भारतीय प्रबंध संस्थान अहमदाबाद
INDIAN INSTITUTE *of* MANAGEMENT AHMEDABAD

विद्याविनियोगाद्विकासः

IIMA
Working Paper

Navigating the Indian Corporate Purpose Dilemma: Insights from an Entity-Based Approach

Astha Pandey
M P Ram Mohan

Research & Publications

Research & Publications

W. P. No. 2025-02-01

Navigating the Indian Corporate Purpose Dilemma: Insights from an Entity-Based Approach

Astha Pandey

M P Ram Mohan

February 2025

भारतीय प्रबंध संस्थान अहमदाबाद
INDIAN INSTITUTE of MANAGEMENT AHMEDABAD

Navigating the Indian Corporate Purpose Dilemma: Insights from an Entity-Based Approach

Astha Pandey* and M P Ram Mohan**

Abstract:

Contemporary versions of the corporate purpose debate highlight the interconnectedness of the forces in corporate law and governance that are critical to importing social welfare as a priority concern into the governance frame. The Indian legal and regulatory framework governing corporate purpose, which embodies pluralistic stakeholderism, offers valuable insights to inform on-going deliberations on this subject in comparative corporate governance scholarship. This article contends that the Indian corporate purpose framework reflects an inherent paradox underpinning its corporate law and governance mechanisms, comprising two limbs - first, the imbalance between directors' duties and shareholders' rights which has left critical questions around controlling shareholders' accountability unaddressed; and second, contradictions in the theoretical foundations underlying the framework which result in ambiguities stemming therefrom. This article seeks to examine the Indian approach to corporate purpose through an analysis of the paradox, the implication of which is that it serves to impede the implementation of stakeholder governance. In so doing, first, we assess critical features of India's framework, through the lens of the manner in which powers, rights and duties are distributed amongst various corporate constituencies within it. Second, we examine three distinct corporate governance theories underlying the Indian framework, namely, shareholder primacy, stakeholder theory and real entity theory, their implications for corporate purpose and the manner in which they interact with and contribute to ambiguities in the framework. Lastly, we analyse the manner in which anchoring the Indian stakeholder governance approach in the real entity conception of the corporation can address the identified ambiguities and provide an appropriate theoretical basis for operationalizing a broader corporate purpose.

Keywords: corporate purpose, directors' best interests duty, shareholder accountability, stakeholder governance, real entity theory, (Indian) Companies Act, comparative corporate governance

*Senior Research Associate, Indian Institute of Management Ahmedabad

** Professor, Indian Institute of Management Ahmedabad

We are grateful to Professor Afra Afsharipour, UC Davis School of Law and Professor Eva Micheler, London School of Economics for detailed and thoughtful comments. We would also like to thank Dr Victoria Barnes, Dr Jonathan Hardman, Dr Peter Underwood, Professor Eva Micheler and Professor Sally Wheeler for organising the Global Corporate Law Seminar Series (Spring Term, 2025), and the participants for helpful comments and discussions. Many thanks also to our colleagues Aditya Gupta, Sahana Simha and Vijay Venkitesh for helpful comments. This work is supported by Research and Publications, and the Centre for Sustainability and Corporate Governance Research, IIM Ahmedabad. The views expressed and any errors or omissions remain our own.

TABLE OF CONTENTS

INTRODUCTION

The debate around the purpose of the corporation and the efficacy of different governance theories for achieving that purpose is far from new.[1] Building on a long line of academic and collective discourse, present day deliberations on corporate purpose highlight the interconnectedness of the forces in corporate law and corporate governance that are critical to importing social welfare as a priority concern into the governance frame. Contemporary corporate purpose debates reflect a significant shift in terms of scope and priorities which is reflected in the following themes. First, a certain normalisation of and the growing influence of stakeholderism in engagement with hard questions pertaining to corporate responsibility and accountability as well as the difficulties associated with internalisation of the stakeholderism norm on account of the predominance of the shareholder primacy norm.[2] Second, the need for critical engagement with the status quo of shareholder-oriented corporate governance,[3] the rise in shareholder power and its implications for shareholder accountability and a broader corporate purpose.[4] Third, the importance of being cognizant of the theoretical foundations of corporate governance[5] and the futility of addressing pressing questions around corporate purpose, the role of the corporation in a broader socio-economic and political context and the legal and regulatory systems that sustain it, through an oppositional stand-off between shareholders and stakeholders.[6] This shift is representative of the 'big picture' context in which corporate law, corporate governance, corporate social responsibility

---

[1] Lisa M. Fairfax, *The Shareholder-Stakeholder Alliance: Exposing the Link between Shareholder Power and the Rise of a Corporate Social Purpose*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 113 (Elizabeth Pollman & Robert B. Thompson eds., 2021); Andrew C. Wicks, F. A. Elmore and David Jonas, *Connecting Stakeholder Theory to the Law and Public Policy*, in THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 98 (Jeffrey S. Harrison et. al. eds., 2019).

[2] Peer Zumbansen, *The Corporation in an Age of Divisiveness*, 26 UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW 269 (2023); Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VIRGINIA LAW REVIEW 1238 (2022); *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUSINESS ROUNDTABLE (Aug. 19, 2019) https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans; Alan S. Gutterman et al., *The Lawyer's Corporate Social Responsibility Deskbook* (2019) 9; *All Stakeholders Not Just Shareholders*, INDUSTRY WEEK (Aug. 20, 2019) https://www.industryweek.com/leadership/article/22028107/corporations-new-purpose-to-serve-all-stakeholders-not-just-shareholders; Lila MacLennan, *Nearly 200 CEOs Just Agreed Upon an Updated Definition of the "Purpose of a Corporation"*, QUARTZ AT WORK (Aug. 19, 2019) https://qz.com/work/1690439/new-business-roundtable-statement-on-the-purpose-of-companies.

[3] Zumbansen, *supra* note 2, at 269.

[4] William W. Bratton, *Shareholder Primacy Versus Shareholder Accountability*, 47 SEATTLE UNIVERSITY LAW REVIEW 415-421 (2024).

[5] Lynn Buckley, *The Foundations of Governance: Implications of Entity Theory for Directors' Duties and Corporate Sustainability*, 26 JOURNAL OF MANAGEMENT AND GOVERNANCE 30 (2021).

[6] Zumbansen, *supra* note 2, at 300.

("**CSR**"), environmental, social and governance ("**ESG**") concerns, business and human rights[7] and stakeholderism, is situated.[8]

In light of this recent evolution in the corporate purpose debate in terms of scope and priorities, the Indian legal and regulatory framework governing corporate purpose offers valuable insights to further inform this on-going debate in comparative corporate governance.[9] On the one hand, the Indian framework has adopted the pluralistic stakeholder governance approach in that it requires directors to treat the interests of various specified stakeholders on an equal footing without creating any hierarchy amongst them.[10] The (Indian) Companies Act, 2013 provides that directors "shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment".[11] On the other hand, the Indian framework contains various shareholder-centric facets, including but not limited to shareholders' exclusive rights to elect directors, bring derivative suits and vote on corporate transactions and amendments to the corporate constitution.[12] In other words, the stakeholder-oriented fiduciary duties co-exist with exceptionally strong shareholder power. In the Indian context, this imbalance between directors' duties and shareholders' rights gets even more exacerbated due to its governance framework being dominated by controlling shareholders who are not subjected to fiduciary duties. From the perspective of the theoretical foundations of corporate governance within which the stakeholder-oriented fiduciary duties are situated, the contradiction is reflected in the embrace of the real entity theory by the directors' fiduciary duty to act in good faith and in the best interests of the company.[13]

[7] Florian Wettstein, *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights*, 6 BUSINESS AND HUMAN RIGHTS JOURNAL 312 (2021).
[8] Zumbansen, *supra* note 2, at 300.
[9] The analysis of the Indian legal and regulatory framework in this article is limited to publicly listed companies. This article employs terms such as 'corporations', 'firms', 'companies', 'public companies' and 'organisations' interchangeably and these terms must be construed accordingly, unless specified otherwise.
[10] Companies Act, § 166(2) (hereinafter, the "Companies Act"); Umakanth Varottil, *The Legal and Regulatory Impetus Towards ESG in India: Developments and Challenges*, in RESEARCH HANDBOOK ON ENVIRONMENTAL, SOCIAL AND CORPORATE GOVERNANCE 468 (Thilo Kuntz, ed., 2024); Amir N. Licht, *Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporation* (European Corporate Governance Institute Working Series in Law No. 476, 2019).
[11] Companies Act, § 166(2).
[12] Companies Act, §§ 152, 169, 241-244, 180, 13, 14.
[13] The analysis of fiduciary duties in this article is limited to the fundamental fiduciary duty to act in good faith and in the best interests of the company applicable to all directors at all times. Accordingly, it does not consider the relationship of this overarching duty with other fiduciary duties given that in common law, these other duties may be considered as subordinate to the fundamental duty to act in good faith and best interests representing 'a list of situations where a director is most likely to be in breach of his fundamental duty' - See Janet Dine and Marios Koutsias, COMPANY LAW (Palgrave MacMillan, 2007); Susan Watson, THE MAKING OF THE MODERN COMPANY 81-99 (Hart, 2022).

The directors' duty obligation recognizes the company as a separate and distinct legal entity by not equating the interests of the company with either the interests of its shareholders or stakeholders. However, despite this recognition, the duty operates within the broader imbalanced governance framework as underlined above, which arguably, does not effectively deviate from the shareholder primacy theory and is therefore ineffective as regards the implementation of a stakeholder conception of corporate purpose.

In sum, the Indian corporate purpose picture is riddled with contradictions. The legal and regulatory framework reflects an inherent paradox underpinning its corporate law and corporate governance mechanisms, comprising two limbs. The first limb reflects the imbalance between directors' duties and shareholders' rights in the framework which has largely left critical questions around shareholders', specifically controlling shareholders' responsibilities and accountability, unaddressed. The second limb reflects the contradictions in the theoretical foundations underlying the framework resulting in various ambiguities arising therefrom. The implication of the paradox is that it serves as a systematically entrenched barrier to the implementation of a broader, pluralistic stakeholder governance model of corporate purpose. Against this context, this article seeks to present the Indian approach to corporate purpose as a case study through an analysis of both the limbs of the paradox underlying its corporate law and corporate governance framework. The objective is to contribute to the contemporary discourse on the appropriate purpose of the corporation and its implementation.

In so doing, first, we examine critical features of India's corporate law and corporate governance framework, through an assessment of the manner in which powers, rights and duties are assigned and distributed amongst various corporate constituencies by its framework. Second, we examine the real entity theory, which in our view has the potential to provide a much-needed theoretical foundation for governance structures that lend themselves to a broader, more pluralistic corporate purpose and to extend the long-standing debate on corporate purpose beyond the question of whether corporations should be run for the benefit of either their shareholders or stakeholders by focusing instead on the interests of the corporate entity itself. Third, we argue for reforms within corporate law and governance to address the identified ambiguities and uncertainties that result from the analysis of the Indian corporate purpose paradox.

This article is structured as follows: Section I presents a brief overview of the shareholder primacy theory, stakeholder theory and real entity theory, and discusses their profound implications for corporate purpose. Section II analyses the Indian legal and regulatory framework governing corporate purpose through the assignment and distribution of powers, rights and duties framing highlighted above. Section III identifies ambiguities stemming from the paradox inherent in the framework which hamper the implementation of the stakeholder governance model embraced by it. Section IV examines the manner in which situating the Indian pluralistic stakeholder governance approach in the real entity conception of the corporation can address the identified ambiguities and provide the foundational theoretical basis for enabling the operationalisation of a broader corporate purpose. Section V recommends the re-evaluation of extant corporate law and governance arrangements and examines certain proposals for effectuating the implementation of the stakeholder governance model endorsed by the Indian corporate purpose framework.

I. Shareholder Primacy Theory, Stakeholder Theory and Real Entity Theory: An Overview

Examining critical issues centred around the purpose of corporations and their role in society necessitates the analysis of the theoretical foundations of corporate governance.[14] Accordingly, this Section briefly assesses three distinct corporate governance theories, namely, shareholder primacy theory, stakeholder theory and real entity theory and their implications for corporate purpose. Specifically, the analysis in this Section will demonstrate the shortcomings of framing the corporate purpose debate in terms of shareholderism versus stakeholderism by discussing the principal objections to the shareholder primacy theory and the stakeholder theory and advancing the entity conception as the appropriate theoretical foundation of corporate governance for implementing a broader corporate purpose.

A. Shareholder Primacy Theory

Origins of the shareholder primacy theory, also referred to as the shareholder theory or shareholder wealth maximisation (notwithstanding the distinction between these terminologies) date back

[14] Buckley, *supra* note 5, at 30.

centuries.[15] According to the shareholder primacy theory, the primary objective of the corporation is to maximise profits for its shareholders.[16] It is based on the agency theory and on the economic conception of the company as a nexus of contracts where shareholders are regarded as having taken on the riskiest bargain in relation to their open-ended commitment of investment in the company.[17] Briefly stated, the agency theory considers the incentives of managers (agents) at odds with those of their shareholders (principals) and this misalignment is resolved by shareholder primacy i.e., by requiring managers to maximise shareholder wealth, thereby reducing potential agency costs arising out of the division of ownership and control.[18] The normative foundation of shareholder primacy comprises two pillars. The first norm is substantive and concerns purpose, requiring that the firm be managed for shareholders' financial benefit.[19] The second norm is procedural and concerns power, stating that shareholders should be able to tell managers how to run the firm.[20] The theory assumes that when operationalized, the two norms ensure that market control over production, and hence economic efficiency, is maximised.[21]

Often referred to as "an almost universal" corporate governance principle, shareholder primacy has long been recognized as the dominant theory of corporate governance.[22] Over the course of the twentieth century, scholarship in corporate law, business and economics, as well as related practice, has been shaped by shareholder primacy which rests on the normative agenda of prioritising shareholder wealth over all other social objectives.[23] In fact, it has been argued that despite the absence of a legal requirement to maximise shareholder wealth, the normative belief that shareholder wealth is the right and proper objective function of management has become such a pervasive norm that the legal requirement may be irrelevant.[24] Scholars have affirmed the centrality of shareholder theory in the corporate laws of the UK and the US wherein consideration

[15] Thomas M. Jones and Jeffrey S. Harrison, *Sustainable Wealth Creation: Applying Instrumental Stakeholder Theory to the Improvement of Social Welfare*, in THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 80 (Jeffrey S. Harrison et. al. eds., 2019).
[16] *Id*.
[17] M. Jensen and W. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 JOURNAL OF FINANCIAL ECONOMICS 305 (1976).
[18] *Id*. at 305-360.
[19] Bratton, *supra* note 4, at 405, 410.
[20] *Id*.
[21] *Id*.
[22] Thomas Clarke, *Deconstructing the Mythology of Shareholder Value: A Comment on Lynn Stout's "The Shareholder Value Myth" A Convivium*, 3 DE GRUYTER 26 (2013).
[23] Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 MODERN LAW REVIEW 49-81 (2005).
[24] Robert A. Phillips, Jay B. Barney, R. Edward Freeman and Jeffrey S. Harrison, *Stakeholder Theory,* in THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 6 (Jeffrey S. Harrison et. al. eds., 2019).

of stakeholders' interests is relegated to an "option" dependent on the discretion of management.[25] While the laws of these jurisdictions do not mandate that in situations where there is a conflict between the short-term interests of shareholders and the long-term interests of the company, directors must act in the interests of the former and disregard the latter, they do require directors to ultimately be solely accountable to shareholders.[26] In other words, even when the board takes into account or advances stakeholders' interests, it is a means to promote an end, namely, shareholders' interests.[27] Stated generally, stakeholders' interests are subordinated to those of shareholders' interests in the UK and the US. The shareholder-centric conception of directors' duties in both these jurisdictions is strengthened by the fact that only shareholders (and not stakeholders) exercise critical governance rights, including but not limited to the rights to dismiss directors and sue them for breach of duties through derivative claims.[28] In the Indian context, the fiduciary obligation to consider the interests of various specified stakeholders is rendered rather weak given that the stakeholder-oriented directors' duties operate within the broader framework of shareholder-centric governance. Thus, it has been argued that shareholder primacy is detrimental to the pluralistic approach to the interests of the company and a broader corporate purpose.[29]

The shareholder theory, despite being acknowledged as the dominant theory in terms of in whose interests corporations should be run, has garnered considerable criticism in legal scholarship on various fronts. In addition to being widely criticised as being a barrier to the implementation of a

---

[25] Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*, 25 REGENT UNIVERSITY LAW REVIEW 269-298 (2012); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VIRGINIA LAW AND BUSINESS REVIEW 177-190 (2008); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AMERICAN UNIVERSITY BUSINESS LAW REVIEW 1-54 (2012).

[26] On US law (Delaware), see Cynthia Williams, *Corporate Social Responsibility and Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 48-49 (Jeffrey N. Gordon and Wolf-Georg Ringe eds., 2015); Leo E. Strine Jr., *Corporate Power is Corporate Purpose I: Evidence from my Hometown*, 33 OXFORD REVIEW OF ECONOMIC POLICY 176-187 (2017). On UK law, see Companies Act, 2006 § 172 (hereinafter, the "UK Companies Act"), David Kershaw, COMPANY LAW IN CONTEXT: TEXT AND MATERIALS 382-383 (Oxford University Press, 2012).

[27] UK Companies Act, § 172 requires directors to have regard to employees' interests, the impact of the company's operations on the community and environment and other considerations but only for the purpose of promoting the company's success for the benefit of its members.

[28] On US law (Delaware), see Unocal Corp. v Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); North American Catholic Educ. Prog. Foundation, Inc. v Gheewalla, 930 A.2d 92, 101 (Del. 2007); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders"). On UK law, see UK Companies Act, §§ 168 and 260.

[29] Beate Sjåfjell, Andrew Johnston, Linn Anker-Sorensen and David Millon, *Shareholder Primacy: The Main Barrier to Sustainable Companies*, in COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 79-147 (Beate Sjåfjell and Benjamin Richardson eds., 2015).

pluralistic corporate purpose, the theory poses severe limitations in terms of its inability to comprehend the corporate form in its entirety.[30] The dominant model, based on the view that the corporation is a nexus of contracts, emphasises that the firm is *not* an entity but rather a set of explicit and implicit contracts establishing rights and obligations among various factors of production.[31] This standard account, based on law-and-economics postulates, stresses on the description of the corporation *as* a nexus of contracts, and fails to capture the more important sense in which the corporation *has* a nexus.[32] The depiction of the corporation as devoid of legal personality has had important implications, generating a range of assumptions that are not only questionable from a legal and historical perspective but are also accompanied by various limitations.[33] The limitations of this approach include its methodological individualism which offers little scope for the recognition of the corporation as an autonomous actor and consequently for organisational accountability.[34]

Stated differently, the shareholder primacy conception reduces the corporation to a mere legal fiction or an aggregate of its parts thereby outrightly denying it of its existence as a separate legal entity that has social consequences.[35] Further, given the impact of the predominance of the shareholder primacy drive in corporate law across jurisdictions, shareholder primacy has been criticised from CSR and ESG perspectives for permitting an intensified externalisation of

---

[30] Peter Underwood, *In-corporating Crisis: Time to Shift the UK Paradigm away from Shareholder Primacy*, 35 EUROPEAN BUSINESS LAW REVIEW 701 (2024).

[31] Jensen and Meckling, *supra* note 17, at 311; Stephen Bainbridge, *The Board of Directors*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 292-293 (Jeffrey N. Gordon and Wolf-Georg Ringe eds., 2018); Jonathan Hardman, *Fixing the Misalignment of the Concession of Corporate Legal Personality*, 43 LEGAL STUDIES 443-460 (2023) (describing transaction cost economics as reducing the role of separate legal personality by rendering it 'merely a cheaper mechanism to achieve private ordering'); Arthur W. Machen, *Corporate Personality*, 24 HARVARD LAW REVIEW 253, 257 (1911) (in later interpretations of the agency theory, there is a transformation from understanding the corporation as a 'legal fiction' i.e., artificial but real to viewing it as 'fictitious' i.e., non-existent); Frank H. Easterbrook and Daniel R Fischel, *The Corporate Contract*, 89 COLUMBIA LAW REVIEW 1416, 1418 (1989); Eugene Fama, *Agency Problems and the Theory of the Firm*, 88 JOURNAL OF POLITICAL ECONOMY 289 (1980); Frank H. Easterbrook and Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (Harvard University Press, 1991) (later interpretations of Jensen and Meckling's agency paradigm dissolved the corporation into nothing more than a 'complex set of explicit and implicit contracts' between various self-interested resource holders as a result of which the corporation effectively became 'a matter of convenience rather than reality.'); See generally, Jennifer G. Hill, *Hidden Fallacies in the Agency Theory of the Corporation* (European Corporate Governance Institute Law Working Paper No. 799, 2024).

[32] Beate Sjåfjell, *Sustainable Value Creation Within Planetary Boundaries - Reforming Corporate Purpose and Duties of the Corporate Board*, 12 SUSTAINABILITY 3 (2020); Bainbridge, *supra* note 31, at 292; Rutger Claassen, *Political Theories of the Business Corporation*, 18 PHILOSOPHY COMPASS 4 (2023) (the agency theory has been referred to as 'contractualism with economic foundations').

[33] Hill, *supra* note 31, at 10.

[34] Paul Wilson, *Barring Corporations from the Moral Community: The Concept and the Cost*, 23 JOURNAL OF SOCIAL PHILOSOPHY 74 (1992); Richard B Stewart, *Book Review: Organizational Jurisprudence*, 101 HARVARD LAW REVIEW 371 (1987); William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STANFORD LAW REVIEW 1480 (1989).

[35] David Gindis, *From Fictions and Aggregates to Real Entities in the Theory of the Firm*, 5 JOURNAL OF INSTITUTIONAL ECONOMICS 29 (2009).

environmental, social and economic costs given its disregard for corporate externalities as a governance concern.[36] Shareholder primacy has also been identified as the driver of short-termist, ethically questionable and distributively unjust corporate behaviour.[37] Lastly, the theory has been criticised from the point of view of governance structures with concentrated ownership patterns, such as India, on the ground that the shareholder primacy approach and its elements aggravate controller opportunism by virtue of controlling shareholders' control rights and their resultant ability to extract private benefits of control at the expense of both minority shareholders and stakeholders.[38]

B. Stakeholder Theory

The stakeholder theory, also referred to as the stakeholder value theory, stands in contrast to shareholder primacy in terms of its relatively more holistic approach to corporate governance.[39] While debates concerning the stakeholder theory have been part of academic deliberations on corporate governance since the 1930s,[40] the concept that stakeholders who contribute to, benefit from, and bear risk in companies should have their interests taken into account in corporate decision-making, gained significant influence in public policy debates in the 1980s following the release of Professor Freeman's seminal book 'Strategic Management: A Stakeholder Approach'.[41] Freeman's seminal formulation of the stakeholder theory does not dismiss profitability as an objective of the corporation but views its primary purpose as being a vehicle to manage stakeholder interests[42] where stakeholders are defined as "any group or individual who can affect or is affected by the achievement of the organisation's objectives".[43] The following summarises the basic ideas that tie together stakeholder thinking: "*...business is a set of value-creating relationships among*

---

[36] Beate Sjåfjell, *Realising the Potential of the Board for Corporate Sustainability*, in THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 698 (Beate Sjåfjell and Christopher Bruner eds., 2019); Bratton, *supra* note 4, at 411; Grant M. Hayden and Matthew T. Bodie, *The Problem of Purpose in Corporate Law*, 62 HOUSTON LAW REVIEW 630 (2025).
[37] Iris H-Y Chiu, *Operationalising a Stakeholder Conception in Company Law*, 10 LAW AND FINANCIAL MARKETS REVIEW 173 (2016).
[38] Ernest Lim, *Directors' Duty to Act in the Best Interests of the Company*, in SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 208 (Cambridge University Press, 2020) (hereinafter, "*Best Interests Duty*"); Chiu, *supra* note 37, at 173-174.
[39] Helmut K. Anheier and Christoph M. Abels, *Corporate Governance: What are the Issues?*, in ADVANCES IN CORPORATE GOVERNANCE: COMPARATIVE PERSPECTIVES 13 (Helmut K. Anheier and Theodor Baums eds., 2020).
[40] Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARVARD LAW REVIEW 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARVARD LAW REVIEW 1145 (1932).
[41] Anhenier and Abels, *supra* note 39, at 13.
[42] David Rönnegard and N. Craig Smith, *Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concern*, in THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 117 (Jeffrey S. Harrison et. al. eds., 2019).
[43] R. E. Freeman, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 53 (Cambridge University Press, 1984).

groups that have a legitimate interest in the activities and outcomes of the firm and upon whom the firm depends to achieve its objectives…it is about how customers, suppliers, employees, financiers (stockholders, bondholders, banks, etc.), communities, and management work cooperatively to create value…understanding a business means understanding how these relationships work…the manager's job is to shape and direct these relationships".[44]

The normative basis of the theory lies in its recognition that the interests of stakeholders are of intrinsic value, in that every stakeholder merits its own consideration in view of their interests, and that these may not necessarily benefit shareholders.[45] Its normative implications are therefore distinct from the shareholder theory. Scholars argue that the stakeholder theory provides an alternative theoretical basis for conceptualising a broader corporate purpose that encompasses societal well-being and social welfare owing to its underlying values of pluralistic-objective decision-making and stakeholder inclusiveness.[46] Proponents of the stakeholder theory have advanced various proposals for legal reforms for operationalizing the application of the stakeholder approach, particularly, an extension of directors' duties, representation of stakeholders on the board of directors, voting rights for stakeholder groups and greater disclosure of corporate information.[47]

The growing influence of the stakeholder theory is reflected in a range of policy and legal reforms across jurisdictions, including jurisdictions where shareholder primacy has been the dominant model, such as the US, the UK, and Australia.[48] Such reforms range from the various approaches to the implementation of CSR, the evolution of benefit corporations and constituency statutes and the rising substantive pressures and expectations regarding ESG and diversity, equity, and inclusion in corporate decision-making.[49] The theory has become one of the most prominent theories within both business ethics and management studies, as well as a dominant paradigm for

---

44 Phillips, Barney, Freeman and Harrison, *supra* note 24, at 3.
45 *Id*. at 6-7.
46 *Id*. at 8-9.
47 Shelley Marshall and Ian Ramsay, *Corporate Purpose: Legal Interpretations and Empirical Evidence*, in THE OXFORD HANDBOOK OF THE CORPORATION 172-173 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).
48 Wicks, Elmore and Jonas, *supra* note 1, at 106-107.
49 *Id*. at 101-107; Zumbansen, *supra* note 2, at 294.

CSR approaches.[50] According to scholars like Professor Keay, the stakeholder theory is already one of the chief intellectual backbones of twenty-first century corporate and commercial law.[51]

Stakeholder theorists as well as critics have acknowledged areas within the theory that warrant future research, especially as its reach and influence increases across various spheres of corporate governance and other disciplines.[52] The normative definition of stakeholders within the theory has been criticised for being excessively expansive so as to make it unworkable in practice.[53] Further, the lack of guidance provided by it to directors on the manner in which they should balance and give effect to heterogeneous or conflicting interests of stakeholders has been identified as a limitation posed by theory.[54] Manifestations of stakeholder-sensitive approaches such as non-shareholder constituency statutes and benefit corporations adopted in various states of a shareholder-centric jurisdiction like the US also reflect similar limitations. Despite the variations in the constituency statutes and benefit corporations models of the stakeholder governance framework, criticisms levied against them include the lack of clarity with respect to identification of stakeholders and the manner in which their interests must be considered and balanced which in turn have been attributed to their modest impact on the US corporate purpose landscape.[55] Moreover, stakeholder theorists have acceded to the need for more work required on the question of the corporation's objective functions in the stakeholder theory and whether this concept can be replaced by corporate purpose to meaningfully answer the question of in whose interests and at whose expense should corporations be managed.[56] A final criticism of the stakeholder value theory is that it does not pay adequate attention to the ownership structure of companies.[57] In jurisdictions where the majority of listed companies have controlling shareholders, such as India, it is unlikely

[50] Rönnegard and Smith, *supra* note 42, at 117.
[51] Wicks, Elmore and Jonas, *supra* note 1, at 106.
[52] Paul C. Godfrey and Ben Lewis, *Pragmatism and Pluralism: A Moral Foundation for Stakeholder Theory in the Twenty-First Century*, in THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 32 (Jeffrey S. Harrison et. al. eds., 2019).
[53] E. W. Orts and A. Strudler, *Putting a Stake in Stakeholder Theory*, 88 JOURNAL OF BUSINESS ETHICS 607 (2009).
[54] Stephen Bainbridge, *The Siren Song of Corporate Social Responsibility*, TCS DAILY (Nov. 14, 2005); John Argenti, *Stakeholders: The Case Against*, 30 LONG RANGE PLANNING 442 (1997); Elaine Sternberg, *The Stakeholder Concept: A Mistaken Doctrine*, (Foundation for Business Responsibilities Issue Paper No. 4, 1999).
[55] Rönnegard and Smith, *supra* note 42, at 121,125-127; Grant M. Hayden and Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 BOSTON COLLEGE LAW REVIEW 2442 (2020); Leo E. Strine, *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 THE BUSINESS LAWYER 397-435 (2020).
[56] Phillips, Barney, Freeman and Harrison, *supra* note 24, at 8-9.
[57] Lim, *Best Interests Duty*, *supra* note 38, at 214-215.

that directors will prioritise the interests of stakeholders over those of controllers if these interests conflict, given that directors' appointment and dismissal powers rest with controllers.[58]

C. Real Entity Theory

The real entity theory is the well-known alternative to the partnership/nexus of contracts model of the corporation.[59] While the theory was prominent in debates on the nature of the corporate form between 1900 to 1930, at the turn of the twentieth century, a formulation of it which was more developed as compared to the versions promulgated by early generation entity theorists began to significantly influence legal, social and political theory as well as institutional economics.[60] Early entity theorists used the terms 'natural' and 'real' interchangeably to oppose the then conflated terms 'fiction' and 'artificial' used to describe the corporate form by proponents of the contractarian view of the corporation.[61] Broadly, entity theorists regarded corporations as real, socio-economic entities as opposed to legal fictions existing only in the contemplation of law.[62] In its traditional form, the entity theory model was considered unappealing given its anthropomorphic nature and its characterization of the firm as a human being.[63] However, present day interdisciplinary scholarship that engages in the study of human behaviour and organisations supports a modern version of the real entity theory and the conception that organisations are autonomous entities that are real in terms of their existence and behavioural consequences.[64]

---

[58] *Id*.
[59] Eva Micheler, *Separate Legal Personality-An Explanation and a Defence*, 24 JOURNAL OF CORPORATE LAW STUDIES 311 (2024) (hereinafter "*Separate Legal Personality*").
[60] Gindis, *supra* note 35, at 26, 32; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Law Theory*, 88 WEST VIRGINIA LAW REVIEW 176 (1985).
[61] Gindis, *supra* note 35, at 32.
[62] *Id*.
[63] Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VIRGINIA LAW REVIEW 1911 (2010).
[64] Eva Micheler, COMPANY LAW-A REAL ENTITY THEORY 20 (Oxford University Press, 2021) (hereinafter, "REAL ENTITY THEORY"); Micheler, *Separate Legal Personality*, *supra* note 59, at 311-312; Asaf Raz, *Taking Personhood Seriously*, 2023 COLUMBIA BUSINESS LAW REVIEW 799 (2024) ("...although the idea of legal personhood has had a rocky journey throughout the last hundred years or so, today's academic and public discourse is in the process of rediscovering personhood as a workable concept, no less (and often more) useful than contract, property, or other well-accepted subjects of legal and economic literature"); Hillary A. Sale, *The Corporate Purpose of Social License*, 94 SOUTHERN CALIFORNIA LAW REVIEW 785, 789 (2021); Caleb N. Griffin, *Humanizing Corporate Governance*, 75 FLORIDA LAW REVIEW 689, 740 (2023) (corporations reflect the contradictions, complexities and richness of the individual human beings that create, own, patronize, move, operate and manage them); Tom C. W. Lin, THE CAPITALIST AND THE ACTIVIST: CORPORATE SOCIAL ACTIVIST AND THE NEW BUSINESS OF CHANGE, 163-165 (2022) ("...the conventional view of businesses ignores the contradictions, complexities and richness of human beings - beings who, as the poet Walt Whitman wrote, "contain multitudes"); Tom C. W. Lin, *The New Corporate Political Governance*, 65 BOSTON COLLEGE LAW REVIEW 833-902 (2024).

Fundamentally, the real entity theory holds that the modern corporation is a distinct legal entity and underlines the essential role of the law in the creation of the legal entity status.[65] The theory stands for the proposition that corporations are real in fact, and that this fact cannot be denied, explained away or otherwise reduced.[66] According to the theory, an entity is "an organisation that is separate from all those associated with it, including its members, and has legal standing and personality".[67] In other words, the corporation's existence is separate from the individuals who comprise its decision-making processes and at the same time, it does not function separately from them.[68] In essence, therefore, the entity theory posits that a company, being a separate legal entity, can only act through agents who are required to promote and protect its interests and purposes, which are separate and distinct from, but may overlap with, those of its agents i.e., its shareholders and stakeholders.[69] While previously companies were considered a legal fiction, the modern company is an entity with separate legal personality resulting in limited liability and a separate capital fund (which represents shareholders' interests).[70] In recognizing the distinct interests of the company, the theory underlines the importance of the separate legal personality rule, and in turn, the principle of limited liability, which comprise fundamental tenets of the modern corporate form.[71]

Professor Micheler explains that as per the entity theory, the company is an organisation with decision-making procedures, routines and habits.[72] It derives its 'actor status' from its ability to act in a legally-recognised way as an autonomous legal person, 'independently of the views and interests of its participants'.[73] Corporate law enables the real entity to become a formal subject of

[65] Gindis, *supra* note 35, at 25.
[66] *Id*. at 41.
[67] Andrew Keay, *Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model*, 71 THE MODERN LAW REVIEW 680 (2008).
[68] Gindis, *supra* note 35, at 35.
[69] Ernest Lim, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 166-175 (Cambridge University Press, 2019) (hereinafter "SHAREHOLDERS' DUTIES") (Professor Lim employs the term 'long-term value and viability theory', the essential characteristics and normative implications of which overlap with the real entity conception of the corporation).
[70] Susan Watson, *How the Company Became an Entity: A New Understanding of Corporate Law*, 2 JOURNAL OF BUSINESS LAW 120-141 (2015).
[71] Micheler, *Separate Legal Personality*, *supra* note 59, at 315-321; Frank H. Easterbrook and Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 40 (Harvard University Press, 1991) ("Limited liability is a distinguishing feature of corporate law - perhaps *the* distinguishing feature"); David Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUMBIA LAW REVIEW 1565-1566 (1991) ("No principle seems more established in capitalist law or more essential to the functioning of the modern corporate economy (than the principle of limited liability)").
[72] *Id*. at 15; Micheler, REAL ENTITY THEORY, *supra* note 64, at 1.
[73] Micheler, REAL ENTITY THEORY, *supra* note 64, at 1.

the law thereby allowing 'a social reality to become formally integrated into the legal system'[74] which stands for and does more than serve as a fictional nexus for contracting.[75] That the company does more than serve as a fictional nexus of contracts is further augmented by the recognition in law of the liability of companies in tort, criminal and regulatory mechanisms.[76] The construct of separate legal personality acts as a legal anchor, allowing the corporation to enter into contracts and this anchor is central to its functioning as well as the position that it occupies in the socio-political economy.[77]

The theory therefore has considerable explanatory power in terms of the complexity as well as the legal characteristics of the corporation which have been downplayed, distorted or largely left unexplained by the dominant 'nexus of contracts' and 'collection of assets' views of the firm, according to which the firm is merely either a 'fiction' or an 'aggregate'.[78] Despite the fact that legal personality is important in both accounts, the role of the law in creating legal entity status is disregarded given the undue importance placed on private contractual ordering.[79] The entity conception on the other hand not only underscores the fundamental role of the law in creating legal entity status but is also discernible in various areas of corporate law, for instance, it explains why despite being members of a company, shareholders can initiate legal proceedings against it, and why the company remains unchanged even when the identity of its shareholders and managers undergoes changes.[80] In terms of the differences between the entity theory and the stakeholder theory, two important distinctions are important to bear in mind. First, while both theories attend to the interests of different constituencies, under the former theory, giving effect to these interests is not an end in itself unlike the latter theory; rather, it is a means to an end, i.e., to promote the interests of the company, an entity that is separate and distinct from the shareholders and

---

[74] Micheler, *Separate Legal Personality*, *supra* note 59, at 317.
[75] *Id*. at 3; Raz, *supra* note 64, at 808 ("...both humans and legal persons (such as corporations) can make contracts, but are not themselves a contract, nor a nexus thereof."))
[76] Micheler, *Separate Legal Personality*, *supra* note 59, at 320.
[77] Micheler, REAL ENTITY THEORY, *supra* note 64, at 81-82.
[78] Gindis, *supra* note 35, at 25-26 (arguing that the two dominant economic perspectives on the firm, namely the 'nexus of contracts' and the 'collection of assets' views, are variations on the same theme - they either deny the existence of the firm by regarding it as a legal fiction or reduce it to an aggregate of its parts).
[79] *Id*.
[80] Keay, *supra* note 67, at 663-698; Ngaire Naffine, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MODERN LAW REVIEW 346, 347 (2003) ("...perhaps the greatest political act of law is the making of a legal person").

stakeholders.[81] Second, under the entity theory, directors are agents of the company whereas under the stakeholder theory, directors are agents of the stakeholders.[82]

As is evident, the entity theory and its postulates have multiple implications for traditional theories of the corporation, corporate law, corporate governance and corporate purpose. Dissatisfaction associated with the limitations and incompleteness of mainstream theoretical accounts of the firm based on a purely economic analysis, primarily the 'fictionalist' or 'aggregationist' conceptions, have prompted a search for new foundations for the theory of the firm in legal scholarship.[83] The failure on part of the dominant shareholder primacy theory to acknowledge the genuine existence of the company as a real entity and its negative ramifications for theorising the company are being increasingly recognized by scholars.[84] Economic scholars themselves have stated that "reviving [the] entity theory is also appropriate if one agrees that the notion of the firm in economics…has become dangerously devalued of legal meaning and institutional substance".[85] It has been argued that the real entity theory encompasses conceptual constructs in relation to fundamental aspects of the nature and functions of corporations that economic theories "have a modest ability to model and explain".[86] The call for reinstating the real entity theory in corporate law scholarship has been echoed by prominent scholars such as Professor Blair who suggests that "this forgotten view can provide new foundations for the theory of the firm" and that "the entity view of the firm should be brought back to the centre stage".[87] Professor Orts further suggests that "a combination of legal and economic analysis opens the door for other disciplines besides economics to describe the social nature of the entities called firms" and that "the role played by the law in creating separate entity status for the firm needs to be recognized instead of being downplayed or ignored".[88] These developments reinforce the relevance of real entity theory that applies to the firm in general and underlines the creation of legal entity status as an important role of the law.[89]

---

[81] Keay, *supra* note 67, at 696; Lim, *Best Interests Duty*, *supra* note 38, at 216-217.
[82] *Id*.
[83] Luigi Zingales, *In Search of New Foundations*, 55 JOURNAL OF FINANCE 1623-1653 (2000).
[84] Underwood, *supra* note 30, at 706; Gindis, *supra* note 35, at 27.
[85] Geoffrey M. Hodgson, *The Legal Nature of the Firm and the Myth of the Firm-Market Hybrid*, 9 INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS 37 (2002).
[86] Christian Witting, *The Place of Managers in the Corporate Governance Architecture*, 24 JOURNAL OF CORPORATE LAW STUDIES 276 (2024).
[87] Margaret M. Blair, *Firm-Specific Human Capital and Theories of the Firm*, in EMPLOYEES AND CORPORATE GOVERNANCE 59, 87 (Margaret M. Blair and Mark J. Roe eds., 1999).
[88] Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE LAW AND POLICY REVIEW 254-329 (1999).
[89] Gindis, *supra* note 35, at 27.

The emphasis placed by the real entity theory on the fundamental role of the law in the creation of the legal entity status is inter-linked with the manner in which the theory conceives and conceptualises corporate purpose. Real entity theorists, in recognizing the company as a distinct entity and a socio-economic actor with consequences with respect to its behaviour and conduct, place enormous importance on the company's ability to form intentions, implement them and assume accountability for the impact that its conduct has in terms of externalities.[90] More specifically, the theory addresses the unsettled question underlying corporate purpose debates as regards what constitutes the directors' good faith and best interests duty and its conventional framing in terms of whom it is owed to, i.e., shareholders or stakeholders.[91] In underlining the existence and personhood of the company and consequently its distinct interests, the real entity theory contends that the interests of the company should be understood as the long-term value and viability of the company itself as opposed to being equated with the interests of either its shareholders or stakeholders.[92] The long-term value and viability of the company requires the board and management to eschew short-termism to ensure that the company not only survives but also flourishes in the long-term.[93] It consists of protecting intellectual capital, (R&D investments, intellectual property), human capital (employees and suppliers), social capital (customers and the community), natural capital (future generations and the environment) and financial capital (profits and share price).[94]

Further, while acknowledging the importance of protecting and promoting shareholders' interests, the theory stands for the proposition that shareholders' interests do not constitute a company's primary or sole purpose.[95] Its normative basis therefore is that giving effect to corporate interest promotes the long-term and sustainable growth of the company.[96] In this way, the real entity theory

---

[90] Witting, *supra* note 86; Elise Bant, *Corporate Culture and Systems Intentionality: Part of the Regulator's Essential Toolkit*, 23 JOURNAL OF CORPORATE LAW STUDIES 345-374 (2023).
[91] See generally, Susan Watson and Lynn Buckley, *Directors' Positive Duty to Act in the Interests of the Entity: Shareholders' Interests Bounded by Corporate Purpose*, 24 JOURNAL OF CORPORATE LAW STUDIES 233-265.
[92] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 163-167.
[93] *Id*.
[94] Colin Mayer, *Who's Responsible for an Irresponsible Business: An Assessment*, 33 OXFORD REVIEW OF ECONOMIC POLICY 163 (2017).
[95] Lim, SHAREHOLDERS' DUTIES, *supra* note 69.
[96] Buckley, *supra* note 5, at 31, 47; Watson and Buckley, *supra* note 91, at 235; Elizabeth Pollman, *Startup Governance,* 168 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 218 (2019) ("The value of the corporation itself…best reflects the sum of the participants' interests and it is to the corporation that the fiduciary duty should be owed").

moves the corporate purpose debate beyond the conventional framing as to whether corporations should be run for the benefit of either their shareholders or stakeholders by focusing instead on the interests of the corporate entity itself.[97] This shift in perspective broadens the traditional understanding of what constitutes corporate interest in terms of directors' duty to act in good faith and in the best interests of the company.[98] That the good faith and best interests duty is owed to the company as a separate entity from its shareholders and the relationship of this duty to corporate purpose has far-reaching implications for corporate purpose and the scholarship on it.[99] In line with the position held by many scholars, this article argues that the real entity theory not only addresses the challenges posed by the shareholder theory and the stakeholder theory, but also provides an alternative theoretical foundation for enabling corporate governance frameworks that credibly lend themselves to the implementation of a pluralistic corporate purpose.[100]

II. DECONSTRUCTING THE INDIAN CORPORATE PURPOSE PARADOX

Having provided a brief overview of the shareholder primacy theory, stakeholder theory and real entity theory and their implications for corporate purpose, in this Section, we examine the manner in which these theoretical constructs interact with and contribute to ambiguities in the Indian legal and regulatory framework governing corporate purpose.

A. Corporate Power Structure and Corporate Purpose

In order to examine the question of corporate purpose, understanding the essential characteristics of the corporate governance structure where power is divided between the board of directors on

[97] Buckley, *supra* note 5, at 33; Lim, *Best Interests Duty*, *supra* note 38, at 215; Raz, *supra* note 64, at 808-811, 815 (arguing that over the last half century, the culture of personhood minimization or dismissal of the corporations' entity nature connects with a broader problem of reductionism in corporate law scholarship. This reductionist understanding has resulted in formulating not just legal concepts but also critical debates in corporate law around minimisation of agency costs and the question of whom directors owe their fiduciary duties to. Recognition of corporate personhood demonstrates the complex structure of corporate law which rather than being understood as predominantly being about agency costs and fiduciary duties must be understood as involving at least five interacting sub-categories (the laws of corporate purpose, personhood, legal obedience, residual claimancy, and fiduciary duty)).
[98] Buckley, *supra* note 5, at 33.
[99] Watson and Buckley, *supra* note 91, at 235.
[100] See Micheler, REAL ENTITY THEORY, *supra* note 64, at 36, 55 (Professor Micheler states that in relation to corporate purpose, the real entity approach advanced in the book is agnostic as to how the balance between shareholders and other participants should be struck – it is possible to adopt the real entity approach and at the same time, either commit to an economic normative argument in favour of a shareholder-centred model of the corporation or rely on arguments that justify a stakeholder-oriented model). This article, in analyzing the Indian stakeholder governance corporate purpose framework and its underlying inconsistencies, advances the real entity theory as a theoretical basis for enabling India's stakeholder-oriented model.

the one hand and shareholders in the general meeting on the other is critical. Further, the governance theories that underpin the division of power under corporate law and the manner in which they interact with each other in the creation of rights and duties amongst the various constituents of the corporation have important ramifications for the analysis of corporate purpose. Accordingly, in this Section, we analyse the inherent contradictions in the Indian legal and regulatory framework governing corporate purpose, namely, the Companies Act, 2013 (hereinafter, the "**Companies Act**") and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter, the "**SEBI Listing Regulations**") through an assessment of the distribution and assignment of powers, rights and duties within the framework.

1. *Directors' Fiduciary Duty to Act in Good Faith and in the Best Interests of the Company*

In jurisdictions governed by common law such as India, directors are subject to a range of duties derived from common law and statutory provisions.[101] In the context of fiduciary duties, the overarching duty to act in good faith and in the best interests of the company, has been held to be the 'core' or 'fundamental' fiduciary duty which is applicable to all directors.[102] Section 166(2) of the Companies Act stipulates that 'a director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment'. Further, the Companies Act's Code for Independent Directors requires independent directors to 'safeguard the interests of all stakeholders', 'balance the conflicting interests of stakeholders' and 'assist in protecting the legitimate interests of the company, shareholders and its employees'.[103] Other stakeholder-oriented elements of India's framework consist of mandatory CSR obligations, including the requirement to constitute a CSR committee and the significant impetus in recent times regarding regulatory disclosures with respect to ESG obligations for large publicly listed companies.[104]

[101] Jennifer Hill, *Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance*, 5 UCI JOURNAL OF INTERNATIONAL, TRANSNATIONAL AND COMPARATIVE LAW 167 (2020).
[102] Madoff Securities International Ltd v Raven [2013] EWHC 3147 (Comm) at [188]; Item Software (UK) Ltd v Fassihi [2005] 2 BCLC 91 at [41].
[103] Companies Act, Schedule IV, paras. II (5) and (6); Companies Act, Schedule IV, para III (12); Companies Act, § 149(8).
[104] Companies Act, § 135; Companies Act, Schedule VII; SEBI Listing Regulations, Reg. 34(2)(f).

The statutory provision of the best interests duty embodies the pluralistic stakeholder governance approach and repudiates shareholder primacy in that it places the interests of shareholders and specified stakeholders on an equal footing, without indicating any preference or hierarchy.[105] It is distinct from the enlightened shareholder value model reflected in Section 172 of the UK Companies Act, 2006 (hereinafter, the "**UK Companies Act**") under which directors are required to take into account the interests of stakeholders only as a means to further the end of benefiting shareholders.[106] Provisions in the Companies Act governing directors', including independent directors' duties and responsibilities "enlarge the boundaries of constituencies deserving the attention of corporate law and corporate boards" and are clear in their prescription that shareholder wealth maximisation should no longer be the primary lens for decision-making by Indian boards.[107] The statutory enactment process as well as the express language of the provisions indicate that there is a positive duty on directors requiring them to consider various stakeholder interests.[108]

In addition to prescribing mandatory CSR requirements for large companies, the Companies Act mandates companies subject to the CSR spending requirements to constitute a CSR committee comprising at least three directors, one of whom must be an independent director.[109] The CSR committee is responsible for formulating and recommending the CSR policy to the board, monitoring the CSR policy of the company from time to time and ensuring reporting of CSR activities.[110] The requirement to constitute the CSR committee is reflective of the adoption of the 'constituency directors' model by company law in India in that while directors are appointed by shareholders, they are specifically required under the law to promote the interests of stakeholders.[111] The Indian CSR board committee model of constituency directors is different from the widely recognised German co-determination model of constituency directors wherein directors

[105] Varottil, *supra* note 10, at 468.
[106] UK Companies Act, § 172(1).
[107] Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE UNIVERSITY LAW REVIEW 465, 466 (2017).
[108] Varottil, *supra* note 10, at 467.
[109] Companies Act, § 135; Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE UNIVERSITY LAW REVIEW 535 (2024).
[110] Companies Act § 135; Lim, *Best Interests Duty*, *supra* note 38, at 232.
[111] Ernest Lim, *Constituency Directors*, in SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 142 (Cambridge University Press, 2020).

are appointed by, or are representatives of, certain stakeholders to advance their interests.[112] The mechanism of constituency directors in India is complemented and reinforced by the best interests duty under which directors are required to promote the interests of stakeholders such as employees, the community and the environment.[113]

Finally, the good faith and best interests duty provision, at least in theory, is reflective of the real entity conception of the corporation in that it treats the company's interests as distinct and separate from those of its shareholders given that the fiduciary duty is owed to the company as an entity separate from its shareholders. The normative assumption as regards recognizing the distinct interests of the company and not equating them with the interests of shareholders and thereby not requiring directors to prioritise shareholder wealth maximisation is that directors will base their decisions in the long-term and sustainable growth of the company.[114] However, as we will demonstrate, proper contextualization of the best interests duty against other central features of corporate law in India, namely, shareholders' rights and its concentrated shareholder environment, manifest the infirmities in India's pluralistic stakeholder governance framework.

2. *Shareholder-centric Rights and Controller Dominance*

Shareholders in common law jurisdictions, particularly Asian jurisdictions such as India, wield significant powers, also known as control rights.[115] These powers include but are not limited to appointing and removing directors at any time without cause by an ordinary resolution,[116] unilaterally altering the articles of association by a special resolution,[117] compelling directors to call a general meeting at any time at the company's expenses by members 10 percent of the voting capital or voting rights,[118] approving mergers and acquisitions,[119] approving related party

[112] Paul Davies, *Efficiency Arguments for the Collective Representation of Workers*, in THE ANATOMY OF LABOUR LAW 382-384 (Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl eds., 2015); Mitbestimmungsgesetz 1976 (May 4, 1976) (Codetermination Act, 1976); Wolfgang Streeck, *Codetermination: The Fourth Decade*, in INTERNATIONAL PERSPECTIVES ON ORGANIZATIONAL DEMOCRACY (Bernhard Wilpert and Arndt Sorge eds., 1984); Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, in EMPLOYEES AND CORPORATE GOVERNANCE 184 (Margaret M. Blair and Mark J. Roe eds., 1999).
[113] Lim, *Best Interests Duty*, *supra* note 38, at 218.
[114] Watson and Buckley, *supra* note 91, at 234-235.
[115] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 11.
[116] Companies Act, § 169.
[117] Companies Act, §§ 13, 14.
[118] Companies Act, § 100.
[119] Companies Act, Chapter XV.

transactions,[120] approving significant transactions,[121] voluntarily winding up a company by special resolution[122] and inspecting the company's documents.[123] Moreover, many enforcement rights under the Companies Act are conferred exclusively on shareholders. These enforcement rights include the right to enforce directors' duties through derivative lawsuits and the right to petition against oppression and mismanagement.[124] Taken together, these powers, many of which are exercised exclusively by shareholders, become even more pronounced in governance structures such as India that are characterised by concentrated ownership patterns.[125]

Controlling shareholders, also known as promoters, who can exercise significant formal as well as informal power over the board, are a defining characteristic of Indian publicly listed companies.[126] They are in a position to exercise their power by influencing the company to make decisions that benefit them at the expense of or to the detriment of the company and its stakeholders.[127] This is on account of the potent and exclusive rights conferred on shareholders with respect to appointment and removal of directors.[128] At the core of appointment rights lie shareholders' power to vote on the selection of directors.[129] The impact of this power is much greater if shareholders also have the power to nominate the candidates for election, as is the case in India.[130] Moreover, under the Companies Act, crucial rights related to corporate decision-making rest exclusively with shareholders, including but not limited to voting rights with respect to director elections, appointments and dismissals, bringing derivative suits and voting on corporate transactions and amendments to the corporate constitution. While the exercise of these rights is subject to exceptions, the ambit of the exceptions is extremely narrow in that they are limited to specific

[120] Companies Act, § 188 and SEBI Listing Regulations, Reg. 23.
[121] Companies Act, § 180(1).
[122] Companies Act, § 304.
[123] Companies Act, § 186(10).
[124] Companies Act, §§ 241-246.
[125] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 12.
[126] OECD CORPORATE GOVERNANCE FACTBOOK 2023, Table 1.1, 27 (2023) https://www.oecd-ilibrary.org/finance-and-investment/oecd-corporate-governance-factbook-2023_6d912314-en; Afra Afsharipour and Manali Paranjpe, HANDBOOK ON CORPORATE GOVERNANCE IN INDIA: LEGAL STANDARDS AND BOARD PRACTICES 27-44 (2021); Vikramaditya Khanna, *Enforcement of Corporate and Securities Law in India: The Arrival of the Class Action?*, in ENFORCEMENT OF CORPORATE AND SECURITIES LAWS: CHINA AND THE WORLD 348 (Robin Hui Huang and Nicholas Calcina Howson eds., 2017); George S. Geis, *Shareholder Power in India*, RESEARCH HANDBOOK ON SHAREHOLDER POWER 592 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[127] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 12.
[128] Companies Act, Schedule IV; Companies Act, §§ 149, 152 and 169.
[129] John Armour, Luca Enriques, Henry Hansmann and Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 53 (John Armour, Luca Enriques et. al eds., 2017).
[130] *Id*.; Companies Act, §§ 152 and 149.

voting-based limitations and transaction-based limitations.[131] Therefore, besides the specific voting and transaction-based limitations, the applicable general rule is that shareholders can exercise their voting rights as they please and in whatever ways they choose to. In other words, the limitations on shareholders' voting powers are the narrow exceptions to the rule that they can vote as they please.[132]

Further, the significant powers wielded by shareholders are augmented by the doctrine of limited liability, according to which shareholders are neither liable for the company's debts or liabilities nor are they personally liable for the adverse outcome of the decisions of the general meeting in the sense that they are not liable to make restitution or pay damages to the company, other shareholders or third parties.[133] Their liability is restricted to any unpaid amount of the shares that they have acquired.[134] Shareholders are held personally liable only in exceptional situations, for instance, fraudulent trading where they have acted as de facto or shadow directors or when the corporate veil is pierced.[135] All in all, shareholders in India exercise significant powers under the Companies Act, including powers to elect and remove directors, approve critical matters such as amalgamations, mergers, sale of assets and dissolutions as well as various enforcement rights and these powers get augmented in the context of controlling shareholders. As regards the division of power in corporate law, it has been argued that shareholders' fundamental and exclusive powers are so significant in terms of their impact and influence, that they involve the direct expression of the 'corporate will'.[136] It is important to note that despite the significance of the powers vested in controlling shareholders in India, coupled with the protection of limited liability, controlling shareholders are not subjected to duties as regards the exercise of their powers and influence.

B. Consequences of the Disrupted Equilibrium in the Corporate Power Structure

The analysis of the fiduciary duty of best interests and significant shareholders' rights discussed above underscores the first limb of the paradox underpinning India's corporate purpose

---

[131] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 13-14.
[132] *Id*.
[133] *Id*. at 13.
[134] *Id*.
[135] Prest v Petrodel Resources Ltd [2013] 2 AC 415.
[136] Robert Flannigan, *Shareholder Fiduciary Accountability*, 1 JOURNAL OF BUSINESS LAW 5 (2014) (hereinafter, "*Shareholder Accountability*") ("The bulk of the power granted to a board or general meeting involves will definition. The powers to elect and remove directors determine which persons actually express the corporate will. Shareholder powers to approve particular matters (amalgamations, continuations, sales of assets, dissolutions) obviously involve the direct expression of corporate will")).

framework. This limb reflects the imbalance between directors' duties and shareholders' rights in the framework that has largely left critical questions around shareholders' responsibilities and accountability unaddressed. The manner in which corporate law is configured in India tilts directorial priorities in favour of shareholders and therefore, the predominance of shareholder primacy as well as the difficulties associated with effectuating stakeholderism in practice are a natural consequence of the configuration of corporate law itself. The design of corporate law is such that only shareholders are entitled to exercise exclusive powers, specifically with respect to electing directors, voting on corporate transactions and amendments to the corporate constitution, and enforcing directors' fiduciary duties through derivative action.

The key shareholder-centric feature which cements shareholder centrality in the Indian framework governing corporate purpose is that shareholders who control a majority of voting shares elect the board.[137] Controlling shareholders wield the power to appoint and dismiss directors, including independent directors, which hampers independent decision-making by directors, including cases or situations wherein directors want to consider and balance the interests of stakeholders. Directors associate an allegiance to controlling shareholders and hesitate to contradict or stand against corporate actions proposed by such shareholders on account of the nomination, selection and removal processes being subject to the voting power of controlling shareholders.[138] The stakeholder-friendly orientation of the best interests duty is rendered ineffective given that the framework lacks the means through which stakeholders may enforce their rights in cases where their interests are not taken into account.[139] Moreover, the framework is unclear in terms of the universe of stakeholders and the manner in which directors must identify, weigh and balance the interests of various stakeholders.[140]

---

[137] Brian R. Cheffins, *The Past, Present and Future of Corporate Purpose*, (European Corporate Governance Institute Law Working Paper No. 713) 50-51, 62-63 (2023) (on the importance of the right to elect directors in the context of corporate purpose).
[138] Companies Act, § 178; SEBI Listing Regulations, Reg. 19; Afsharipour, *supra* note 107, at 494-495; Vikramaditya Khanna and Shaun J. Matthew, *The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence*, 22 NATIONAL LAW SCHOOL OF INDIA REVIEW 35, 37-38 (2010).
[139] Mihir Naniwadekar and Umakanth Varottil, *The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis*, (NUS Working Paper No. 2016/006) 15-17 (2016); Devarshi Mukhopadhyay and Rudresh Mandal, *The End of Shareholder Primacy in Indian Corporate Governance? Says Who?!*, 46 COMMONWEALTH LAW BULLETIN 603 (2020).
[140] Companies Act, § 166; Companies Act, Schedule IV, para. II (5) and para III (12); SEBI Listing Regulations, Regs. 4(2)(d) and 4(2)(f); Naniwadekar and Varottil, *supra* note 139, at 14; Afsharipour, *supra* note 107, at 490.

The fiduciary duty mandate that requires directors to promote the interests of stakeholders operates within a legal framework in which shareholders continue to wield exclusive powers with respect to directors' appointment, dismissal and enforcement of directors' duties. With respect to the pluralistic stakeholder governance model embodied by Section 166(2) of the Companies Act, it has been argued that "the magnanimity of its verbiage and rhetoric in favour of stakeholders merely pays lip service to them and obscures any real teeth or legal ammunition available to non-shareholder constituencies to assert those rights as a matter of law."[141] The best interests duty, despite recognizing the company as a separate and distinct legal entity by not equating the interests of the company with either the interests of its shareholders or stakeholders, operates within the broader shareholder-centric governance framework. It therefore does not effectively deviate from the shareholder primacy theory and is consequently ineffective in terms of the implementation of the stakeholder conception of corporate purpose. The imbalance in the Indian framework governing corporate purpose on account of its shareholder-friendly facets gets even more exacerbated given that the governance framework is dominated by controlling shareholders who exercise significant powers through formal and informal means without being subjected to concurrent legal duties when they exercise these powers or exert their influence.[142]

C. Theoretical Contradictions Underlying the Indian Corporate Purpose Paradox: A Comparative Assessment

The second limb of the Indian corporate purpose paradox is discernible in the contradictions in the theoretical foundations, namely, the shareholder primacy theory, stakeholder theory and real entity theory underlying its framework. The good faith and best interests duty under Section 166(2) of the Companies Act requires directors to treat the interests of various specified stakeholders on an equal footing without creating any hierarchy amongst them. In this sense, Section 166(2), by explicitly requiring directors to consider and protect the interests of stakeholders, embodies the stakeholder theory and departs from the shareholder primacy theory. Moreover, the fiduciary duty, in creating and recognizing the distinction between the interests of the company and the interests of shareholders and other specified stakeholders, not only repudiates the shareholder primacy theory but also embraces the real entity theory. However, despite embodying pluralistic

[141] Naniwadekar and Varottil, *supra* note 139, at 1, 20-21.
[142] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 13.

stakeholderism and recognizing the company as a distinct legal entity which is separate from its shareholders, the fiduciary duty functions within the broader shareholder-centric governance framework embedded in principles of the shareholder primacy theory.

Contradictions between theoretical foundations and governance systems underlying corporate purpose frameworks are evident in other jurisdictions as well. One of the primary arguments in favour of the shareholder primacy theory, especially when compared with the stakeholder theory, is that it is clear and unambiguous in terms of its prescription of the corporate objective, which is, shareholder wealth maximisation.[143] This claim can be contested by demonstrating the inconsistencies between theories and systems governing corporate purpose in the UK and the US whose corporate governance frameworks (notwithstanding variations in approaches) reflect the predominance of shareholder primacy. The UK has been described as "the bastion of shareholder primacy"[144] and is widely regarded as a shareholder-friendly jurisdiction on account of the shareholder-centric features of its company law.[145] However, a case study deploying the team production theory, which has been held to have its roots in the stakeholder theory, sheds light on key elements of UK's corporate law architecture, such as directors' duties, shareholders' rights and allocation of managerial authority.[146] It also further augments the point established earlier in this Section as regards the proper contextualization of the best interests duty against other central features of corporate law.[147]

Briefly stated, the team production model developed by Professors Blair and Stout overlaps substantially with the stakeholder theory in its recognition that all those affected by the performance of the corporation, for instance, customers, suppliers, employees and shareholders,

[143] R. E. Freeman, A. C. Wicks and B. Parmar, *Stakeholder Theory and "The Corporate Objective Revisited"*, 15 ORGANIZATION SCIENCE 364-369 (2004); Jones and Harrison, *supra* note 15, at 80-81.
[144] P. M. Vasudev and S. Watson, *Introduction*, in CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 6 (P. M. Vasudev and S. Watson eds., 2012).
[145] Vincenzo Bavoso, *The Global Financial Crisis, the Pervasive Resilience of Shareholder Value and the Unfulfilled Promise of Anglo-American Corporate Law*, 6 INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 213, 215 (2014); Paul Davies and Jonathan Rickford, *An Introduction to the New UK Companies* Act, 5 EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 51, 53 (2008).
[146] Brian Cheffins and Richard Williams, *Team Production Theory Across the Waves*, 74 VANDERBILT LAW REVIEW 1583-1624 (2021); Claudio R. Rojas, *An Indeterminate Theory of Canadian Corporate Law*, 47 UBC LAW REVIEW 59, 98 (2014) (maintaining that the team production model is rooted in stakeholder theory).
[147] Cheffins and Williams, *supra* note 146.

have an interest in its operations.[148] It seeks to address the largely unaddressed gap in the stakeholder theory regarding the manner in which corporate decision-makers are to be held accountable with respect to considering and balancing the interests of various stakeholders by directly linking consideration of non-shareholder constituencies, especially employees, with firm productivity.[149] Stated simply, the model provides that efficient production is a function of firm-specific investment by a wide range of stakeholders - a team "of people who enter into a complex agreement to work together for their mutual gain", rather than a hierarchy.[150] The governance implications of the team production model stem from its requirement to protect stakeholders' firm-specific investments - under the model, the decision-maker is tasked with coordinating the contributions of different stakeholders to protect their expectations of a return on their investments and ensure curtailment of expropriation by various stakeholder groups.[151] This function is assigned to the board of directors who operate as 'mediating hierarchs' to balance stakeholder interaction and facilitate the right ex-ante level of specific investments by all parties.[152]

The case study which examines the UK corporate law and governance framework against the team production model demonstrates that board centrality and autonomy, which form part of key elements of the team production model, feature prominently in UK corporate governance despite its shareholder-centric legal regime.[153] In so doing, it draws attention to the often neglected role played by private ordering in the development of team-production friendly arrangements in UK corporate governance.[154] The study also illustrates that proper contextualisation of powerful shareholder rights, including but not limited to the exclusive right under Section 168 of the UK Companies Act to remove directors by means of a simple majority vote in the general meeting, validates the claim that their mere existence cannot fundamentally discredit the team production theory in the UK corporate law and governance context.[155] It is important to note that Section 168

---

[148] Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VIRGINIA LAW REVIEW 247-328 (1999); Michael Magill, Martine Quinzil and Jean-Charles Rochet, *A Theory of the Stakeholder Corporation*, 83 ECONOMETRICA 1685 (2015); Wicks, Elmore and Jonas, *supra* note 1, at 97, 98 (the team production model overlaps substantially with the stakeholder theory).
[149] Blair and Stout, *supra* note 148, at 247.
[150] *Id*. at 278; Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 18 (Jeffrey N. Gordon and Wolf-Georg Ringe eds., 2017).
[151] Gilson, *supra* note 150, at 19.
[152] *Id*.
[153] Cheffins and Williams, *supra* note 146.
[154] *Id*.
[155] *Id*.

in particular has been described as the "most notable among the shareholders' powers of strategic intervention under UK law"[156] given that when the director removal power was introduced, it was considered to have "shifted ultimate control of the direction of the company from the board (and, often, the management) to the general meeting of the shareholders, which came to be viewed as the ultimate controller of the company's assets because of its power to 'hire and fire' the directors."[157]

Similarly, in the context of US Delaware law, Blair and Stout, who advanced the team production model of corporate governance have argued that "many features of corporate law in the United States are more consistent with our team production model than they are with shareholder primacy, at least if shareholder primacy is interpreted to mean maximisation of shareholder value in the short term."[158] They base their argument on the contention that under US corporate law, "prescriptions for directors' duties under the team production model turn out to be very similar, and perhaps even 'observationally equivalent' in practice to the prescriptions that advocates of long-term share value maximisation would make" and that the alignment between corporate law and the team production model is fortified on account of this.[159] Board centrality and autonomy, which are key features of the team production theory, feature prominently in US corporate law given that directors "are not subject to direct control or supervision by anyone, including the firm's shareholders." Instead, "corporate law gives boards of directors total authority over corporations."[160] As regards shareholder-centric features of US corporate law, such as exclusive shareholder rights to select directors and initiate derivative litigation, Blair and Stout have submitted that when properly contextualised, it becomes evident that these rights are of limited

[156] Marc T. Moore, *United Kingdom: The Scope and Dynamics of Corporate Governance Regulation*, in COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 929 (Andreas M. Fleckner and Klaus J. Hopt eds., 2013).
[157] UK Companies Act, 1948 c. 38, § 184; Andrew Johnston, Blanche Segrestin and Armand Hatchuel, *From Balanced Enterprise to Hostile Takeover: How the Law Forgot About Management*, 39 LEGAL STUDIES 75, 91 (2019).
[158] Blair and Stout, *supra* note 148 (note that the authors acknowledge that the team production theory is more relevant for widely held corporations than for other types of companies and that Delaware General Corporation Law is the only corporate law statute cited in the article); Margaret M. Blair, *Directors' Duties in a Post-Enron World: Why Language Matters*, 38 WAKE FOREST LAW REVIEW 890 (2003); Wicks, Elmore, and Jonas, *supra* note 1, at 97, 98. Given that a majority of US public companies are incorporated under Delaware law, our analysis is limited to it - See generally, Stephen Bainbridge, DExit Drivers: Is Delaware's Dominance Threatened?, (UCLA School of Law Law-Econ Research Paper No. 24-04, 2024); Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 GEORGIA LAW REVIEW 1111, 1113 (2021); John Armour, Bernard Black and Brian Cheffins, *Delaware's Balancing Act*, 87 INDIANA LAW JOURNAL 1345, 1348 (2012).
[159] Blair, *supra* note 158, at 890-891.
[160] Margaret M. Blair, *Corporate Law as a Solution to Team Production Problems*, in THE OXFORD HANDBOOK OF THE CORPORATION 203 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).

practical significance.[161] Therefore, according to them, substantively, US corporate law conforms with the team production theory and this interpretation of corporate law is supported by many proponents of the stakeholder theory.[162]

Further, in the UK, the legal construct of the company is that of a 'separate legal person' subject to decision-making by the board of directors and, to a greater latitude than in many other jurisdictions, by shareholders.[163] Section 16 of the UK Companies Act states that the company, on incorporation, becomes a body corporate capable of exercising all functions of an incorporated company. The fiduciary duty of good faith and best interests embodied under Section 172 of the UK Companies Act provides for a range of considerations to be taken into account by the board, including stakeholders' interests, and such consideration of various interests is meant to serve as a means to promote an end which is shareholders' interests. Hence, the requirement to consider stakeholder interests is rendered rather weak given the subordination of stakeholders' interests to those of shareholders' interests. Moreover, despite the recognition of the separate entity status of the company under the UK Companies Act, the directors' fiduciary duties operate within the overarching framework of shareholder primacy given the shareholder-centric conception of the best interests duty which is strengthened by powerful governance rights exercised exclusively by shareholders. Such rights include rights relating to director removals and initiating derivative litigation for breach of directors' duties.[164] Sections 16 and 172 when compared, therefore, give rise to ambiguities with respect to the appropriate theory of the UK corporation.[165]

The ambiguity resulting from the interaction between theoretical approaches and the corporate governance system in the UK can therefore be summarised as follows: the requirement that the company be run in the interests of its members i.e., shareholders, necessarily disregards or suppresses the interests of the company as a distinct legal entity and yet, the fiduciary duty of good faith and best interests is owed to the entity itself. Phrased differently, the corollary of the legal requirement that directors run the company in the interests of its members is the potential

---

[161] Blair and Stout, *supra* note 148, at 293-294, 310-111; Blair *supra* note 160, at 204-205.
[162] Marshall and Ramsay, *supra* note 47, at 173-174; Blair and Stout, *supra* note 148.
[163] Salomon v Salomon & Co Ltd [1896] UKHL 1; Christopher Bruner, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (Cambridge University Press, 2013) (for a discussion on the significantly greater latitude of shareholder powers in the UK as compared to the US).
[164] UK Companies Act, §§ 168 and 260.
[165] Underwood, *supra* note 30, at 705.

suppression and disregard of the interests of the company as a distinct legal entity.[166] Similarly, in relation to the legal conception of the corporation as a separate legal entity in the US, Delaware courts, in interpreting the fiduciary duty of best interests state that directors are required to act for the benefit of the 'corporation' and more often than not append the words 'and its shareholders' thereby equating the interests of the corporation with those if its shareholders.[167] From the perspective of theoretical foundations and legal frameworks underlying corporate purpose, like India, the UK and the US present a mixed picture as demonstrated by the manner in which the three corporate governance theories overlap and interact with each other, resulting in contradictions with respect to both corporate purpose as well as the corporate form.

III. AMBIGUITIES AND CONTRADICTIONS IN THE INDIAN CORPORATE PURPOSE FRAMEWORK

Following on from the discussion on both limbs of the Indian corporate purpose paradox, in this Section, we examine the ambiguities and contradictions emanating therefrom and their hindering implications for operationalising stakeholder governance in India.

A. Lack of Clarity on the Best Interests Duty

In the Indian context, corporate law in general, and the Companies Act in particular, does not expressly stipulate what is meant by 'in the best interests of the company'.[168] Further, other than providing that a company may be formed for any "lawful purpose", there are no specifications on the concept of corporate purpose in the Companies Act.[169] The lack of clarity with respect to the best interests duty which underpins the pluralistic stakeholder governance model in India renders the purported objectives that directors are expected to pursue elusive and unclear. This uncertainty is supplemented by the disjunct between the fiduciary duty to act in the best interests of the company and the appointment and removal processes of directors.[170] Corporate law, in requiring

[166] *Id*.
[167] Norman Veasey and Christine T. Di Guglielmo, *How Many Masters Can A Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUSINESS LAWYER 764 (2008); Simone M. Sepe, *Intruders in the Boardroom: The Case of Constituency Directors*, 91 WASHINGTON UNIVERSITY LAW REVIEW 344 (2013); Guth v Loft 5 A2d 503, 509 (Del 1939); NACEPF v Gheewalla 930 A 2d 92, 99, 101 (Del 2007); Ebay Domestic Holdings, Inc v Newmark 16 A 3d 1 (Del Ch 2010); Martin Gelter and Geneviève Helleringer, *Constituency Directors and Corporate Fiduciary Duties*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 304 (Andrew S. Gold and Paul B. Miller eds., 2014).
[168] Sjåfjell, Johnston, Anker-Sorensen and Millon, *supra* note 29, at 79-147; J. Quinn, *The Sustainable Corporate Objective: Rethinking Directors' Duties*, 11 SUSTAINABILITY 6734 (2019); Sjåfjell, *supra* note 32, at 7.
[169] Companies Act, § 3; Afsharipour, *supra* note 107, at 466-467.
[170] Gelter and Helleringer, *supra* note 167, at 303.

and enabling the appointment of directors by specific constituencies, is implicit in its precept that directors not only represent these groups or individuals in a symbolic sense, but that they are also intended to be knowledgeable about and sympathetic to their interests.[171] The very fact that there is a designated appointer creates a specific connection between the constituency director and the appointing constituency which is typically reinforced by the latter's power to either dismiss or not reappoint the director.[172] In other words, "loyalty inspired by selection is confirmed by the confidence which the appointers repose in their nominees which is reinforced by the appointer's power of dismissal".[173]

In exercising their voting rights, shareholders, barring exceptional situations, are unrestrained in the employment of their discretion and favour their own interests without regard to the preferences of other shareholders or stakeholders and this wide discretion stems from their ability to appoint and remove directors and consequently control the outcomes of board deliberations.[174] The best interests fiduciary obligation is based in part on the cynical but realistic assumption that elected officers, in exercising their discretionary authority, will favour the interests of those whose votes elected them.[175] In fact, it has been argued, rather convincingly, that the right of shareholders to nominate a director should be read as providing for the implicit understanding that it is accepted by the parties that a special responsibility towards a shareholder is in the interests of the company as a whole.[176] Therefore, the absence of a specific understanding of the concept of the best interests duty in company law coupled with the appointment and removal powers of controlling shareholders impedes the promotion of interests of constituencies other than shareholders, despite the requirement that directors must take into account the interests of specified stakeholders other than shareholders in Section 166(2) of the Companies Act. The argument that the mere fact that a director has been nominated by certain shareholders does not impose any duty to benefit such

[171] *Id*.
[172] *Id*.
[173] E. W. Thomas, *The Role of Nominee Directors and the Liability of Their Appointers*, in CORPORATE GOVERNANCE AND THE DUTIES OF COMPANY DIRECTORS 148, 150 (Ian Ramsay ed., 1997).
[174] *Id*.
[175] J. A. C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST LAW REVIEW 12 (1987).
[176] Elizabeth Boros, *The Duties of Nominee and Multiple Directors*, 11 COMPANY LAWYER 211 (1989); Philip P Crutchfield, *Nominee Directors: The Law and Commercial Reality*, 12 COMPANY LAWYER 136 (1991); Pey-Woan Lee, *Serving Two Masters: The Dual Loyalties of the Nominee Director in Corporate Groups*, 5 JOURNAL OF BUSINESS LAW 449 (2003).

shareholders is archaic and far removed from the reality of corporate culture, practice and governance.[177]

Since corporate law does not provide a clear understanding of what it means to act in the best interests of the corporation, to a large extent, directors interpret the content of their duties through board deliberations and the outcome of board deliberations is ultimately determined by the manner in which directors are nominated and appointed.[178] It has been acknowledged that "corporate law has avoided such puzzles by, for the most part, equating the duty to the corporation with a duty to act in the best interests of its shareholders."[179] The ambiguity stemming from the lack of clarity on what is meant by 'best interests of the corporation' casts a convenient shadow over what in actuality is an unsettling issue in relation to corporate purpose, even more so in the context of the significant powers wielded over governance mechanisms by controlling shareholders. Overall, the uncertainty with respect to the best interests duty results in the duty being analysed in isolation from the broader governance architecture of promoter dominance and fails to appreciate its importance for corporate governance arrangements that enable a broader corporate purpose. Therefore, the best interests duty and corporate purpose need clarity and specific articulation in the Companies Act. This is especially important on account of the fact that Section 166(2) states that the fiduciary duty is owed to the company as a separate entity from its shareholders because the recognition of the separate entity status has important ramifications for theoretical foundations as well as governance mechanisms that lend themselves to stakeholder governance.

B. The Fundamental Shareholder Fiduciary Accountability Gap

The uncertainties associated with the best interests duty in the Companies Act can to a large extent be attributed to the similarities in the approach to fiduciary duties to the UK model of directors' duties which has been transplanted to jurisdictions governed by common law, including India.[180]

---

[177] Gelter and Helleringer, *supra* note 167, at 303.
[178] *Id*.
[179] David K. Millon, *Redefining Corporate Law*, 24 INDIANA LAW REVIEW 228 (1991).
[180] See generally, David Cabrelli and Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AMERICAN JOURNAL OF CORPORATE LAW 109 (2015); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MODERN LAW REVIEW 1 (1974); Amir N. Licht, *Legal Plug-ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY JOURNAL OF INTERNATIONAL LAW 195 (2004); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN LAW REVIEW 11 (1998); Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 JOURNAL OF ECONOMIC LITERATURE 285, 286 (2008).

Moreover, the legal and regulatory framework governing corporate purpose in India, which is based on a combination of corporate law and securities regulation, has been primarily derived from the Anglo-American model of corporate governance.[181] Since the early twentieth century, a central legacy issue in the UK and the US has been that of the principal-agency costs or the managerial agency costs problem (arising from the separation of ownership and control) and the ex-ante and ex-post measures to address it.[182] These measures include but are not limited to increasing and empowering dispersed shareholders, monitoring directors, augmenting and aligning managerial incentives with shareholders' interests, the market for corporate control, directors' duties and the appointment of independent directors.[183] The importance given to the role of shareholders and the purpose of the general meeting in the UK and the US has been shaped by certain prominent views. One such view is that vulnerable shareholders' interests which are divergent from those of their agents' i.e., directors', need to be protected and therefore, directors are accountable to and owe duties to shareholders.[184] Consequently, shareholders unlike directors, owe no duties when they exercise their voting powers and can generally, subject to very limited situations, vote as they please, even when doing so may potentially be at variance with the interests of the company given that the interests of the company have been interpreted to mean the interests of the shareholders, as discussed earlier.[185] In fact, the rule that shareholders can vote as they please has been repeatedly

---

[181] Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NATIONAL LAW SCHOOL OF INDIA REVIEW 1-50 (2009); Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 335-402 (2009); A. Soni and S. Soni, *Impact of Sarbanes Oxley (SOX) Act on Corporate Governance Practices*, 8 PACIFIC BUSINESS REVIEW INTERNATIONAL 38-43 (2015); Harpreet Kaur, *Achieving Sustainable Development Goals in India*, in THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 461-462 (Beate Sjåfjell and Christopher Bruner eds., 2019).

[182] John Armour, Henry Hansmann and Reinier Kraakman, *Agency Problems and Legal Strategies*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29-48 (John Armour, Luca Enriques et. al eds., 2017).

[183] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 5; Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 512 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

[184] Adolf A. Berle, Jr., and Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (Commerce House, 1932); Ronald J. Gilson and Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUMBIA LAW REVIEW 863 (2013) (arguing that in the US, in addition to the agency problem posed by the separation of ownership and control, there is the agency problem caused by the divergence of interests between institutional shareholders and their beneficiaries); Henry Hansmann, *Ownership of the Firm*, 4 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 267 (1988); *UK Report of the Committee on the Financial Aspects of Corporate Governance* (Cadbury Report, 1992) at [6.1], [6.6]; Jensen and Meckling, *supra* note 17, at 305; Andrew Keay, BOARD ACCOUNTABILITY IN CORPORATE GOVERNANCE 72-83 (Routledge, 2017).

[185] Pender v Lushington (1877) 6 Ch D 70 at 75 (Jessel MR) ("...a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest").

affirmed in subsequent decisions in the UK and also represents the law in the common law countries including India.[186]

The evolution of Indian corporate law and securities legislation, including corporate governance reforms, predominantly reflects the Anglo-American model of corporate governance which has been described as the most shareholder-centric approach given that it places shareholders at the centre of the corporate power structure.[187] Under both, the Companies Act and the SEBI Listing Regulations, reforms aimed at enhancing corporate governance standards have tended to favour shareholder centrality, choice and primacy. The focus of reforms has predominantly geared towards fostering shareholder rights and directors' duties over addressing shareholders' formal responsibility and accountability in relation to their decision making powers with respect to both, minority shareholders as well as stakeholders.[188] The burden of fiduciary obligations, which are derived from the principles of agency law, rests solely on directors. Shareholders, on the other hand, do not owe fiduciary obligations either to the company or to each other. However, the distinctive characteristics of India's concentrated ownership patterns and governance structure and the resultant agency costs, despite having been recognised and acknowledged in corporate governance scholarship, have not been adequately considered by its legal and regulatory framework.

The agency costs in shareholder-controlled systems are costs associated with private benefits of control, also referred to as the private benefits agency problem which are distinct from the principal-agency costs that arise in dispersed ownership systems such as the UK and the US.[189] The focus of corporate governance reforms, therefore, from an agency costs perspective, must be

[186] North-West Transportation Co Ltd v Beatty (1887) 12 App Cas 589 (PC); Burland v Earle [1902] AC 83; Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 2 All ER 625; Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] 2 All ER 563.

[187] Paul Davies, Luca Enriques, Gerard Hertig, Klaus Hopt and Reinier Kraakman, *Beyond the Anatomy*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 313 (Reinier Kraakman, John Armour et. al eds., 2009); Alan Dignam and John Lowry, COMPANY LAW 7-8 (Oxford University Press, 2009); See Bratton, *supra* note 4, at 444 ("...shareholder primacy and shareholder accountability are natural enemies, like cats and dogs").

[188] Afsharipour and Paranjpe, *supra* note 126, at 10-26 (for an overview of corporate governance reforms in India). The overview outlines the substantial importance placed on duties and responsibilities of directors (particularly, independent directors) in enhancing corporate governance standards in India. In terms of shareholder duties and accountability, the focus of governance reforms has largely been limited to enhancing disclosures of related party transactions. The issue of shareholder fiduciary accountability has not been addressed in a context and jurisdiction-specific manner despite the extent, significance and scope of corporate control exercised by promoters on corporate governance in India.

[189] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARVARD LAW REVIEW 1650-1652 (2006).

on minimising costs associated with private benefits of control as opposed to reform measures targeted at addressing the managerial agency costs problem which largely focus on shareholder empowerment techniques.[190] The key problem in concentrated ownership jurisdictions is 'tunneling' or the 'transfer of resources out of a company to its controlling shareholders', often at the expense of minority shareholders and other stakeholders.[191] Such extraction of private benefits of control typically takes place through self-dealing transactions between the controlling shareholder and the company and gets exacerbated by the presence of pyramid and cross-holding structures in several listed companies.[192] In addition to these financial or pecuniary benefits of control exercised by controlling shareholders, there is an entire spectrum of potentially powerful advantages stemming from sources external to the company, also known as non-pecuniary private benefits of control, that controlling shareholders benefit from.[193] These benefits include but are not limited to political gains, cultural contingent benefits and institutional financial benefits.[194] The social, political and economic power inherent in corporate control that vests with promoters has far-reaching implications in terms of influencing policy domains beyond the boundaries of the firm.[195] It is also important to note the distinction between pecuniary or internal and non-pecuniary or external private benefits of control. While pecuniary private benefits of control are extracted at the expense of minority shareholders and stakeholders and impact them negatively, non-pecuniary private benefits of control may impact minority shareholders and stakeholders, positively or negatively, depending on the manner in which they drive controlling shareholders' behaviour.[196] Accordingly, it has been argued that promoter dominance is not necessarily antithetical to stakeholder governance, especially given the long-term orientation and commitment of controlling shareholders to the growth and performance of companies.[197] This survival and stability advantage,

[190] *Id*. at 1652-1672.
[191] Luca Enriques, Gerard Hertig, Hideki Kanda and Mariana Pargendler, *Related Party Transactions*; Edward Rock, Paul Davies, Hideki Kanda, Reinier Kraakman and Wolf-Georg Ringe, *Fundamental Changes*; Paul Davies, Klaus Hopt and Wolf-Georg Ringe, *Control Transactions*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 145-242 (John Armour, Luca Enriques et. al eds., 2017).
[192] Marianne Bertrand, Paras Mehta and Sendhil Mullainathan, *Ferreting Out Tunneling: An Application to Indian Business Groups*, 117 QUARTERLY JOURNAL OF ECONOMICS 126 (2002) (the control of promoters in Indian public companies is emboldened through mechanisms such as cross-holding, pyramiding, and tunneling).
[193] Puchniak, *supra* note 183, at 527-528.
[194] *Id*.
[195] Curtis J. Milhaupt, *The (Geo) Politics of Controlling Shareholders*, (European Corporate Governance Institute Law Working Paper No. 696) 14-23 (2023).
[196] Puchniak, *supra* note 183, at 531-532.
[197] Afra Afsharipour, *supra* note 107, at 496.

however, comes at the cost of the private benefits agency problem.[198] It is therefore imperative that corporate governance mechanisms be designed with a focus on ensuring that the benefits of controlling shareholders outweigh the costs that accompany the potential for controller expropriation and opportunism.[199]

The distinctive attributes of the governance structure and resultant agency problems highlight that the views that the Anglo-American construction of fiduciary duties and shareholders' rights are based on as discussed above are highly disputable in the concentrated ownership context of India on two grounds. One, the substantial formal and informal powers wielded by controlling shareholders upend the notion of shareholders as vulnerable and in need of protection.[200] Two, addressing the costs associated with controller opportunism necessitates subjecting shareholders to duties when they exercise their control rights through voting and other means.[201] The measures to address the private benefits of control agency problem arising from the Indian promoter dominated ownership structure such as subjecting shareholders' rights and powers to controlling mechanisms, have been left largely unexplored by corporate law and governance reform given its shareholder-centric approach to corporate governance.

The need to balance corporate decision-making power between directors and shareholders has been acknowledged even in shareholder-centric jurisdictions such as the US wherein controlling shareholders are not subjected to duties other than under two limited situations, namely, closely-held corporations and freeze-outs.[202] It has been argued that with the change in the pattern of share ownership of public companies gearing towards concentration in institutional investors, corporate law and governance needs to shift its focus from managing agency costs to managing costs associated with opportunistic shareholder activism and that the corporate law doctrine of fiduciary

---

[198] Ronald J. Gilson and Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 785, 787-789 (2003).

[199] *Id*.; Geis, *supra* note 126, at 607.

[200] Puchniak, *supra* note 183, at 524-525.

[201] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 266-272; Astha Pandey and M.P. Ram Mohan, *Re-evaluating Corporate Purpose: A Critical Assessment of the Indian Stakeholder Governance Framework through a Historical and Comparative Analysis*, 63-66 (IIMA Working Paper Series, 2024) (forthcoming, Delaware Journal of Corporate Law).

[202] Iman Anabtawi and Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STANFORD LAW REVIEW 1255-1308 (2008); See generally, Flannigan, *Shareholder Accountability*, *supra* note 135, Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Shareholders*, (2004) 60 BUSINESS LAWYER 1 (2004), J. Travis Laster, *The Distinctive Fiduciary Duties that Stockholder Controllers Owe*, 20 NEW YORK UNIVERSITY JOURNAL OF LAW AND BUSINESS 461-515 (2024).

duty is especially well-suited to meet this challenge.[203] Hence, from the perspective of the Indian legal and regulatory framework governing corporate purpose which embraces a wider stakeholder conception, the failure to address the imbalance of power in the corporate structure by not subjecting controlling shareholders to fiduciary duties is anomalous and needs rectification.

C. Reinforcement of Shareholder Primacy by Corporate Law

The ambiguities underlined above showcase that in terms of both, the fiduciary duty of best interests and the rights of shareholders, especially the right to elect and dismiss directors, the norm of shareholder primacy is reinforced by the anatomy of corporate law itself, despite the legal separation of the corporation from its shareholders. The current structure of Indian corporate law and governance and consequently the characteristics of the corporate form decisively favour the shareholder primacy principle in terms of the history of reform efforts as well as statutory provisions given their shareholder-friendly orientation. The adverse consequences of the perpetuation of the shareholder primacy drive by the legal design that sustains the corporate power structure are predominantly twofold. First, negative externalities including concerns about stakeholder protection stemming from the corporation's activities are left to external regulation and regulatory constraints from other areas of law as opposed to being addressed as a governance concern in corporate law.[204] Second, the narrow and undue focus on ordering the affairs between internal constituents or insiders of a corporation, namely, shareholders, directors and executives results in issues relating to liability for negative externalities remaining unattended.[205]

Addressing questions such as whether and how an exception can be made to the principle of limited liability by requiring the parent company or controlling shareholders to provide redress to victims in situations when a company within a corporate group or a subsidiary has caused harm to a third party and is unable to provide compensation,[206] are critical, and yet left unexamined by the inconsistencies that form an integral part of legal frameworks that are based on shareholder

[203] Anabtawi and Stout, *supra* note 202, at 1296.
[204] Beate Sjåfjell and Christopher Bruner, *Introduction*, in THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 6 (Beate Sjafjell and Christopher Bruner eds., 2019); Chiu, *supra* note 37, at 175; Benedict Sheehy, *Sustainability, Justice and Corporate Law: Redistributing Corporate Rights and Duties to Meet the Challenge of Sustainability*, 23 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 303-304 (2022).
[205] Chiu, *supra* note 37, at 174; Sheehy, *supra* note 204, at 290-295.
[206] Ernest Lim, *Liability of Companies, Shareholders and Directors*, in SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 237-283 (Cambridge University Press, 2020) (hereinafter, "*Liability of Companies*").

primacy. Such issues have profound implications for governance frameworks like India which embrace a pluralistic corporate purpose as well as for central features of the corporate form. This Section analysed the ambiguities stemming from the legal and theoretical contradictions in the Indian framework governing corporate purpose. Taken together with Section II, it drew attention to the importance of theoretically sound corporate governance frameworks not only for corporate purpose but also for the corporate form within which corporate purpose is situated.

Contradictions in the theoretical constructs that the corporate purpose framework in India is based on and the interplay between them are a testament to the extent to which a corporate theory such as shareholder primacy can create substantial impediments to the actualization of stakeholderism in a governance system that endorses stakeholder protection and is also cognizant of the corporation as a distinct legal entity. Inconsistencies in theoretical approaches regarding the relationship between corporations and their shareholders and stakeholders also have implications with respect to the explanatory power of governance theories for the corporate form. For instance, under the shareholder primacy theory, for certain purposes, the principle of separate legal personality is disregarded by treating corporations and their shareholders synonymously.[207] However, for other purposes such as shareholder liability for tortious wrongs or corporate contractual debts, shareholder primacy regards separate legal personality as a cardinal principle of corporate law by treating corporations and their shareholders as radically separate.[208] Scholars have in fact cautioned against such inconsistencies.[209] We argue in favour of such caution as the contradictions resulting therefrom only serve to reinforce the status quo of shareholder-centric corporate governance which is inadequate especially in the context of conceptualising enabling frameworks for implementing a broader corporate purpose.[210]

IV. ANCHORING STAKEHOLDER GOVERNANCE IN THE REAL ENTITY THEORY

As discussed, the following factors account for the key contradictions and uncertainties underlying the Indian corporate purpose framework: (i) lack of clarity on the meaning of the best interests

[207] L. Stout, L. Robé, P. Ireland, S. F. Deakin, K. Greenfield, A. Johnston et al., *The Modern Corporation Statement on Company Law*, (2016).
[208] *Id*.
[209] *Id*.
[210] Sheehy, *supra* note 204, at 295.

duty; (ii) decontextualized transplantation of the Anglo-American corporate governance model; and (iii) reinforcement of shareholder primacy by the structure of corporate law. In this Section, we examine the manner in which situating the stakeholder governance approach adopted by its framework within the real entity theory conceptualization can potentially address the identified uncertainties and consequently provide an appropriate theoretical basis for operationalizing a broader corporate purpose.

A. Addressing the Best Interests Duty Puzzle Through the Entity Approach

In Sections II and III, we discussed the implications of the predominance of the shareholder primacy norm in corporate law in terms of obscuring the stakeholder-oriented formulation of the best interests fiduciary duty reflected under Section 166(2) of the Companies Act by equating the interests of the company with the interests of its shareholders. Examining the best interests duty through the real entity theory aids in addressing concerns with respect to the conceptual ambiguities in the understanding of the fiduciary duty. Under the entity theory, the recognition of the modern company as a distinct legal entity signifies that acting in the best interests of the company means that companies should be run not in the interests of shareholders or stakeholders, but rather in the interests of the corporate entity itself.[211] Thus, the primary focus is on the interests of the corporation, understood as a distinct legal entity. This conceptualization of the corporation as a distinct and separate entity therefore overcomes the limitations posed by the shareholder primacy theory and stakeholder theory in the following respects. One, it distinguishes the interests of the corporate entity from those of its shareholders, thereby addressing issues related to the pressures associated with the shareholder primacy drive and pivoting the focus of the best interests duty on enhancing the long-term value and viability of the corporate entity as opposed to the interests of its shareholders. Two, it results in broader notions of what comprises corporate interest which opens up director decision-making to consider the interests of corporate constituents other than shareholders when acting in the interests of the company.[212]

The importance attributed to the separate entity status of the corporation under the real entity theory addresses the issue regarding the lack of specifications on the concept of corporate purpose

[211] Buckley, *supra* note 5, at 31.
[212] I.-M. Esser and J. Du Pleiss, *The Stakeholder Debate and Directors' Fiduciary Duties*, 19 SOUTH AFRICAN MERCANTILE LAW JOURNAL 362 (2007); Buckley, *supra* note 5, at 46, 48.

under the Companies Act which adds to the conceptual incoherence of the best interests duty and the purported objectives that directors are expected to pursue. That the good faith and best interests duty is owed to the corporation as a separate legal entity from its shareholders has profound implications for corporate purpose.[213] The separate entity status accorded to the corporation by law is inextricably linked with the corporation's purposes and values and demonstrates the importance of explicit articulation of such purposes and values.[214] More specifically, the understanding of the best interests duty in terms of the interests of the corporate entity and its long-term value and viability under the entity theory necessitates that the interests of the corporation be understood in light of its purpose, with such value-enhancement of the entity ultimately benefiting its shareholders as well as other stakeholders.[215] This understanding highlights the fundamental importance of purpose and its implications for the good faith and best interests duty. Professor Ciepley's contention that directors have a fiduciary duty to the corporate entity and its authorised purposes and not to specific persons thereby recognizing directors as 'purpose fiduciaries' helps concretize the entity conceptualization of the best interests duty and its implications for corporate purpose.[216] In this way, the entity theory echoes and provides justifications for the growing call with respect to the inclusion of the legal requirement for companies to specifically articulate their purposes in their constitutional documents. Such explicitly stated purposes provide the basis on which directors, acting as purpose fiduciaries, may discharge their fiduciary obligation to the corporate entity and its long-term interests.[217] The importance of explicit articulation of corporate purpose in legislative and corporate constitution documents is being especially recognized in the context of enabling frameworks that endorse a broader corporate purpose.

In the Anglo-American context, purpose clauses lost their specificity and relevance with the enactment of general incorporation statutes.[218] This resulted in thwarting the development of the

[213] Watson and Buckley, *supra* note 91, at 259-263.
[214] Colin Mayer, *Conceiving Corporate Commitment: Creation and Confirmation*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 212 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[215] Watson and Buckley, *supra* note 91, at 263.
[216] David Ciepley, *Corporate Directors as Purpose Fiduciaries: Reclaiming the Corporate Law We Need*, (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426747; Lyman P. Q. Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 260-284 (D. G. Smith & Andrew S. Gold eds., 2018) 260-284; Paul B. Miller and Andrew S. Gold, *Fiduciary Governance*, 57 WILLIAM AND MARY LAW REVIEW 513, 519-520 (2015).
[217] Watson and Buckley, *supra* note 91, at 263.
[218] Ciepley, *supra* note 216; Miller and Gold, *supra* note 216, at 536–538; Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEXAS LAW REVIEW 1423-1452 (2021); David Ciepley, *How America's Corporations Lost their Public Purpose, and How it Might be (Partially) Restored*, 10 ACCOUNTING, ECONOMICS, AND LAW: A CONVIVIUM 1-25 (2020);

fiduciary duty doctrine in that its evolution focused on the interests of the company, more often than not understood to mean its shareholders, as opposed to focusing on whether the company's articulated purpose was being pursued in good faith and in the best interests of the company by its corporate fiduciaries.[219] Professor Pollman argues that "the purpose clause has enduring relevance even as the debate on corporate purpose shifts because it remains a tool for coordinating long-term ventures and associations, and it still reflects the public-private collaboration that is at the heart of the corporate enterprise".[220] The inclusion of purpose provisions in constitutions and as a requirement in corporate law has the potential to curb the pervasive influence of shareholder primacy as well as support the implementation of stakeholder governance as it addresses the ambiguities stemming from the lack of clarity on what constitutes the best interests duty.[221] That directors are first and foremost purpose fiduciaries ensures that they exercise the good faith and best interests duty to the entity, where the interests of the entity are understood in light of explicitly and publicly stated purposes in corporate constitutional documents as required by corporate law.[222] Moreover, in the Indian controlling shareholder context, controlling shareholders' role and responsibility in shaping and determining the corporations' overarching purpose, by virtue of the

See generally, Ronald J. Gilson and Curtis J. Milhaput, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling*, 12 HARVARD BUSINESS LAW REVIEW 15-17 (2022) (for a discussion on the abolition of special charters keyed to a quasi-public purpose and the move to general incorporation regimes (starting in the mid-nineteenth century) which underpinned the idea that incorporation should be available to all regardless of corporate purpose and the implications thereof, in the context of the US - "Corporate law came to focus increasingly on the governance rights of shareholders and the fiduciary duties directors owe to the shareholders. Thus, the corporation had evolved from a specialized entity, created for the particular ends of the sovereign, to an entity created to facilitate new and ever evolving forms of organization needed by the economy. This view of corporate law would reach its zenith in the 1980s, led by legal scholars Frank Easterbrook and Daniel Fischel, echoing Jensen and Meckling's seminal article, that characterized the corporation as a "nexus of contracts," and corporate law as a set of efficiency-enhancing default rules provided free of charge by the state")).

[219] *Id*.

[220] Pollman, *supra* note 218, at 1447-1448 (explaining that requiring a specific purpose in chartering documents as part of the process of forming a corporate entity served the crucial function of circumscribing the organisation's activities and delineating the charter's scope of authority); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VIRGINIA LAW REVIEW 1281-1282 (2001); William G. Roy, *Socializing Capital: The Rise of the Industrial Corporation*, in THE OXFORD HANDBOOK OF THE CORPORATION 98-100 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019); Mayer, *supra* note 214, at 229 (explaining that while the corporation was originally established by charter (which was the product of negotiation between the incorporators and state legislators) to undertake public purposes, with the passing of general incorporation laws, the public benefit commitment that was intrinsic to the corporation, diminished)).

[221] Hayden and Bodie, *supra* note 36, at 7 ("As meaningful limitations on individual corporate purpose were disappearing from corporate charters, the shareholder primacy norm started becoming more important within the law."); Dodge v. Ford Motor Company 170 N.W. 668 (Mich. 1919) ("...a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end").

[222] Ciepley, *supra* note 216; Watson and Buckley, *supra* note 91, at 261-263.

inherent power that they wield on the corporate governance system directly, through their voting rights, and indirectly, through other informal means, cannot be overstated.[223]

The concept of corporate power, and shareholder power in particular, is especially complex and issues related to it play out in profoundly different ways depending on the nature of ownership and governance structures and whether they are dispersed or concentrated.[224] Some experts are sceptical about the impact of shareholder power on enabling the corporation's ability to pursue interests beyond shareholder profit, and have even referred to increased shareholder power as "toxic" and antithetical to the interests of the corporation and stakeholders.[225] Others view shareholder power as a necessary and critical accountability tool and have underlined its impact on facilitating the embrace of a corporate purpose that is centred on stakeholders and broader societal welfare.[226] In fact, the importance of shareholder power in effectuating significant changes in corporate behaviour in terms of shifting the shareholder-oriented focus of corporate purpose has been recognized by acknowledging that any such change will be possible "only as long as…investors allow it".[227]

A defining characteristic of concentrated shareholder environments such as India, is the significant influence that promoters or controllers exercise, on shaping corporate decisions and consequently corporate purpose. The exercise of shareholder power and influence extends beyond formal means such as voting rights with respect to director elections and other corporate matters. While the channels and forms of influence depend on the nature of controlling shareholders, the power wielded by them in terms of controlling the corporation and dictating its affairs operates on a wide-

[223] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 12; Puchniak, *supra* note 183, at 524-525; Colin Mayer, *Shareholderism versus Stakeholderism - A Misconceived Contradiction: A Comment on "The Illusory Promise of Stakeholder Governance", by Lucian Bebchuk and Roberto Tallarita*, 106 CORNELL LAW REVIEW 1859, 1867-1868 (2021); Mayer, *supra* note 214, at 212.
[224] Jennifer Hill, *Images of the Shareholder - Shareholder Power and Shareholder Powerlessness*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 53 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[225] Lynn A. Stout, *The Shareholder Value Myth*, (Cornell Law Faculty Publications, 2013) 2; Lynn A. Stout, *The Toxic Side Effects of Shareholder Democracy*, 161 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2013) (discussing the "toxic" influence of shareholders' power and the extent to which such power may be used to divert corporate resources and attention from stakeholders and their concerns).
[226] Lisa M. Fairfax, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION (Carolina Academic Press, 2011) 3; Fairfax, *supra* note 1, at 118-129.
[227] Jesse Fried, *The Roundtable's Stakeholderism Rhetoric is Empty, Thankfully*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 22, 2019) https://corpgov.law.harvard.edu/2019/11/22/the-roundtables-stakeholderism-rhetoric-is-empty-thankfully/; Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARVARD BUSINESS REVIEW (Aug. 30, 2019) https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric.

ranging spectrum.[228] This spectrum represents an amalgamation of significant economic, political and social power so much so that such power of corporate control includes the power to influence matters of law, policy and institutional development.[229] Policy domains that are impacted by controlling shareholders' influence are wide-ranging and include but are not limited to matters concerning national security, economic sanctions, stock exchange competition, corporate influence on domestic political systems, and progress on ESG efforts.[230] Understanding the economic, political and social dimensions of corporate control exercised by controlling shareholders is particularly crucial in the context of the heightened concern for corporate externalities and the non-financial interests of stakeholders within which the contemporary debate on corporate purpose is situated.[231]

The realisation that controlling shareholders in India exercise enormous power and effectively control the corporate governance in most large public companies has crucial implications for informing the mechanisms through which stakeholder governance can be operationalized. Further, proper contextualization of shareholder power highlights two crucial insights. First, it evinces the reality of how power dictates purpose within the corporate structure. Second, it demonstrates that while shareholder power is critical to the advancement of a broader corporate purpose, the far-reaching implications of its exercise, especially in promoter ownership and control structures, necessitates that the exercise of shareholder powers be counterbalanced with concomitant duties in order for stakeholder governance to translate into reality. This leads us to the next ambiguity in the Indian corporate purpose framework identified in the previous Section, which is with respect to the issue of shareholder fiduciary accountability.

---

[228] Milhaupt, *supra* note 195, (analysing the wide-ranging spectrum of influence enjoyed by controlling shareholders in terms of non-pecuniary private benefits of control and the significant consequences of such influence on domestic political systems and institutional development); Afra Afsharipour, *Lessons from India's Struggles with Corporate Purpose*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 363-386 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (on the influence of controlling shareholders specifically in the Indian context).
[229] *Id*.
[230] Milhaupt, *supra* note 195.
[231] *Id*. at 4 (on the importance of examining the various dimensions (social, economic and political) of corporate control exercised by controlling shareholders in corporate governance scholarship)); Jedidiah Purdy, David Grewal, Amy Kapczynski and K. Rahman, *Building a Law-and -Political-Economy Framework: Beyond the Twentieth - Century Synthesis*, 129 THE YALE LAW JOURNAL 1784, 1820 (2022) (the recognition of the need for corporate governance scholarship to engage with various dimensions of corporate control is in line with the Law and Political Economy (LPE) approach in legal scholarship which seeks to reorient legal scholarship around questions of power rather than economic efficiency by asking how law creates, protects and reproduces political and economic power, for whom and with what results)); Zumbansen, *supra* note 2, at 234-310 (also employing the LPE approach to revisiting and reevaluating the normative assumptions that have been driving corporate governance and financial regulation over time).

B. Conceptualising Shareholder Fiduciary Accountability Through the Entity Approach

In Sections II and III, we demonstrated how the decontextualized transplantation of the shareholder-centric Anglo-American corporate governance model in India has resulted in the negative outcome of the issue of shareholder accountability and responsibility being left unaddressed by its legal and regulatory framework governing corporate purpose. Despite the ownership structure and hence governance problems in India being different from those of the UK, the legal principles that regulate the division of powers, rights and duties in company law are derived primarily from English common law (notwithstanding differences in statutory law). One such significant feature in both the UK and other common law jurisdictions such as India is that shareholders generally do not owe duties to either the company or minority shareholders.[232] The formulation of shareholder fiduciary accountability in the UK dating back to the nineteenth century was misguided on account of the following factors. First, the failure to discard the joint stock company conception of shareholders as 'owners', 'principals' or 'proprietors' of businesses.[233] Second, the unwarranted acceptance of the assertion that shareholders were free to vote as they pleased when compromised by selective interest.[234] In sum, the role of shareholders and the general meeting in common law jurisdictions, including India, have been shaped by two influential views, which are, that shareholders are owners or principals and that they can vote as they please.

These assertions are highly contestable in the context of concentrated ownership and governance structures such as India. Importantly, the misleading formulation which forms the basis of shareholder fiduciary accountability in English common law hampers the recognition of the entity status of the corporation and the legal consequences of separate legal personality.[235] This misleading formulation was only partially addressed by courts in the UK when the fiduciary accountability of directors was recognised.[236] However, courts failed to explicitly acknowledge the fiduciary accountability and duty of shareholders to the corporation thereby hindering the full

---

232 Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 20.

233 Flannigan, *Shareholder Accountability*, *supra* note 136, at 30; Robert Flannigan, *The American Misconstruction of Director Fiduciary Accountability*, 33 EUROPEAN BUSINESS LAW REVIEW 792 (2022) (hereinafter, "*Director Accountability*") (explaining that the joint stock company constitutions that were registered gave the new corporate shareholders the same 'owner' powers they possessed in their former capacities as partners (powers to elect and remove directors, amend the constitution, dissolve the firm, etc.), fostering the mistaken view that shareholders remained the 'real' owners or principals of the business)).

234 Flannigan, *Shareholder Accountability*, *supra* note 136, at 30.

235 *Id*.

236 *Id*. at 30; Salomon v A. Salomon & Co Ltd [1897] A.C. 22; Percival v Wright [1902] 2 Ch. 421.

appreciation and development of the fiduciary consequences of the entity status.[237] This failure is reflected in Indian company law and its construction of fiduciary accountability on account of it being primarily derived from the principles of English common law. There is no reason as to why the conceptual incoherence must be maintained. Given the differences in the set of governance problems in both the jurisdictions, the issue with respect to the viability of reforms based on a system which has a different set of governance problems altogether becomes evident.[238]

The real entity theory provides guidance in this regard. That shareholders are accountable as fiduciaries to the corporation is a conceptual consequence of the entity status.[239] Recall that the strength of the explanatory power of the entity conception for corporate law, governance and purpose lies in the recognition of the corporation as existing separately from the various components that comprise its decision-making processes, and at the same time, functioning through them. Under the entity theory, the company, being a separate legal entity, acts through its agents who are required to promote and protect its interests and purposes, which are separate and distinct from, but may overlap with, those of its agents i.e., its shareholders and stakeholders. Since a corporation cannot itself physically express its will, others must be authorised to do so for it and corporate law provides for this delegation of the corporate will through the division of powers between the board of directors and the shareholders in the general meeting.[240] Both, the board and the general meeting derive their authority to express the corporation's will through the corporation, and for the purposes and benefit of the corporation (not the shareholders or stakeholders).[241] Accordingly, the members of each organ i.e., the board and the general meeting should be subject to fiduciary accountability.[242] This is the manifest default consequence of the entity status of the corporation.[243] The exercise of powers assigned to the board through which they express aspects of the corporate will attracts fiduciary accountability.[244] The same principle should be applicable when shareholders exercise their wide-ranging powers including director elections and removals,

[237] *Id*. at 30.
[238] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 20.
[239] Flannigan, *Shareholder Accountability*, *supra* note 136, at 6-12; Flannigan, *Director Accountability*, *supra* note 233, at 792-793.
[240] Flannigan, *Director Accountability*, *supra* note 233, at 792-793.
[241] *Id*.
[242] *Id*.
[243] Flannigan, *Shareholder Accountability*, *supra* note 136, at 10.
[244] Flannigan, *Director Accountability*, *supra* note 233, at 792.

amendments to constitutional documents and approving significant transactions.[245] The exercise of powers by shareholders in the general meeting signifies effectuating the will of the corporation on its behalf and on critical functions that entail significant responsibility as a consequence of which, shareholders are fiduciaries to the corporation.[246]

Further, the emphasis that the entity theory places on the separate legal personality of the corporation leads to two inferences with respect to the fiduciary accountability status of shareholders that help debunk the misguided assertions that form the basis of shareholder fiduciary accountability in English common law discussed above. The first inference is that shareholders are not owners of the corporation - rather, the corporation exists as a separate legal entity and exercises its will through its agents, namely, the board and the general meeting as a result of which directors, as well as shareholders owes fiduciary duties to the corporation. Therefore, to deny that shareholders, acting through the general meeting, owe duties to the company, is contrary to the principle of separate legal personality.[247] The second inference is that the assertion that the general meeting is an agent of the company and therefore has fiduciary accountability, provides the justification for the voting powers of shareholders and the manner in which they should be exercised i.e., to protect and promote the best interests of the corporate entity.[248] Both the inferences therefore are cognizant of the separate and distinct legal personality of the company and are rooted in the real entity theory of the corporation. In this way, the entity conceptualization highlights the relationship between corporate power and corporate purpose as well as the importance of implementing governance mechanisms for ensuring that corporate power is exercised in a manner that facilitates the implementation of stakeholder governance.

C. Confronting Corporate Externalities and Liability - Related Challenges Through the Entity Approach

In Sections II and III, we discussed the adverse implications of the reinforcement of shareholder primacy by the structure of corporate law on concerns associated with liability for negative

[245] *Id*. at 792-793.
[246] Flannigan, *Shareholder Accountability*, *supra* note 136, at 2-11.
[247] Peter G. Watts and F.M.B. Reynolds, BOWSTEAD AND REYNOLDS ON AGENCY (Peter G. Watts and F.M.B. Reynolds eds., 2014); Peter G. Watts and F.M.B. Reynolds, BOWSTEAD AND REYNOLDS ON AGENCY (Peter G. Watts and F.M.B. Reynolds eds., 2017); Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 10.
[248] Lim, SHAREHOLDERS' DUTIES, *supra* note 69, at 15.

externalities by underlining the inconsistencies inherent in the approach with respect to the separate legal personality of the company and its relationship with its shareholders and stakeholders. As discussed earlier, the real entity theory is strongly anchored in the separate legal personality principle. It therefore offers some valuable conceptual insights which help address the inherent inconsistencies underpinning shareholder primacy especially with respect to the manner in which issues relating to corporate misconduct must be dealt with.

In the UK, until as recently as 2013, the doctrine of corporate veil was understood to imply the disregard of the principle of separate legal personality.[249] The prevalent understanding according to both courts and academic scholarship as regards the doctrine of piercing the corporate veil was that under certain specific circumstances, the legal personality of the company is 'disregarded' and 'a person who owns and controls a company is…identified with it in law by virtue of that ownership and control'.[250] This understanding is rooted in the dominant nexus of contracts approach which conceptualises the corporation as a fictional nexus for the aggregation of contributions by its participants.[251] The characterisation of the company as a mere fiction or an aggregate of its parts forms the basis on which the identity of the company is conflated with that of its shareholders and its separate legal personality is undermined.[252]

The conceptualization of the doctrine of veil piercing as a doctrine that underpins the disregard of corporate personality has resulted in an incomplete and flawed understanding of the inter-linked principles of separate legal personality and limited liability. Given that principles of company law in India are derived from English common law, this deficient understanding with respect to the doctrine of veil piercing, separate legal personality and limited liability subsist in Indian company law and jurisprudence as well. Moreover, the predisposition of the nexus of contracts model to characterise the company and its shareholders as indistinguishable gets exacerbated in ownership

[249] Prest v Petrodel [2013] 2 AC 415; Alan Dignam and Peter B. Oh, *Disregarding the Salomon Principle: An Empirical Analysis, 1885–2014*, 39 OXFORD JOURNAL OF LEGAL STUDIES 16-49 (2019) (identifies 213 cases as being concerned with the 'disregard' of the company's separate legal personality); Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 COMPANY, FINANCIAL & INSOLVENCY LAW REVIEW 15-28 (1999) (identifies 290 cases with a similar interpretation of the doctrine of piercing the corporate veil).
[250] Prest v Petrodel [2013] 2 AC 415, at [16] (Lord Sumption); Sarah Worthington and Sinéad Agnew, SEALY AND WORTHINGTON'S TEXT, CASES, & MATERIALS IN COMPANY LAW (Oxford University Press, 2022) 35; Brenda Hannigan, COMPANY LAW (Oxford University Press, 2021) para 3.14; Murray A. Pickering, *The Company as a Separate Legal Entity*, 31 THE MODERN LAW REVIEW 481-511 (1968).
[251] Micheler, *Separate Legal Personality*, *supra* note 59, at 309-311.
[252] *Id*.

and governance structures such as India that are dominated by controlling shareholders. Despite the recognition of the confusion and uncertainty that the lack of clarity with respect to the veil piercing doctrine has caused in law by courts and legal scholarship, the doctrine which 'has been generally assumed to exist in all common law jurisdictions' has endured obstinately as a doctrine of corporate disregard.[253]

In the context of the UK, Micheler explains that veil piercing persisted as a doctrine of corporate disregard because of the following inter-linked factors. Judicial reasoning was inadvertently informed by a conception of the corporation that had its historical roots in English partnership law.[254] The partnership law conception of the company, which has dominated academic scholarship on UK corporate law for over fifty years, endured, because it fits well with the nexus of contracts model which views the company as a fiction or an aggregate of its parts thereby disregarding its separate legal personality.[255] Therefore, despite its shortcomings, veil piercing and its characterization as a doctrine that legitimises disregarding the legal personality of the company has informed the incoherent understanding of principles such as separate legal personality and limited liability in company law which in turn have strong bearings on concerns associated with corporate abuses and misconduct. The negative ramifications stemming from such incomplete understanding are evident in extant company law in that it does not provide clear cut answers to questions centred around the liability for negative externalities caused by operations of corporations which can result in serious and adverse consequences in terms of environmental harms, destruction of livelihoods and human rights violations.[256] Stated alternatively, corporate law, on account of it being misguided by the veil piercing doctrine as a doctrine of corporate disregard, does not provide for adequate redressal mechanisms for victims of corporate wrongdoings.

Considering that the real entity conception of the corporation is rooted in the principle of separate legal personality, it has the potential to address the conceptual ambiguities associated with the incoherent understanding of veil piercing, separate legal personality and limited liability principles

[253] *Id*. at 2-11.
[254] *Id*.
[255] *Id*.
[256] Sjåfjell, *supra* note 32, at 699, 703-704 (on the impact of the operations of corporations on the environment, economy and human rights and the detrimental effects of the failure by corporate law and governance to address these broader issues).

based on the contractarian model of the company which underpins shareholder primacy. As discussed earlier, the conceptualisation of the corporation under the real entity theory recognizes the role played by the law in the creation of the legal entity status of the corporation. According to the theory, corporate law enables entities, which are real in their existence and in their consequences, to become formal subjects of the law.[257] Importantly, corporate law makes the corporate form available to corporations with a view to facilitating their independent functioning and also with a view to imposing liability on them for criminal, statutory and other wrongs.[258] The separate legal personality of the corporation creates a formal legal unit which operates independently from, and at the same time, through its members, directors, customers, suppliers and other stakeholders.[259] The real entity theory therefore conceives the company as a creation of the law which functions autonomously as well as with and through its various constituents.[260] This conceptualisation of the company under the real entity theory which places emphasis on the legal entity status of the corporation is supported by other key features of the modern corporation such as the processes of formation and termination and the rules governing tortious, criminal as well as regulatory corporate liability.[261]

Given this understanding of the corporation and its features, the fundamental conceptual deficiency with respect to conflating veil piercing with disregard for separate legal personality becomes evident. When courts impose liability on a parent company or its shareholders for the wrongdoings or debts of its subsidiary, such imposition amounts to creating an exception to the principle of limited liability as opposed to piercing the corporate veil or disregarding the separate legal personality of the company.[262] Creating an exception to the limited liability principle neither violates the separate legal personality rule nor does it frustrate the consequences of the rule.[263] Therefore, maintaining the separate legal personality of companies is not a legitimate basis for

[257] Micheler, *Separate Legal Personality*, *supra* note 59, at 317.
[258] Gindis, *supra* note 35, at 39 and 41; Bant, *supra* note 90; David Gindis, *Ernst Freund as the Precursor of the Rational Study of Corporate Law*, 16 JOURNAL OF INSTITUTIONAL ECONOMICS 597-621 (2020).
[259] Gindis, *supra* note 35, at 35; Micheler, *Separate Legal Personality*, *supra* note 59, at 317.
[260] Micheler, *Separate Legal Personality*, *supra* note 59, at 317.
[261] *Id*. at 303, 15; See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 INDIANA LAW JOURNAL 473 (2006), 477-478; Samuel W Buel, *The Responsibility Gap in Corporate Crime*, 12 CRIMINAL LAW AND PHILOSOPHY 471, 473 (2018); Susan Watson, *How the Company Became an Entity: A New Understanding of Corporate Law*, 1 JOURNAL OF BUSINESS LAW 120 (2015) (recognising the corporation as an entity and an autonomous actor in society enables us to see corporations not only as rights holders, but also as subject to certain responsibilities vis-à-vis society).
[262] Lim, *Liability of Companies*, *supra* note 206, at 242-247.
[263] *Id*. at 245.

upholding the limited liability principle for shareholders.[264] The predominant reason underlying the reluctance in judicial reasoning and academic literature to attribute and impose liability for corporate wrongdoings on the parent company or shareholders in such instances is the misguided assumption with respect to the doctrine of piercing the corporate veil according to which piercing the veil amounts to disregarding separate legal personality because the company and its shareholders are treated synonymously.[265]

The real entity theory demonstrates that framing the concern in terms of the reasons as to why entities other than the delinquent subsidiary i.e., the parent company and/or shareholders should not be afforded the protection of limited liability and what exceptions to the principle of limited liability must be formulated helps better explain and address the issue of liability for externalities as opposed to framing the issue in terms of piercing the corporate veil. Separate legal personality and limited liability are distinct, and therefore, creating exceptions to the limited liability principle does not infringe the separate legal personality or the personhood of the company.[266] Accordingly, the cases on veil piercing are not and should not be viewed as the basis for impeding the imposition of liability on parent companies or their controlling shareholders.[267]

In fact, in discussions on situations that warrant veil piercing and veil peeking, scholars have acknowledged that such situations are not an exception to and exist alongside corporate personhood.[268] Professor Pargendler has argued that academics, judges and practitioners have often committed a fallacy of equivocation when defending complete corporate separateness, which stems from the different meanings of the term "separate"[269] and yet, this reigning fallacy of complete corporate separateness continues to serve as a shield against corporate accountability.[270] She contends that while legal personality undoubtedly provides a distinct nexus for the imputation of legal rights and duties, this does not necessarily mean that corporations are or should be treated as legally separate or insulated from shareholders, especially controlling shareholders, in all

[264] *Id*.
[265] Micheler, *Separate Legal Personality*, *supra* note 59, at 302; Lim, *Liability of Companies*, *supra* note 206, at 236.
[266] Lim, *Liability of Companies*, *supra* note 206, at 245-246.
[267] *Id*.
[268] Mariana Pargendler, *The Fallacy of Complete Corporate Separateness*, 14 HARVARD BUSINESS LAW REVIEW ONLINE 3 (2024).
[269] *Id*.
[270] *Id*. at 16.

contexts.[271] There are a limited number of ways in which a corporate entity can cease to exist, for instance, through dissolution or liquidation.[272] However, veil piercing and veil peeking do not form part of the ways in which the corporate entity ceases to exist - what does change through their deployment is the allocation of certain rights and duties between the corporation and other parties, primarily shareholders.[273]

In the Indian context specifically, given the significant powers wielded by parent companies over their subsidiaries, the failure to hold parent companies or their controlling shareholders liable for uncompensated harms caused to victims or innocent third parties on the basis of corporate separateness of group entities is highly questionable.[274] It also has the potential to result in detrimental consequences in terms of accommodating the perception that corporate law permits companies to continue to use corporate group structures to engage in highly risky or hazardous business operations that adversely impact third parties, without any corresponding legal responsibility for the harms caused by them.[275] Therefore, in devising an appropriate liability regime for the purposes of ensuring deterrence and appropriate redressal mechanisms for victims of corporate externalities, adequate attention needs to be paid to the ownership and governance structure of companies in jurisdictions like India given that the presence of controlling shareholders will have critical bearings on the exceptions to the principle of limited liability.[276] The analysis above attests to the explanatory power of the real entity theory in terms of its nuanced approach to the conception of the modern corporation, its ownership and governance structures and the distinct governance problems resulting therefrom. The discussion in this Section also

---

[271] *Id*.
[272] Asaf Raz, *The Legal Primacy Norm*, 74 FLORIDA LAW REVIEW 985-986 (2022).
[273] *Id*.
[274] Lim, *Liability of Companies*, *supra* note 206, at 259; Mariana Pargendler, *The New Corporate Law of Corporate Groups*, 14 HARVARD BUSINESS LAW REVIEW 343-344, 378-381 (2024) (Professor Pargendler argues that the rise of what she terms 'entity transparency', or the erasure of entity boundaries in the application of corporate law rules of investor protection, which has increased in certain jurisdictions (including India) reveals a lack of direct correlation between a jurisdiction's willingness to overcome entity boundaries for purposes of imposing liability on shareholders (asset departitioning) and for purposes of extending the application of shareholder rights to controlled firms (regulatory departitioning or "pass-through"). She identifies a double standard in the erasure of entity boundaries in the application of corporate law rules and questions whether it is justified - "Shareholders appear to often have it both ways: the law is willing to uphold entity boundaries to benefit shareholders by shielding them from liability while simultaneously disregarding entity boundaries for purposes of applying corporate law rules of shareholder protection")).
[275] Lim, *Liability of Companies*, *supra* note 206, at 259; Micheler, *Separate Legal Personality*, *supra* note 59, at 325-326 (arguing that while the law has developed a range of tools addressing corporate abuse through group structures, further intervention should be carried out in the specific context rather than through a general rule of corporate 'disregard'.)
[276] Christian Witting, *The Basis of Shareholder Liability for Corporate Wrongs*, in ENFORCING SHAREHOLDERS' DUTIES 191-213 (Hanne S. Birkmose and Konstantinos Sergakis eds., 2019); Lim, *Liability of Companies*, *supra* note 206, at 237-283 - see *infra* note 289 and accompanying text.

demonstrates the manner in which anchoring the pluralistic stakeholder governance approach endorsed by the Indian corporate purpose framework in the real entity theory can potentially address the uncertainties identified in the framework and provide the much-needed theoretical foundation for enabling the implementation of a broader corporate purpose.

V. EVALUATING REFORMS FOR ANCHORING STAKEHOLDER GOVERNANCE IN THE ENTITY CONCEPTION AND OPERATIONALISING STAKEHOLDER GOVERNANCE

In this Section, we draw on various recommendations from legal scholarship on certain adjustments and reforms in corporate law and governance that might perhaps be suitable to give effect to anchoring the Indian stakeholder governance model in the real entity conception of the corporation and for implementing stakeholder governance in practice. We discuss these recommendations briefly with the objective of highlighting their significance in terms of restructuring corporate governance to accommodate stakeholders and consequently adjust the balance of powers in corporate law rather than providing definitive answers to questions on optimal structures and mechanisms.

In the preceding Section, the analysis on situating the stakeholder-oriented governance model in the real entity approach so as to address the underlying ambiguities in the Indian corporate purpose framework, underscored certain critical insights. First, it highlighted the importance of explicit specification of purposes in corporations' constitutional documents and its bearings on the best interests duty. Professor Mayer's conceptualisation of 'purpose', according to which purpose means a functional objective for the firm, which should neither be aspirational nor descriptive but built around problem-solving, provides guidance on explicit articulation of corporate purpose.[277] According to Mayer, 'purpose' is "associated with enhancing the well-being and prosperity of shareholders, society and the natural world".[278] He contends that the role of formal purpose statements is twofold: first, to determine the corporation's legitimate sources of profits; and second, to provide the basis for trust in the firm's commitments to deliver public and private benefits that drive the legitimate earning of profits.[279] His conceptualisation includes additional

[277] Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 JOURNAL OF MANAGEMENT STUDIES 889-890 (2021).
[278] *Id*.
[279] *Id*.

specifications in respect of the firm's legal boundaries, the concept of profit, and the bundle of rights and duties encompassed by the notion of ownership that may be referred to in devising mechanisms for inclusion of the legal requirement for specific articulation of corporate purposes in constitutional documents.[280]

Second, the assessment underlined controlling shareholders' accountability and responsibility in relation to the articulation and operationalisation of the corporation's overarching purpose, their status as fiduciaries to the corporation and the importance of subjecting them to fiduciary duties. It identified a legitimacy deficit in the Indian framework in terms of the powers wielded by controlling shareholders on the corporate governance system without concomitant duties and their ramifications for implementing a broader corporate purpose. In order to effectively address the costs associated with private benefits of control, it is imperative that corporate governance mechanisms, particularly, subjecting controlling shareholders to fiduciary duties, be considered. In this regard, adequate attention must be paid to questions relating to whom the duties should be owed to, under what circumstances, what the scope and content of the duties should be and how they must be enforced. Professor Lim's study on controlling shareholders' fiduciary duties in common law Asia tackles these questions in a jurisdiction and context-specific manner and may be referred to in designing appropriate mechanisms for the imposition of fiduciary duties on controlling shareholders in India.[281]

Third, the assessment emphasised the need for clarity on the meaning of 'interests of the corporation' and its implications for the discharge of the best interests duty by directors, acting as purpose fiduciaries, to the corporate entity and its long-term interests. The corporation's purposes have critical implications for the understanding of the best interests duty which under the real entity conception is linked with the long-term value and viability of the entity rather than being conflated with the interests of either shareholders or stakeholders. The formulation of the 'interests of the company' under Section 159(a) of the Singapore Companies Act, 1967 presents a nuanced

---

[280] Colin Mayer, *What is Wrong with Corporate Law? The Purpose of Law and the Law of Purpose*, 18 ANNUAL REVIEW OF LAW AND SCIENCE 290 (2022).

[281] Ernest Lim, SHAREHOLDERS' DUTIES, *supra* note 69; See Andreas Cahn, *The Shareholders' Fiduciary Duty in German Company Law*, in SHAREHOLDERS' DUTIES 347-361 (Hanne S. Birkmose ed., 2017) (on the manner and scope of imposition of fiduciary duties on controlling shareholders under German corporate law); See generally, Gaia Balp and Marco Ventoruzzo, *Controlling Shareholders and their Duties*, in COMPARATIVE CORPORATE GOVERNANCE 324-345 (Afra Afsharipour and Martin Gelter eds., 2021) (on controllers' duties toward minority shareholders in the US, Germany and Italy).

approach to enabling directors to promote the interests of the corporate entity. According to Section 159(a), matters to which directors are entitled to have regard to in exercising their powers include the 'interests of the company's employees generally, as well as the interests of its members'.[282] The approach to the interests of the company under Singapore law is different from the approach under Section 172 of the UK Companies Act in that under the former, the interests of stakeholders are not subordinated to those of shareholders and directors are permitted, but not required, to have regard to the interests of employees, whether or not it benefits shareholders.[283] It is also distinct from the approach under Section 166(2) of the (Indian) Companies Act in that it does not embody a stakeholder-oriented model.[284] Under Section 159(a), promoting stakeholder interests is a means to an end where such end is understood in terms of the long-term growth and sustainability of the company.[285]

Company law in Singapore embraces the real entity understanding of the best interests duty by recognising that the interests of the solvent company are context dependent and that the company has interests that are separate and distinct from those of its shareholders and stakeholders thereby permitting directors to pursue and justify decisions on the basis that they promote corporate interest.[286] Further, while courts have held that the interests of the solvent company are to be equated with those of shareholders,[287] there is also case law that not only recognises that the interests of the solvent company are separate and distinct from those of the shareholders but also that corporate interest can be preferred over shareholders' interests under certain circumstances.[288] For instance, the court has held that directors are not in breach of their duties if they prefer corporate interest over shareholders' interest by retaining profits instead of distributing them as dividends.[289]

Fourth, the assessment underscored the importance of re-thinking the rules applicable to the principle of limited liability in order to address concerns relating to corporate externalities.

[282] Lim, *Best Interests Duty*, *supra* note 38, at 223-224.
[283] *Id*. at 224.
[284] *Id*.
[285] *Id*.
[286] *Id*.
[287] Tong Tien See Construction Pte Ltd v Tong Tien See (2002) MSCLC 97558 [54].
[288] Raffles Town Club Pte Ltd v Lim Eng Hock Peter (2010) SGHC 163 [162].
[289] *Id*.

Holding illicit parent companies and controllers accountable for harms caused by their subsidiaries necessitates the formulation of exceptions to the principle of limited liability for ensuring adequate deterrence and redressal mechanisms. In this regard, it is imperative to take into account factors such as the role of controlling shareholders in the Indian corporate governance structure, the merits and limitations of fault-based liability and strict liability frameworks and appropriate enforcement mechanisms in the design and implementation of such liability regimes.[290]

Finally, the assessment highlighted that the operationalisation of stakeholder governance necessitates rebalancing the distribution of powers in company law given that the power matrix within the current framework results in fostering shareholder primacy. Effective implementation of the pluralistic stakeholder-oriented model adopted by the Indian framework and situating it within the entity conception requires the recognition that stakeholders other than shareholders make firm-specific commitments that strengthen the long-term value and viability of the firm. Stakeholders therefore must be afforded decision-making as well as enforcement related rights which under the current framework are exercised exclusively by shareholders.[291] This is important in order to ensure parity of consideration in decision-making between shareholders and stakeholders, substantive outcomes of fairer distribution of responsibility and mitigation of externalities that are left unaddressed on account of the predominance of shareholder primacy.[292] Accordingly, we discuss certain proposals that have been advanced on rethinking approaches to corporate governance for creating structures and governance mechanisms that are conducive to the stakeholder conception of corporate purpose.

The first and foremost amongst the reform recommendations is the creation of enforceable rights for stakeholders, through both, private and public enforcement measures, in the absence of which other reforms that lend themselves to stakeholder governance will be of little practical

[290] Lim, *Liability of Companies*, *supra* note 206 (for a detailed evaluation of current and proposed redress mechanisms for victims of corporate wrongdoing including judicial piercing of the corporate veil, judicial imposition of duty of care on the parent company, statutory enterprise liability, statutory strict liability on the shareholders of the delinquent subsidiary, and liability on networks specifically in the context of Asian common law jurisdictions, including India); Witting, *supra* note 276 (discussing the factors that must be accounted for in designing an appropriate liability regime that incentivizes all participants in corporate endeavours, particularly shareholders, to take appropriate measures to avoid the causation of personal injuries - contours of the discussion are limited to corporate insolvency).
[291] Chiu, *supra* note 37, at 177-178.
[292] *Id*. at 175.

significance.[293] As regards devising corporate governance structures for stakeholder representation on corporate boards, Germany's co-determination model provides an illustrative example of the benefits of employee representation on boards.[294] Under German law, supervisory boards of certain types of companies are required to have fifty percent of directors appointed by employees to represent and advance employees' interests.[295] The co-determination model ensures that employee considerations form part of decision-making processes at the board level.[296] It is supplemented by directors' duties according to which the board must take into account the interests of shareholders and stakeholders in order to ensure the company's sustainable value creation.[297]

The impact of employee representation on boards on corporate success has been examined extensively in literature and many studies point to evidence that indicates benefits in terms of firm efficiency and market value, higher spending on research and development and long-term employment protection.[298] While other European Union countries have also adopted co-determination laws, the German model is the most far-reaching and well-established one.[299] Moreover, two bills on employee representation on boards have been introduced in the US - one that requires forty percent of boards in companies worth a certain revenue threshold to be elected by employees, and another that requires listed companies to have one-third of their boards elected by employees.[300] Another mode for ensuring stakeholder representation on boards and consequently implementing a broader corporate purpose has been proposed in the form of creation of a tripartite board in companies of certain sizes.[301] According to the proposal, the three tiers would comprise the following: the first tier focused on business strategy, operations and finance; the second tier focused on the sustainability of operations; and the third tier focused on taking into

[293] Lim, *Best Interests Duty*, *supra* note 38, at 220.
[294] Anhenier and Abels, *supra* note 39, at 32.
[295] Davies, *supra* note 112.
[296] German Corporate Governance Code (2019), Foreword at 2.
[297] *Id*.
[298] L. Fauver, and M. E. Fuerst, *Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards*, 82 JOURNAL OF FINANCIAL ECONOMICS 673-710 (2006); K. Kraft, J. Stank and R. Dewenter, *Co determination and Innovation*, 35 CAMBRIDGE JOURNAL OF ECONOMICS 145-172 (2011); E. Han Kim, Ernst Maug and Christoph Scheider, *Labor Representation in Governance as an Insurance Mechanism*, 22 REVIEW OF FINANCE 1251-1289 (2018); See also, Jens Dammann, *Codetermination's Moment of Truth: Overseas Workers*, (European Corporate Governance Institute Law Working Paper No. 809, 2024).
[299] Kraft, Stank and Dewenter, *supra* note 298.
[300] Accountable Capitalism Act, § 3348, 115th Cong. 2018 §§ 2(2)(A), 5(c)(1), 6(b); Reward Work Act (2018), § 2605.
[301] Sheehy, *supra* note 204, at 297-300.

consideration concerns related to employees and communities impacted by the company's operations and conduct.[302]

In order to add to the efficacy of the mechanism of stakeholder representation on boards, a supplementary mechanism to the three-tier board has been proposed according to which a new corporate organ comprising denominated stakeholders should be created that would function in addition to and along with the board of directors and the general meeting.[303] Rights relating to corporate decision-making exercised exclusively by shareholders would have to accordingly be redistributed with key stakeholders to enable them to exercise voting rights on matters pertaining to stakeholder concerns, including but not limited to ESG concerns, social welfare and corporate externalities.[304] The stakeholder organ would therefore serve as an effective counter-balancing corporate organ with the readjustment of rights reflecting a more balanced power matrix which would be more holistic and inclusive compared to the constraining norm of shareholder primacy.[305]

As an alternative to board representation for stakeholders, it has been recommended that companies enter into stakeholder covenants with key stakeholders and that this arrangement must be supplemented by a concurrent directors' duty to comply with such covenants, once entered into.[306] The reason attributed to preferring the stakeholder covenants framework to stakeholder representation on boards is that stakeholder covenants provide a range of options for companies and their stakeholders to structure their relationships, and that board representation is only one amongst such options.[307] Stakeholder covenants may be modelled on and regarded as the legal equivalents of the company's constitutional documents which are a form of covenants with shareholders.[308] Once established, stakeholder covenants must be treated as contractual obligations binding the company and its group of stakeholders inter se.[309] Further, the identification of key stakeholders, their contents, including mandatory rules and procedures must be provided for in the

302 *Id*. at 298.
303 *Id*. at 300-303.
304 *Id*.; Hayden and Bodie, *supra* note 36, at 19 ("Governance rights not only give additional stakeholder groups a more effective way to define their collective interests, but also provide a mechanism to ensure that the corporation pursues those interests").
305 Sheehy, *supra* note 204, at 302.
306 Chiu, *supra* note 37, at 176-177.
307 *Id*. at 176.
308 *Id*. at 176, 179.
309 *Id*. at 179.

legislative design.[310] The stakeholder covenants mechanism therefore recognises stakeholders as part of the entirety of constituents that make firm-specific commitments and contribute to the company's long-term growth.[311]

Another proposal that recognises the importance of not treating stakeholders' interests as inferior to those of shareholders, and at the same time is cognisant of the risks associated with providing stakeholders with enforcement remedies in terms of potential increase in litigation and transaction costs, merits consideration. According to this proposal, while shareholders must retain the ability to exercise control rights, stakeholder interests must be represented by a third unifying body or a third party, preferably, a regulator.[312] The regulator should be empowered with bringing derivative suits for breach of a revised duty owed to stakeholders.[313] Essentially, this third party's role may be perceived as that of an ombudsman as it acts as a gatekeeper to claims on behalf of stakeholders which in turn serves two crucial functions: one, enforcement of wider interests provides support to the concept of enforced third-party action; and two, it allows for an element of objectivity in reviewing when to pursue action against a corporation for breach.[314] The regulator would have a process whereby affected stakeholders could lodge complaints or concerns, which would be reviewed by the regulator, who can decide to take action or engage in further discussions with the company.[315] This proposal therefore addresses concerns related to transaction costs, protects directors in their efforts to consider the interests of shareholders and stakeholders and also provides a control mechanism for instances where corporations may be held accountable for externalities placed by them on third parties.[316]

In terms of mechanisms for considering and balancing the interests of various stakeholders, it has been argued that the duty of impartiality holds substantial promise as a doctrinal framework for addressing the interests of stakeholder constituencies, especially in jurisdictions like India that endorse a pluralistic approach to corporate purpose.[317] The conceptual framework of this proposal

[310] *Id*.
[311] Blair and Stout, *supra* note 148, at 247.
[312] Underwood, *supra* note 30, at 721.
[313] *Id*.
[314] *Id*. at 722.
[315] *Id*. at 721.
[316] *Id*. at 721-722.
[317] Licht, *supra* note 10, at 23, 30.

has been derived primarily from trustees' duty of impartiality in discretionary trusts and has been tailored appropriately to be applicable to corporate settings.[318] The proposal states that directors and other corporate fiduciaries with strategic responsibilities will be obliged to treat the company's stakeholders impartially when they make business judgments in the best interests of the company as a whole - an obligation that will be discharged by considering the interests of the company's various stakeholders.[319] The obligation of stakeholder impartiality will form part of directors' duties which must be discharged with a degree of skill and care that is reasonably required in the circumstances.[320] Further, the proposal recommends that to ensure that stakeholder impartiality is effectuated in practice, non-shareholder stakeholders must be able to enforce their right to impartial treatment.[321] The formal requirement to consider stakeholder interests through the duty of stakeholder impartiality under this proposal responds directly to one of the primary criticisms against the stakeholder model regarding the lack of guidance for directors on the manner in which stakeholder interests are to be taken into account and balanced.[322]

CONCLUSION

The debate on corporate purpose is essentially a debate about the appropriate ends of corporate law and governance and the means of achieving those ends. These ends presuppose a particular model which is based on a theoretical foundation of the corporation. An analysis of corporate purpose frameworks therefore necessarily entails an assessment of how well the particular ends endorsed by the said framework sit within the chosen model and how well the model justifies the means of carrying out the given purpose or achieving those ends.[323] This article, by placing the pluralistic stakeholder governance approach embodied by the Indian corporate purpose framework at the centre of its analysis, identifies a fundamental misalignment between the ends endorsed by the framework i.e., pluralistic stakeholderism, and the means of achieving those ends i.e., allocation of decision and governance rights, given that the means are lacking on account of the power structure and the resultant accountability deficit within which they operate. This article

---

[318] *Id*. at 23-29.
[319] *Id*. at 23-24.
[320] *Id*. at 24.
[321] *Id*. at 27-28.
[322] *Id.* at 3.
[323] Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governanc*e, 97 NORTHWESTERN UNIVERSITY LAW REVIEW 547-606 (2003); Zachary J. Gubler, *The Neoclassical View of Corporate Fiduciary Duty Law*, 91 THE UNIVERSITY OF CHICAGO LAW REVIEW 177-178 (2024).

advances the real entity theory as the appropriate theoretical foundation for addressing the challenges posed by the Indian framework and for enabling the implementation of the stakeholder-oriented corporate purpose model adopted by it. It demonstrates the entity theory's compelling explanatory power for essential features of the corporate form which have far-reaching implications for corporate purpose. It also assesses how anchoring stakeholder governance within the entity conception can potentially move the corporate purpose debate beyond its reductionist framing by centering the discourse around the long-term interests of the corporate entity. Finally, it highlights the importance of restructuring governance mechanisms and adjusting the distribution of powers, rights and duties such that the governance framework which forms the basis of the pluralistic stakeholder governance model can transcend its current perception as an empty rhetorical exercise. The overarching endeavour is to contribute to addressing pressing questions around the normative objectives of corporate law and the appropriate purpose of corporations that contemporary corporate governance scholarship continues to grapple with. This is especially critical in the context of the complex challenges of our times in terms of socio-economic inequality, corporate inequities regarding gender and race and climate change.