at para. 68.

[139] Spindler, *supra* note 126, at para. 68, with reference to Koch, *supra* note 130, at para. 36. See also Peter O. Mülbert, *Soziale Verantwortung von Unternehmen im Gesellschaftsrecht*, 54 DIE AKTIENGESELLSCHAFT 766, 771 (2009).

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but rather a regulatory architecture that has elevated employees above shareholders as central powerbrokers in French corporate governance.[142]

The centrality of employees in corporate governance – which has primarily been legally secured by France's powerful pro-employee labor laws – has been reinforced by a social compact that has made the welfare state a central force in French corporate governance and society.[143] France's paternalistic and externalities-controlling ethos has for a long time been rooted in centralized state action, including the state acting directly as a large investor in major public companies and as a promoter of insolvency legislation prioritizing the protection of employees. The power of the welfare state, combined with France's highly concentrated shareholder structure, have enhanced its stakeholderist leaning corporate and securities law tradition, which was partly inspired by post-war German capitalism and partly by France's sociopolitical culture that companies are social entities with social obligations.[144]

Since the industrial revolution in the second half of the 19th century and until 1940, the French economy relied on family-owned businesses. Authoritarian paternalism was its hallmark as illustrated by the Wendel family and other "*patrons"* presiding over the then central coal industry: the firm provided workers with modern housing and good health care services.[145] After 1945, the French state enhanced its control over the management of major companies for at least three reasons.

First, the government wanted to signal its break from the shameful history in which several significant French companies collaborated with the Nazi regime (including the car manufacturer Renault and the flight engine constructor Gnome & Rhône, later SNECMA). Asserting state

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[142] See MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT 65-70 (OUP, 2003). [check pincite]

[143] FRANÇOIS EWALD, THE BIRTH OF SOLIDARITY: THE HISTORY OF THE FRENCH WELFARE STATE 182, 182 (Melina Cooper ed., 2020) (2020 revised edition first published in French in 1986, Duke University Press Books).

[144] Ben Clift, COMPARATIVE POLITICAL ECONOMY: STATES, MARKETS AND GLOBAL CAPITALISM, 217 (2nd ed., Bloomsbury Publishing, 2021) noting that firms are understood as "social entities with social obligation"; see also MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT, (Oxford: OUP, 2003) 65-70, stressing at 65: "In France a socialist elite, as well as its political competitors, pressed firms for decades to stabilised employment inside the firm". [check pincite]

[145] See THOMAS PHILIPPON, LE CAPITALISME D'HÉRITIERS. LA CRISE FRANÇAISE DU TRAVAIL (Seuil, 2007).

control over these companies sent this signal. Second, the development of France into a country defined by its powerful welfare state dovetailed with the government directly controlling important companies that were central to key means of production (such as coal with Charbonnages de France, electricity with Electricité de France (EDF) and gas with Gaz de France (GDF)). Third, to further enhance the power of the state, the government moved to nationalize major French financial institutions and insurance companies (e.g., Banque de France, Crédit Lyonnais, Société Générale, Banque nationale pour le commerce et l'industrie, Comptoir national d'escompte de Paris and 11 insurance companies). This was an effective means to channel the financing required to rebuild France in the post-World War II era.

These developments were the catalyst for a period of bureaucratic capitalism characterized by hierarchical management, often led by top managers trained as engineers or civil servants in the elite French *Grandes Ecoles.* Some of these managers went on to found family corporate groups and joined a fresh post-war close-knit economic elite, selected primarily based on their success in academic exams. Through its majority shareholdings in powerful companies, and (to a lesser extent) through its 5-year state economic planning (*planification*), the French government promoted the advancement of the welfare state using its voting power in companies and regulatory force to drive corporate purpose for the advancement of society as a whole – with a particular focus on the welfare of employees.

Renault served as the archetype for France's stakeholder approach to corporate governance. It is often described as the French "social poster child" for a corporate governance ethos that prioritized the welfare of employees and building an equitable society over a narrow focus on maximizing shareholder value. Specifically, Renault entered into corporate agreements in 1955 with its union that included salary increases that were indexed on productivity gains, making its employees beneficiaries of increased profits alongside its shareholders. Renault became famous for extending a third week of paid vacation to its employees – a signpost for corporate France which has developed an ethos of protecting vacation time over maximizing shareholder value – a feature that can be seen in statistics that reflect considerably less average vacation days in Anglo-American companies than in French ones. This stakeholderist blueprint served as a template for other French companies developing into a stakeholder ethos which has come to define French corporate

governance. This deeply engrained social and stakeholderist corporate culture is something which a narrow focus on formal French corporate law – which has only recently formally skewed more strongly in the stakeholderist direction – fails to capture.

Indeed, the 1966 French Companies Act, codified in the Commercial Code, did not initially include specific provisions on corporate purpose beyond a minimalist description of the role of the board.[146] The Civil Code defined corporations as an organization agreed on by people through contract to undertake a common enterprise "with a view to sharing the profit"[147] and having "a valid purpose", which was "formed in the common interest of its shareholders".[148] However, the 1966 Act offered the two-tier board system as an option, which many large CAC 40 companies adopted. While the role of employees in management decisions throughout corporate France has been described as "scarecrow-like",[149] it was rather significant in state-controlled companies. The absence of fiduciary duties has traditionally offered greater freedom to managers, quelling the influence of shareholders. Also, labor law has traditionally included provisions protecting employees individually as well as through their unionization. The power of employees in French corporations was further strengthened when a left-wing government came to power in 1981 – limiting the work week to 39 hours to rebalance the purpose of the corporation towards improving employee welfare over maximizing shareholder value. The Miterrand left-wing government also engaged in a wave of nationalizations: by 1985 the state-owned sector represented 10% of France's economic activity, including 13 of the 20 largest companies and almost the entirety of the financial credit sector.[150] Overall, in the post-World War II era, France's formal stakeholderist leaning corporate law, strong labor laws, and a powerful welfare state placed it squarely on the stakeholderism end of the global corporate purpose continuum.

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[146] "The board of directors determines the direction of the company's business and oversees its implementation". Commercial Code art. L225-35. See also art. L225-64 for the identical provisions in the context of a two-tier board structure.

[147] Civil Code art. 1832

[148] Civil Code art. 1835.

[149] MAURICE COZIAN, ALAIN VIANDIER & FLORENCE DEBOISSY, DROIT DES SOCIETES (29th ed., Lexis Nexis 2016) n°1079.

[150] PETER HALL, GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE 204 (OUP, 1986) and VIVIEN A. SCHMIDT, THE FUTURES OF EUROPEAN CAPITALISM 189 (OUP, 2002). [check pincites]

However, as we have seen in Asia and Germany, although countries establish corporate governance equilibrium, they experience ebbs and flows around that equilibrium over time. In this respect, France is no exception. Starting in 1986, France embarked on a period which was dubbed "economic liberalization". During this period, the state divested its interest in major companies (privatization of Saint Gobain in 1986, banks Paribas and Suez in 1987); however, it concomitantly supported a network of cross-shareholdings (*noyaux durs*) designed to protect companies against hostile takeovers and short-term market pressure.[151] At the same time, in a bid to boost entrepreneurship, corporate law was liberalized (the *société par actions simplifiéees*, which allowed for private ordering through default provisions was introduced in 1994 and its scope was extended in 2001 – and minimum capital requirements for *société à responsabilité limitée* where eliminated in 2003).

Despite efforts to liberalize the formal corporate law, it still included – and reinforced – employee representation in large companies, a lack of directors' fiduciary duties still limited shareholder power and, most importantly, the central ethos of strong employee protections, ensconced in a powerful welfare state, still defined French corporate governance. The standard work week was cut to a mandatory 35-hour maximum in 1998 – despite the prospect of negative consequences for professional engagement and a decline in shareholder value. In addition, a post-war democratic elite remained in place perpetuating family dynasties such as Michelin, Auchan, and Danone. This facilitated the continuation of a close-knit economic elite holding the reins of power in French corporate governance.

The rise of foreign investors starting in the 1990s, and reaching 40% of the CAC 40 companies shares by 2003,[152] further drove a shift along the continuum towards more shareholderism. Cross-shareholding quickly unwound forcing corporate leaders to focus more on shareholder value and to abandon the conglomerate structures, which have remained more intact in Germany. French corporations increasingly raised their finances on the equity market and granted their senior

[151] Two main networks emerged, one around the banks Paribas and Société Générale, and a second one around Suez and Bank nationale de Paris (BNP). FranÇois Morin, *A Transformation in the French Model of Shareholding and Management*, 29 ECON. & SOC. 36, 38-39 (2000).

[152] Michael Goyer, *US-France Analysis Series: The Transformation of Corporate Governance in France*, THE BROOKINGS INSTITUTION 1, 2 (2003).

executives stock-options – a move which cut against the egalitarian ethos in French companies, which prized employee welfare and relative income equality in the post-World War II era. This aspect of French corporate governance moved it closer to the shareholder end of the corporate purpose continuum.[153] At the same period, the 1996 *Vilgrain* court decision recognised that, a director owes a duty of transparency to the shareholders and needs to refrain from opportunistic behaviour, which has been interpreted as amounting to a duty of loyalty to protect shareholders' interests.[154]

Against this backdrop, corporate law was also modernised in the 2000s via a series of legislative amendments[155] to provide stronger information rights and other protections to investors, as well as to facilitate more flexible corporate structures. No director's fiduciary duty was however enshrined in the legislation. Self-regulation geared in the same direction as companies published a corporate governance code in 1995, anticipating the following legislative development: since 2016 boards have been required to present a corporate governance report to the general assembly, and have generally adhere to a shareholder-friendly corporate governance code on a comply or explain basis. These developments enhanced the role of independent directors and increased shareholder power more generally.[147] They also prompted some to suggest that shareholderism had become the driving force behind French corporate governance.

However, it is fair to say that even during this time, corporate governance in France remained rooted in stakeholderism, as powerful employee-friendly labour laws and high corporate taxation to fund a generous welfare system prevailed. Also, even when cross-shareholding and concentrated ownership were diluted, the elite class remained largely unchanged – legislation limiting the number of directorships that could be held by a single person had no significant impact on the control of the elite on corporate governance. In any case, for that period and up to the present, the concentration in shareholding got reinforced due to the weight and growth of luxury brand family-owned groups such as LVMH (Arnault family 47.35%), Kering (Pinault family 41%), Hermès (Dumas family 66.6%), L'Oréal (Bettancourt family 33.3%), and Dassault Systèmes & Aviation & Thalès (24%).

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[153] Gunnar Trumbull, *The State and the Entrepreneur*, in SILICON AND THE STATE: FRENCH INNOVATION POLICY IN THE INTERNET AGE 1, 27 (Brookings Institution Press, 2004).

[154] Cass. com., 27 Feb. 1996, n° 94-11.241, Vilgrain c/ Alary.

[155] 2001 New Economic Regulations Act; Aug. 1, 2003, Financial Security Act and Economic initiative Act; June 24, 2004, Reform of Securities Ordinance; etc.

From 2014, there was a shift away from enhanced shareholder power. First, with the *Loi* Florange, France introduced the requirement that large economically viable enterprises which decide to close are required to find a buyer that will protect the jobs. The same act introduced dual share voting for long term investors.[156] These loyalty shares with tenured voting resulted in a diminution of the investment by Anglo-American institutional funds in French companies.[157] Second, France aggressively implemented non-mandatory provisions in the EU directive on mergers to empower directors at the expense of shareholder autonomy.[158]

Most recently, congruent with public opinion, a growing concern for the environment has emerged as a key issue in French society, which has promoted changes in corporate governance.[159] Given France's history of having an interventionist state,[160] there was a popular expectation that the state would play a strong role in implementing environmental protections.[161] Indeed, the state fulfilled this expectation – perhaps even going beyond what would have been optimal by even more religiously embracing the interests of employees, the environment, and purposefulness in a forceful and unprecedented manner. Recent legislation provides clear grounds for directors and senior management to consider ESG issues as material to a corporation's operations with the clear

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[156] The act was rafted in response to a dispute between workers and their unions, and Arcelor-Mittal, in the wake of the multinational's decision to shut down steel works located in the commune of Florange (Moselle), in north-west France. It grew out of a promise made, in the 2012 electoral campaign, by the then presidential candidate, François Hollande: all companies that employed a workforce of more than a thousand people in France (and in Europe) and wished to close down factories or production centres considered to be economically viable should be required to make their best endeavours to find a buyer before doing so.
The law that was eventually passed is much more wide-ranging, as it addresses several other issues in no way connected with the promise made by the then French presidential candidate.
See Marco Becht, Yuliya Kamisarenka & Anete Pajuste, *Loyalty Shares with Tenure Voting – Does the Default Rule Matter? Evidence from the Loi Florange Experiment*, 63 J.L. & ECON. 473, 475 (2020).

[157] Laurence Boisseau, *Loi Florange : les droits de vote double découragent les grands fonds étrangers*, LES ECHOS, (Feb. 11, 2019, 6:42 PM), https://www.lesechos.fr/finance-marches/marches-financiers/loi-florange-les-droits-de-vote-double-decouragent-les-grands-fonds-etrangers-963563.

[158] Insert reference

[159] See, Fabrice Bonnifet, *Développement durable : « Nous sommes au fait des limites du système sur lequel est ancrée la création de valeur de nos entreprises »*, LE MONDE, (Oct. 17, 2023, 7:30 AM), https://www.lemonde.fr/idees/article/2023/10/17/developpement-durable-nous-sommes-au-fait-des-limites-du-systeme-sur-lequel-est-ancree-la-creation-de-valeur-de-nos-entreprises_6194950_3232.html.

[160] Ben Clift, COMPARATIVE POLITICAL ECONOMY: STATES, MARKETS AND GLOBAL CAPITALISM, 215-216 (2nd ed., Bloomsbury Publishing, 2021). [check pincite]

[161] See e.g., a call for state centralized planning to enable sustainable economic development, Christian Babusiaux & Cécile Blatrix, *L'Etat doit mettre en place une gouvernance à la hauteur des défis écologique*, LE MONDE, (Sept. 27 2023, 8:30 AM), https://www.lemonde.fr/idees/article/2023/09/27/l-etat-doit-mettre-en-place-une-gouvernance-a-la-hauteur-des-defis-ecologiques_6191172_3232.html.

knowledge that French history is devoid to corporate directors being sanctioned for failing to maximize shareholder value.[162]

As early as 2017,[163] France imposed a "duty of vigilance" (*devoir de vigilance*) in large companies.[164] This duty requires large companies to identify and prevent risks to human rights and fundamental freedoms, the health and safety of individuals and the environment, that result from the company's activities and those of the companies it controls. The scope of this duty of vigilance also encompasses the activities of subcontractors or suppliers with which the company has an established business connection.[165] To discharge the duty of vigilance, companies are required to draft, and make publicly available, a corporate "vigilance plan" in consultation with stakeholders. Failure to comply with obligations under the duty of vigilance makes the company liable for the damage that could have been avoided by complying with such obligations.[166]

In the early 2010s, prominent corporate leaders like the CEO of the CSR-oriented Michelin, Alain Sénard, and the CEO of Danone (a firm historically committed to the dual model of pursuing both social and economic values), Emmanuel Faber, voiced their commitment to stakeholders,[167] and their concern that foreign investors were progressively imposing a short-term financial culture on French companies. This corporate voice found institutional support in a 2018 official report by Nicole Notat and Alain Sénard titled "The company and collective interest" and based on 200 interviews with representatives of business circles, banks, investors, unions, think-tanks and government. The report endorsed the view that the purpose of companies is not only to make profit

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[162] Alain Pietrancosta, *Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and E.U. Perspectives*, 52 (European Corporate Governance Institute - Law Working Paper No. 639, 2022), available at: https://ssrn.com/abstract=4083398.

[163] *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law No. 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017.

[164] The scope of application extends to companies with more than 5,000 employees in France or 10,000 employees worldwide.

[165] Ibidem.

[166] *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law No. 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017, p. XX.

[167] It might be noted that French business law, and insolvency law in particular, have often provided for the welfare of employees as their actual central goal. *See* Roe 2003.

but also to carry out social and environmental objectives.[168] It also called, successfully, for legislative reform.

The law reform subsequently enacted largely aligned with the content of the report,[169] and was realized through the 2019 loi PACTE.[170] The statute added a new paragraph to article 1833 of the French Civil Code stating that "*the company is managed in its corporate interest, taking into consideration the social and environmental stakes linked to its business.*"[171] Though the comma between "corporate interest" and the rest of the provision is said to have been introduced in an effort to create a hierarchy between the interests, on its face, the preeminence of corporate interest remains rather weak – but this has yet to be determined by French courts.

It may be noted that the freshly revised French Code of corporate governance also tends to equalize the relative importance of corporate, social, and environmental interests. The French Association of Private Companies (AFEP), that gathers about 115 of the largest corporations representing about 15 % of French GDP and employing 2 million people,[172] and the leading network of entrepreneurs in France (MEDEF), where 95 % of members are small and medium companies, have developed together governance standards, to help listed companies improve their operations and management. The AFEP-MEDEF Corporate Governance Code, largely adhered to by French listed companies, was amended in 2018 to state that "*the Board of Directors performs the tasks conferred by the law and acts at all times in the corporate interest. It endeavors to promote long-term value creation by the company by considering the social and environmental aspects of its activities.*"[173]

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[168] *Mission « Entreprise et intérêt général » : remise du rapport de Jean-Dominique Senard et Nicole Notat*, MINISTRY OF THE ECONOMY, FINANCE AND INDUSTRIAL AND DIGITAL SOVEREIGNTY: LIBERTÉ ÉGALITÉ FRATERNITÉ (Mar. 9, 2018), www.economie.gouv.fr/mission-entreprise-et-interet-general-rapport-jean-dominique-senard-nicole-notat.

[169] Didier Poracchia, *De l'intérêt social à la raison d'être des sociétés*, BULL. JOLY SOCIÉTÉS, L. n° 2019-486, 22 mai 2019, JO, 23 mai 2019, p. 40.

[170] *LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises* [LAW no. 2019-486 of May 22, 2019 on the growth and transformation of businesses], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], May 23, 2019.

[171] See Lucas F.-X., *L'inopportune réforme du Code civil par la loi PACTE*, BULL. JOLY SOCIÉTÉS, Sept. 2018, p. 477; Conac *P.-H., La société et l'intérêt collectif : la France seule au monde ?, Dossier « La réécriture des articles 1833 et 1835 du Code civil : révolution ou constat ? »*, REV. SOCIÉTÉS 2018, p. 558; Alain Pietrancosta, *Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives*, 47 (European Corporate Governance Institute - Law Working Paper No. 639, 2022), available at: https://ssrn.com/abstract=4083398 .

[172] AFEP The Voice of Large French Companies, https://afep.com/en/afep/ (last visited June 8, 2024).

[173] Article 1.1 of Code AFEP-MEDEF.

Finally, the PACTE Law amended the Civil Code to allow company to include in their articles of associations a definition of company's "fundamental reason for existing" (*raison d'être*), which can be compared to its "mission purpose".[174] To date, 55% of CAC40 large French listed companies have stated a *raison d'être*. These *raisons* d'être, which are included in the company's articles of incorporation, do not appear dissimilar from other management tools offering employees the opportunity to express their views about the company's purpose. They often are factual and linked to the company's core activities,[175] rather than expressing any distinct purpose that would create binding commitments for the company to expand its purpose.[176] They therefore tend to inflate the management's zone for insulation where it is free to decide on which project to engage.

It remains to be seen whether the *raison* d'être, introduced to broaden corporate purpose in France, will drive France further towards the stakeholderism end of the continuum. In theory, corporate law, directors and managers can be held liable to shareholders and the company for violations of the articles of association, including the *raison d'être* if one is included.[177] In practice, however, the *raison d'être* provisions are probably too vague to provide an effective ground for liability or dismissal. Though it might provide a ground for action regarding contracts entered by the company, the absence of case law on this issue makes it unlikely that board decisions or contracts could be found voidable on the grounds that they conflicted with the *raison d'être*. However, the

[174] David Kershaw & Edmund Schuster, *The Purposive Transformation of Corporate Law* (European Corporate Governance Institute - Law Working Paper No. 616, 2021), available at: https://ssrn.com/abstract=3363267.
[175] *See* Les entreprises du CAC 40 à l'âge de la raison d'être, Comfluence, March 2020; Comité de suivi et d'évaluation de la loi PACTE. Premier rapport. Annexes, sept. 2020, 76; Second rapport, Sept. 2021, Annexes, 213.
[176] This is illustrated by the provision included in the articles of association of Carrefour (a global retailer with a yearly turnover in excess of 80 billion euros in 2022, about half of it generated outside France) and Atos' (a global player in cybersecurity and digital transformation and annual revenue of about 11 billion). 'Our mission is to help shape the information space. With our skills and services, we support the development of knowledge, education and research in a multicultural approach and contribute to the development of scientific and technological excellence. All over the world, we enable our customers and our employees, and more generally the greater number, to live, work and progress sustainably and confidently in the information space.' It can be observed that Atos has experienced extreme turmoil since that time and is on the brink of bankruptcy, currently protected by a last chance procedure (plan de sauvetage) as two the offers of two potential buyers are assessed by all creditors. There is of course no link of causality implied. It simply turns out that in this case the push towards the further stakeholder end of the spectrum did not open up to an era of corporate growth
[177] "Executives may be held individually, or as a group, liable by shareholders, the company and third parties for (…) violation of corporate bylaws" (Art 1850 C civ and L 225-251 code de commerce).

combination of the *raison d'être* and market discipline is not to be excluded.[178] Typically contracts that were negotiated in such a way that they created an imbalance to the detriment of the stakeholders protected through the *raison d'être* could potentially justify an action. It is, however, likely that in such a case parties may be inclined to negotiate rather than litigate. Though, in theory again, in the context of negotiations and strategic decisions, such as anti-takeover defenses, the potential impact of the *raison d'être* may turn out to be real [179] – but there is a dearth of case law on this matter.

To conclude, while France's stakeholder centered system of corporate governance has only recently been primarily rooted in formal corporate law, one must bear in mind that France displayed a regulatory architecture giving preference to employees over shareholders, and firmly rooting the jurisdiction on the stakeholderism side of the global corporate purpose continuum. More, French history of corporate governance showed it moved further to the shareholder-side for about a 20-year period between 1995 and 2014. At that time France adopted its first corporate governance code and undertook a series of pro-shareholders corporate law reform. This swing was soon followed in 2014 by a highly mediatised pro-stakeholders nudge taking the form of default double-voting rights upon two years of share ownership (Loi Florange). A pendulum is at play in France in the manner not dissimilar to the one Lund describes in the US.

However, assessing where on the continuum, i.e., closer to which end of the continuum, a given regime is rooted represents an essential information for legislators and managers alike. Without such estimate, costly mis-steps loom. For example in 2018, the preparatory Notat & Senard report contemplated the 2019 Loi Pacte as meant to catch up with deeply UK so called "Enlighted Shareholderism" that was gauged as a British understatement for "stakeholderism" placing the UK on a more pro-stakeholder path than France. This evaluation betrayed a misunderstanding of the relative positioning of France and the UK on the shareholders/ stakeholders continuum. Such

[178] Alain Pietrancosta, *Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and E.U. Perspectives*, 53 (European Corporate Governance Institute - Law Working Paper No. 639, 2022), available at: https://ssrn.com/abstract=4083398; *see* also Cass. com. 20-9-2017 No. 15-29.098 and 15-29.144: BRDA 20/17 inf. 7. regarding liability for the purpose pursued by companies when fundraising.

[179] See, *Veolia and Suez announce that they have reached an agreement allowing the merger of the two groups*, VEOLIA, (Apr. 12, 2021), https://www.veolia.com/en/our-media/newsroom/press-releases/veolia-and-suez-announce-they-have-reached-agreement-allowing.

mistakes are costly as the appetite for additional stakeholderism measures they trigger may well backfire, sending companies in the un-appealing far end of the spectrum, a place likely to paralyze further growth. That Emmanuel Faber, the pro-stakeholder former CEO of Danone was ousted represents a cautionary tale regarding possible consequences of relentlessly pushing towards more stakeholderism rather than finding a more balanced equilibrium.

On the formal corporate law level, the *raison d'être* appears to be the unfortunate product of such mis-assessment. Despite its non-compulsory nature the *raison d'être* has been embraced by a non-trivial number of French companies. Atos, a French global player in cybersecurity and digital transformation mentioned above was an early adopter of a *raison d'être* in its articles of association as it was managed by Thierry Breton (now EU commissioner for economic) and listed among the French top CAC 40 companies.—Atos has experienced extreme turmoil since that time and is nowadays on the brink of bankruptcy, currently protected by a last chance procedure (*plan de sauvetage)* as the offers of two potential buyers are assessed by all creditors. There is of course no link of causality implied. It simply turned out that the push towards the further stakeholderist end of the spectrum did not open up to an era of corporate growth. That some shareholders may now validly contemplate a derivate action on the basis of the non-performance of the company's *raison d'être* commitment shows how an ill-pitched commitment to stakeholderism may backfire.

3.0 Illuminating the Corporate Purpose Continuum

[to be added]

4. Stakeholderism in emerging markets and developing economies beyond India and China

4.1. Introduction

Emerging markets and developing economies represent about 85% of the world's population and 59% of the global Gross Domestic Product (GDP).[180] Despite their relevance, most corporate governance debates – and the debate on corporate purpose is no exception – often focus on, and they are heavily influenced by, academic and policy discussions taking place in advanced economies, and particularly in the United Kingdom and the United States. This influence of the United Kingdom and the United States can probably be explained by a variety of factors, including the size of their local capital markets, the pioneering role that the United Kingdom has played in the enactment of "good corporate practices", the importance of US investors in international capital markets, or the fact that the United Kingdom and the United States are home of some of the world's best universities – and therefore many of the legal and finance scholars working in corporate governance. Regardless of the reasons, this "Anglo-Saxon" myopia has perversive effects for the global debate on corporate purpose. This is due to the significant divergences existing across jurisdictions, and particularly between the United Kingdom and the United States and most EMDEs. As will be mentioned in Section 3, EMDEs present some unique features that undermine the desirability of a stakeholder-model of corporate governance. Moreover, as was evidenced from the experience of China and India, many EMDEs have already embraced stakeholderism.

The following sections will review the state and evolution of stakeholderism in EMDEs beyond China and India, with particular emphasis on some of the largest economies in Latin America and Africa. That analysis will help us support one of the primary claims of this article: stakeholderism in the Global South (and in several major advanced economies outside the United Kingdom and the United States) existed long before it was "discovered" in the Anglo-American world.[181] It will then be explained why EMDEs are different, and why these differences present additional risks for stakeholderism in EMDEs. This suggests that from a normative perspective a greater emphasis on shareholderism may be desirable in EMDEs – even though virtually all EMDEs have

[180] Christine Lagarde, *The Role of Emerging Markets in a New Global Partnership for Growth by IMF Managing Director Christine Lagarde*, INTERNATIONAL MONETARY FUND, (Feb. 4, 2016), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp020416.

[181] For a pioneering analysis of stakeholderism in the Global South, see Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535, 536-538 (2024). See also Mariana Pargendler, *The Global South in Comparative Corporate Governance*, 11-12 (European Corporate Governance Institute - Law Working Paper No. 751, 2024), available at: https://ssrn.com/abstract=4699188).

concentrated shareholder structures, a factor which militates more towards shareholderism generally. Again, it must be emphasized that we are not suggesting that within the context of EMDEs – or in the context of any countries – that there is a one-size-fits all solution to corporate purpose. Rather, this is to highlight common features of EMDEs that seem to skew the continuum more towards the shareholder-side – but stakeholderism still remains very much part of the continuum. However, what seems clear is that the Anglo-American-cum-global perspective for a uniform shift towards more stakeholderism is likely to have particularly deleterious consequences in the case of EMDEs. Also, the understanding of these international divergences in the context of EMDEs will help us support another important claim of this article: diversity matters. Namely, it will be shown that diversity in *context* and diversity in *strategy solutions* are key when it comes to debating, understanding, and dealing with the corporate purpose puzzle in EMDEs and everywhere else in the world.

4.2. Stakeholderism in Brazil, Nigeria and South Africa

Brazil is the largest economy in Latin America, representing more than 33.29% of the GDP in Latin America and the Caribbean.[182] Most Latin American countries have French legal origins. Contrary to what is often assumed in the literature, however, Brazilian commercial laws are not heavily influenced by Portuguese law nor do they automatically follow the French legal tradition.[183] Instead, the influence of certain lobbies seems to have made Brazilian lawmakers deliberately pick and choose among the laws of different civil and common law jurisdictions.[184] In terms of corporate governance, however, Brazil has been clearly influenced by German law, as evidenced, among other aspects, by the existence of a two-tier board of directors.

When it comes to corporate purpose, Brazil is one of those jurisdictions that was already "woke" long before the stakeholder approach became popular in the Anglo-American world. Indeed, since the enactment of the Brazilian Companies Act in 1976, Brazilian law requires corporate directors and officers to act in the best interest of the company, "including the requirements of the public at

[182] *World Economic Outlook (April 2024): GDP, Current Prices*, INTERNATIONAL MONETARY FUND, https://www.imf.org/external/datamapper/NGDPD@WEO/WEOWORLD/WE (last visited June 5, 2024).
[183] Mariana Pargendler, *Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil*, 60 THE AM. J. COMP. L. 805, 810-812, 842 (2012).
[184] *Ibid*.

large and of the social role of the corporation."[185] Moreover, Brazilian corporate law requires controlling shareholders to have duties and responsibilities towards "the other shareholders of the corporation, those who work for the corporation and the community in which [the company] operates".[186] Therefore, even though some authors have interpreted these provisions in the sense of mandating corporate insiders to act in the best interest of the shareholders at the lowest possible cost for the community,[187] it can be argued that the 1976 Brazilian Companies Act abandoned, at least formally, the shareholder approach.[188] More importantly for the purpose of this article, it did so long before the recent rise of the stakeholder approach in the corporate governance debate.[189]

In Africa, two of the largest economies, Nigeria and South Africa, also have stakeholder-oriented provisions in their corporate laws. In South Africa, the mandate to take into account the interest of the stakeholders can be observed in Principle 16 of the 2016 King IV Report on Corporate Governance for South Africa that states that "[i]n the execution of its governance role and responsibilities, the governing body [of the corporation] should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time."[190] Consistent with the King IV report which emphasises on sustainable development, the 2011 South African Code is concerned with creating long-term value for stakeholders, a "societal benefit over and above economic results".[191] In fact, being second to the UK in adopting a stewardship code, South Africa pioneered in the emphasis of ESG in stewardship.[192] Apart from soft-law measures, South Africa's commitment to sustainable

[185] Law No. 6404, de < Dec. 15, 1976 ? date of promulgation in Portugese >, < Brazilian Corporations Law > [official gazette abbreviation] de < 15 Dec. 1976? date of publication in day, month, yr format> (Brazil), art. 154.
[186] *Id*, art. 116.
[187] Nelson Eizirik, A LEI DAS S/A COMENTADA, 359 (São Paulo, Quarter Latin, 2011).
[188] FABIO KONDER COMPARATO & CALISTO SALOMAO, O PODER DE CONTROLE NA SOCIEDADE ANÔNIMA 322 (Forense, 6th ed., São Paulo, 2014).
[189] Latin America is not the only region that was "woke" long before the United Kingdom and the United States. This phenomenon has also been observed in Asia. For a pioneering work in this area, see Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, 4 RED 14, 20 (2022).
[190] KING IV REPORT ON CORPORATE GOVERNANCE FOR SOUTH AFRICA 2016 (The Institute of Directors in Southern Africa, 2016), Principle 16.
[191] Natania Locke, *Encouraging Sustainable Investment, in South Africa CRISA and Beyond*, in GLOBAL SHAREHOLDER STEWARDSHIP 471, 473 (Dionysian Katelouzou & Dan W. Puchniak eds., CUP, 2022).
[192] Dionysia Katelouzou & Dan W. Puchniak, *Global Shareholder Stewardship: Complexities, Challenges and Possibilities*, in Global Shareholder Stewardship 3, 14, 35 (Dionysia Katelouzou & Dan W. Puchniak eds., CUP, 2022) ("South African Code 2011 was an outlier among first generation non-UK codes with the core focus on ESG.").

development is evident from the enactment of statutory provisions to the same effect.[193] Prior to the 2011 Code, South Africa's Companies Act of 2008 innovated by instituting a social and ethics committee, which provided a legal foundation to stakeholderism.[194]

In Nigeria, 305(3) of the Nigerian Companies and Allied Matters Act (CAMA) 2020 states "a director shall act at all times in what he believes to be the best interests of the company as a whole (…) and in doing so, shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations." Moreover, the law specifies that 'the matters to which a director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.'[195]

Therefore, the anecdotal evidence of some of the largest economies in Latin America and Africa also seems to confirm the fact that, long before the Anglo-Saxon world advocated for a stakeholder approach in corporate governance, this debate already existed in the Global South. Therefore, perhaps the Global North should look at the Global South, and not the other way around, for enriching the debate on the promises and perils of stakeholderism.[196] In fact, given that many EMDEs have moved from shareholder-oriented to stakeholder-oriented models of corporate governance, this shift in the model of corporate governance can provide a natural experiment for future empirical studies assessing the desirability of stakeholderism, at least in a particular context that, as examined in section 3, significantly differs from the context existing in the Global North.

4.3 The dark side of stakeholderism (especially in the Global South)

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[193] Natania Locke, *Encouraging Sustainable Investment, in South Africa CRISA and Beyond*, in GLOBAL SHAREHOLDER STEWARDSHIP 471, 482-488 (Dionysian Katelouzou & Dan W. Puchniak eds., CUP, 2022).

[194] Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 536, 538 (2024).

[195] Companies and Allied Matters Act No. (124) (2020) 107: O.G., A178, Section 305(4) (Nigeria).

[196] Traditionally, the Global North has influenced many corporate law debates in the Global South. In the past years, however, solutions traditionally existing in the Global South, such as the existence of stakeholder-oriented provisions, are being discussed in the Global North. Therefore, some authors have rightly argued that there is a form of "reverse convergence" in comparative corporate governance, "with various institutions of the Global North coming to resemble their Global South counterparts." See Mariana Pargendler, *The Global South in Comparative Corporate Governance*, 1-2, 11-12 (European Corporate Governance Institute - Law Working Paper No. 751, 2024), available at: https://ssrn.com/abstract=4699188.

The potential risks and challenges of adopting a stakeholder-oriented model of corporate governance has been well described in the literature.[197] In short, these problems include lack of accountability and agency problems that may increase the cost of capital firms and ultimately harm the development of capital markets and the promotion of firm's access to finance.[198] Therefore, well-intentioned initiatives to favor stakeholders may end up making stakeholders worse off (Bebchuk/Tallarita). These problems have been generally identified in the Global North. However, despite the relevance of the corporate purpose debate in EMDEs, the literature has generally omitted the fact that the market and institutional environment existing in the Global North is very different from the market and institutional environment found in the Global South.[199]

While there are many divergences between advanced economies and EMDEs, and particularly between the United States and the United Kingdom and the Global South, some of the most important divergences for the corporate purpose debate include: (i) the development and efficiency of capital markets; (ii) the level of corruption; and (iii) the quality and effectiveness of corporate governance. Even though other factors, such as the existence of controlling shareholders, have important implications for the corporate purpose debate, they should be examined separately given that they are not unique features of EMDEs. In fact, the existence of controlling shareholders is also the general rule in most advanced economies, including Singapore, Hong Kong, and Europe.[200]

Indeed, with the exception of China, India and Brazil, most countries in the Global South have less developed capital markets.[201] This aspect, along with the low levels of shareholder activism in

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[197] Michael C. Jensen, Value Maximisation, Stakeholder Theory, and the Corporate Objective Function, 7 EUR. FIN. MGMT. 297, 305 (2001); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 305-306 (2020).

[198] Michael C. Jensen, Value Maximisation, Stakeholder Theory, and the Corporate Objective Function, 7 EUR. FIN. MGMT. 297 (2001); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 305 (2020).

[199] Exceptions include: Mariana Pargendler, *Corporate Governance in Emerging Markets*, FGV Direito SP Research Paper Series No.17), available at: https://ssrn.com/abstract=2417994; Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535, 538 (2024); Emmanuel Adegbite, Kenneth Amaeshi & Olufemi Amao, *The Politics of Shareholder Activism in Nigeria*, 105 J. BUS. ETHICS 389, 390 (2012).

[200] Adriana de la Cruz, Alejandra Medina & Yun Tang, *Owners of the World's Listed Companies*, OECD CAPITAL MARKET SERIES (2019).

[201] Mariana Pargendler, *The Global South in Comparative Corporate Governance*, 3-4 (European Corporate Governance Institute - Law Working Paper No. 751, 2024), available at: https://ssrn.com/abstract=4699188);

most EMDEs,[202] leads to the existence of less informally efficient capital markets. Therefore, the market plays a weaker role in policing inefficient and wrongly behaved managers and controlling shareholders. As a result, the problem of lack of accountability generally associated with a stakeholder-model of corporate governance will be exacerbated in the Global South.

Second, most EMDEs suffer from problems of corruption.[203] For instance, in the 2023 Corruption Perception Index, the only EMDE ranked among the top 20 jurisdictions with lowest levels of perceived corruption is Uruguay.[204] Other EMDEs from the top 50 countries include Bhutan, Chile, Cabo Verde, Costa Rica, and Fiji.[205] The remaining EMDEs are ranked below the top 50, and the lowest positions of the index are exclusively occupied by Global South jurisdictions led by South Sudan, Syria, Somalia, and Venezuela.[206] Given the prevalence of state-owned enterprises (SOEs) in the Global South,[207] the existence of corruption in the public sector may exacerbate the problems of accountability and poorer corporate governance often associated with a stakeholder approach. Third, jurisdictions in the Global South generally exhibit higher private benefits of control.[208] By capturing the benefits that controlling shareholder can obtain at the expense of – or not shared with – minority shareholders, the level of private benefits of control can serve as a proxy for the quality and effectiveness of corporate governance.[209] In a study covering 39 jurisdictions and the control premium paid to the controller in 393 transactions, it was found that private benefits of control ranges from -4 percent of firm value in Japan to +65 percent of firm

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Accelerating Capital Markets Development in Emerging Economies Country Case Studies White Paper, WORLD ECONOMIC FORUM (May, 2016), https://www.un.org/esa/ffd/wp-content/uploads/2016/01/Developing-domestic-capital-markets_IFC-World-Bank-Group_IATF-Issue-Brief.pdf; Lemuel Ekedegwa Odeh, *A Comparative Analysis of Global North and Global South Economies*, 12 J SUSTAINABLE DEV IN AF. 338, 340 (2010).

[202] Emma Sjöström, *Shareholder Activism for Corporate Social Responsibility: What Do We Know?*, 16 Sustainable Dev. 141, 153 (2008).

[203] *Corruption Perception Index 2023*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/en/cpi/2023 (last visited June 5, 2024).

[204] *Ibid*.

[205] *Ibid*.

[206] *Ibid*.

[207] ADRIANA DE LA CRUZ, ALEJANDRA MEDINA & YUN TANG, OWNERS OF THE WORLD'S LISTED COMPANIES, (OECD Capital Market Series, Paris, 2019).

[208] Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross- Country Analysis*, 68 J. FIN. ECON. 325, 336 (2003); Alexander Dyck & Luigi Zingales, Private benefits of control: An international comparison, 59 THE J. FIN. 537, 550 (2004).

[209] Alexander Dyck & Luigi Zingales, *Private benefits of control: An international comparison*, 59 THE J. FIN. 537, 537 (2004); Ronald J. Gilson & Alan Schwartz, *Contracting About Private Benefits of Control* 3 (Columbia Law & Economics Research Paper No. 436), available at: https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/359494/doc/slspublic/ssrn-id2182781.pdf.

value in Brazil.[210] Interestingly, while countries with the highest private benefits of control mainly included jurisdictions in the Global South, such as Argentina, Austria, Brazil, Colombia, Mexico, Turkey, and Venezuela, those with low private benefits of control are advanced economies such as Australia, Canada, Finland, France, Hong Kong, Japan, the Netherlands, New Zealand, Norway, Singapore, Taiwan, the United Kingdom, and the United States.[211] Therefore, that seems to support the fact that, as a result of a variety of reasons, including underdeveloped capital markets, problems of enforcement and poor corporate governance rules to effectively tackle the tunnelling problem prevailing in EMDEs, jurisdictions in the Global South provide low levels of protection to minority shareholders. Therefore, any rules empowering corporate insiders would end up harming the development of capital markets and firms' access to finance. As a result, given that a stakeholder-oriented model of corporate governance would empower the directors, and indirectly the controlling shareholders appointing and removing the directors, embracing stakeholderism would exacerbate the already high risk of opportunism of controllers vis-à-vis outside investors existing in these most EMDEs. Therefore, well-intention initiatives to reduce poverty and foster social and economic development by embracing stakeholderism may end up generating the opposite result.

5. Conclusion [to be completed]

[210] Alexander Dyck & Luigi Zingales, *Private benefits of control: An international comparison*, 59 THE J. FIN. 537, 538 (2004).

[211] These are exceptions. For example, advanced economies such as Italy have high benefits of control and a few countries from the Global South, such as South Africa, have low private benefits of control.