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Re-evaluating Corporate Purpose: A Critical Assessment of the Indian Stakeholder Governance Framework through a Historical and Comparative Analysis

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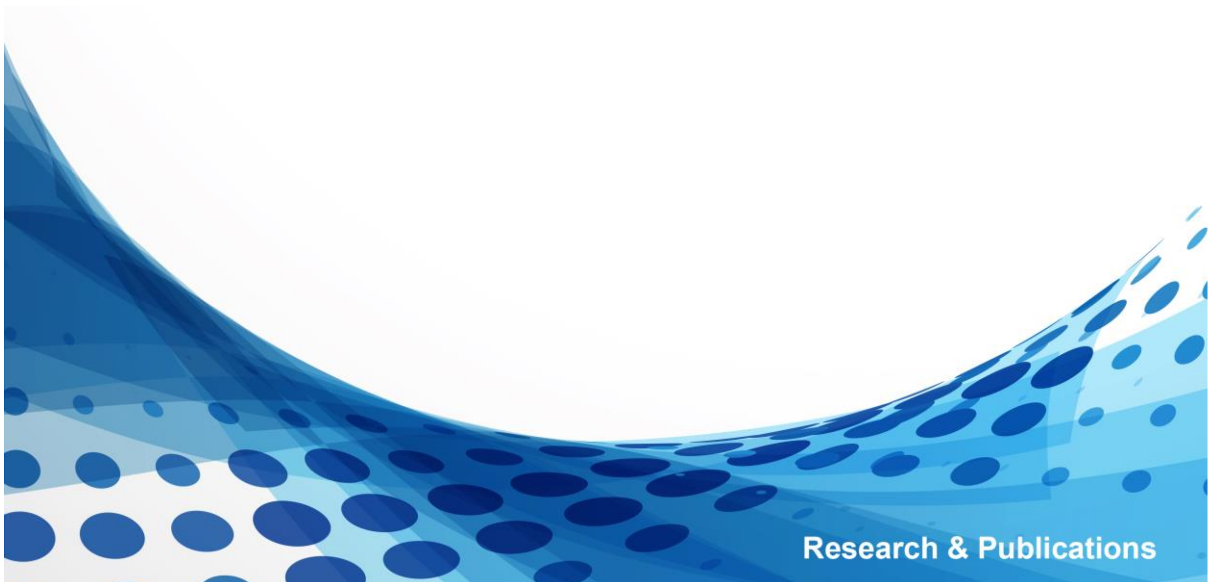

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Re-evaluating Corporate Purpose: A Critical Assessment of the Indian Stakeholder Governance Framework through a Historical and Comparative Analysis

Astha Pandey* and M P Ram Mohan**

Abstract:

In the last century, the meaning and interpretation of the purpose of the corporation has undergone a succession of ideological shifts. Corporate purpose has become the prime focus of wide-ranging debates over the shareholder primacy versus the stakeholder primacy conceptualization of the corporation. While this debate is not new, in recent times, stakeholderism and its enduring viability as a theory of the corporation has gained considerable traction. At the same time, shareholder primacy and its explanatory power as a valid theory of contemporary organizations is being increasingly questioned. The current Indian legal and regulatory framework governing corporate purpose embodies stakeholderism. In sharp contrast to this, the Anglo-American corporate law framework can be characterized as predominantly shareholder-centric. This article seeks to contribute to contemporary discourse on the theorization of corporations by evaluating the stakeholder-oriented corporate purpose framework adopted by India. In doing this, it examines the historical trajectory of the doctrine of corporate purpose in the U.S., the U.K. and India. This comparative analysis provides an opportunity for enhancing discussions on corporate purpose in comparative corporate governance scholarship given the common law heritage of these jurisdictions and the differences between them in terms of ownership patterns, governance structures and philosophies that have guided their experience with corporate purpose. Broadly, this article makes the following arguments: (i) tracing the evolution of corporate purpose demonstrates that there is a need for its re-evaluation; and (ii) despite adopting the pluralistic form of stakeholder governance, the Indian framework governing corporate purpose is lacking in certain fundamental aspects. The article also proposes certain areas for further scholarly investigation to inform the re-evaluation of corporate purpose and the direction of comparative corporate governance scholarship.

Keywords: corporate purpose, stakeholder governance, shareholder primacy, comparative corporate governance, convergence

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TABLE OF CONTENTS

INTRODUCTION 4

I. CORPORATE PURPOSE AND STAKEHOLDERISM: SIGNIFICANCE AND THEORETICAL APPROACHES 9
A. Significance of Corporate Purpose 10
B. Theoretical Approaches to Stakeholderism 11
C. Contextualizing Corporate Purpose 14
1. *Corporate Purpose Beyond Wealth Maximization and Credible Commitment* 14
2. *Stakeholderism, Corporate Personhood and a Broader Corporate Purpose* 15

II. CORPORATE PURPOSE IN INDIA: HISTORICAL EVOLUTION AND CURRENT FRAMEWORK 19
A. Historical Evolution of Corporate Purpose in India 20
B. Legal and Regulatory Framework Governing Corporate Purpose in India 22
1. *Companies Act and SEBI Listing Regulations* 22
2. *CSR and ESG Framework* 24
C. Limitations and Challenges in the Indian Framework on Corporate Purpose 27
1. *Implementation-related issues* 27
2. *Enforcement-related issues* 28
3. *CSR and ESG-related issues* 29
4. *Challenges Associated with Concentrated Ownership Patterns* 31
D. Stakeholderism, Controlling Shareholders and Credible Commitment 32

III. CORPORATE PURPOSE IN THE U.S. AND THE U.K.: HISTORICAL EVOLUTION, SCHOLARSHIP AND ITS IMPACT 35
A. Historical Evolution of Corporate Purpose in the U.S. and the U.K. 36
B. Scholarship and its Impact on Anglo-American Corporate Governance 38
1. *The Berle – Dodd Debates: Corporate Purpose and Social Responsibility* 38
2. *Berle and Means: Corporate Purpose and Managerial Capitalism* 40
3. *Jensen and Meckling: Corporate Purpose and Shareholder Primacy* 43

C. Shareholder Primacy and the Missing Historical Context 45

IV. Implications of the Predominance of the Shareholder Primacy Doctrine 47
A. Importance of Contextualizing the Predominance of Shareholder Primacy 48
B. Anglo-American Corporate Governance: Presupposed Benchmark for Best Practices Globally 50
C. The Comparative Corporate Governance Convergence Debate 52

V. Learnings and Areas for Further Research 55
A. Examining Differences in Corporate Governance Systems for Comparative Analysis 55
B. Situating India in Comparative Corporate Governance Scholarship 56
C. Corporate Purpose, Corporate Governance Structures and Corporate Ownership Patterns 58
D. Key Lessons and the Way Forward 60

Conclusion 66

INTRODUCTION[1]

The public corporation has been acknowledged as one of the most significant innovations in human history.[2] In fact, it was considered an ideal vehicle for the twentieth century economy, characterized by long-lived assets and economies of scale.[3] In recent times, however, public corporations have been increasingly characterized as being out of sync with the twenty-first century economy.[4] The debate around the future of corporations has intensified significantly[5] and consequently, the direction and effectiveness of corporate performance, corporate law and corporate governance are being challenged as never before.[6] The challenge of the corporation laid down by Adolf Berle, one of the most influential theorists of the corporation, in 1959, remains a focal point of contention till date:

> "*A commercial instrument of formidable effectiveness, feared because of its power, hated because of the excesses with which that power was used, suspect because of the extent of its political manipulations within the political State, admired because of its capacity to get things done. From the turn of the twentieth century to the present, nevertheless, its position as a major method of business organisation has been assured. Although it was abused, no substitute form of organisation was found. The problem was to make it a restrained, mature and socially useful instrument.*"[7]

From the time Berle made the aforementioned statement on the primary challenge of the modern corporation up until today, the existential normative questions of purpose and control with respect to the corporation remain unresolved.[8] Contemporary scholarship on corporate governance points to the need for a richer theoretical account of the corporation to inform and influence the trajectory of the design and development of innovative, accountable and sustainable corporations.[9] The

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[1] The analysis in this article is limited to publicly listed companies. Terms such as 'corporations', 'firms', 'companies', 'public companies' and 'organizations' must be read and understood accordingly.
[2] Thomas Clarke, Justin O'Brien and Charles O'Kelley, *The Evolving Corporation: Economy, Law and Society* in THE OXFORD HANDBOOK OF THE CORPORATION 2 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).
[3] *Id.* at 23.
[4] *Id.*
[5] Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 JOURNAL OF MANAGEMENT STUDIES 887, 887-888 (2021).
[6] Thomas Clarke, Justin O'Brien and Charles O'Kelley, *supra* note 2, at 1.
[7] *Id.* at 2.
[8] *Id.* at 3.
[9] *Id.* at 2.

unprecedented and far-reaching implications of crises such as COVID-19, rising environmental degradation and inequality, and exploitative labour practices accompanied by inordinate corporate profits have rekindled the need, amongst academics, policy-makers and businesses to re-examine the nature of the current capitalist system and the role of corporations in it.[10]

Such re-examination, at its core, implies re-assessing, amongst other things, existing sustainability strategies and long-term priorities as opposed to short-term goals of businesses. In this regard, one of the most significant developments in corporate governance in the last few years has been the recognition of the view (including by some of the most influential actors in the corporate community) that corporations should focus on furthering the interests of corporate stakeholders as well as the broader society, instead of focusing primarily on shareholders.[11] In 2019, the Business Roundtable, America's leading non-profit association of chief executives and directors, released a statement signed by one hundred and eighty one chief executive officers, expressing a commitment to embracing a corporate purpose that included a "fundamental commitment" to deliver value to all of the corporations' stakeholders.[12] The Business Roundtable made clear that its statement was aimed at "redefining" corporate purpose to promote "an economy that serves all Americans."[13] This is in sharp contrast to the shareholder wealth or interest position propounded by Milton Friedman according to which earning of profits for shareholders is the sole responsibility of businesses.[14]

The debate on 'shareholderism' versus 'stakeholderism' has been a long-standing one with conflicting perspectives extending back decades.[15] Despite there being a considerable body of scholarship around corporate purpose, academics and policy-makers continue to grapple with

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[10] Colin Mayer, *supra* note 5, at 887; Saule T. Omarova, *The "Franchise" View of the Corporation: Purpose, Personality, Public Policy* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 209 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[11] Lisa M Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VIRGINIA LAW REVIEW 1163, 1165 (2022).

[12] *Id.* at 1166; Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans', Business Roundtable (Aug. 19, 2019), available at https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[13] *Id.*

[14] Colin Mayer, *The Governance of Corporate Purpose,* EUROPEAN CORPORATE GOVERNANCE INSTITUTE-LAW WORKING PAPER No. 609/2021 1, 2 (2021); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, NEW YORK TIMES MAGAZINE (Sep. 13, 1970), at 32.

[15] Brian R. Cheffins, *The Past, Present and Future of Corporate Purpose*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, LAW WORKING PAPER NO. 713 1, 1 (2023).

issues in and around this area of corporate governance. This debate has taken different forms and been articulated by corporate law and management scholars for the better part of a century but the focus of literature on the subject has remained rather consistent, which is, to attempt to discern whether the corporation primarily serves the purpose of its shareholders or its stakeholders.[16] Corporate law scholars who argue in favour of shareholder wealth maximization subscribe to the view that corporate decision-makers and managers are obligated to focus on shareholder interests.[17] On the other end of the spectrum are scholars who argue in favour of stakeholder governance and subscribe to the view that corporations should be managed in the interests of a broad range of stakeholders, which include employees, customers, creditors, suppliers, environment, community and the like.[18] The debate on corporate purpose goes to the heart of corporate law and corporate governance because underpinning it are questions centred around the fundamental nature of corporate purpose i.e. why are corporations created, why they exist, what they do, what they aspire to become etc.[19]

In examining these questions, it becomes imperative to trace the scholarship on corporate purpose to its origins and examine the profound intellectual impact of those deliberations in moving shareholder value maximization or what later came to be known as "shareholder primacy" to the centre of the debate over corporate purpose.[20] This debate has played a significant role in not only shaping Anglo-American corporate governance[21] but also in influencing the realms of economics, corporate governance, corporate law and organizational behaviour globally.[22] Despite their myriad differences, until recently, modern corporate law and governance in the United States ("**U.S.**") and the United Kingdom ("**U.K.**") has, in theory and practice, been defined by shareholder primacy.[23] Recognition of the interests of other corporate stakeholders has largely been on the margins of corporate law and governance in both systems, with "shareholder primacy" at the core.[24]

[16] Veronica Root Martinez, *A More Equitable Corporate Purpose* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 50 (Elizabeth Pollman & Robert B. Thompson eds., 2021).
[17] *Id.* at 50-51.
[18] *Id.*
[19] Colin Mayer, *supra* note 5, at 888.
[20] Brian R. Cheffins, *What Jensen and Meckling Really Said about the Public Company* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 1-3 (Elizabeth Pollman & Robert B. Thompson eds., 2021).
[21] Dan W. Puchniak, *No Need for Asia to Be Woke: Contextualizing Anglo-America's "Discovery" of Corporate Purpose*, 4 RED, GROUPE D'ETUDES GEOPOLITIQUES 14, 14 (2022).
[22] Brian R. Cheffins, *supra* note 20, at 3.
[23] Dan W. Puchniak, *supra* note 21, at 14.
[24] *Id*.

Moreover, the shareholder primacy doctrine has been a powerful concept that has defined business practice and government policies around the world for half a century as a consequence of American corporate governance emerging as the de facto gold standard for "good" corporate governance around the world.[25] The confidently and assertively titled well-known article "The End of History for Corporate Law" by two of America's preeminent law professors, Henry Hansmann and Reinier Kraakman,[26] in which they concluded that "*in key commercial jurisdictions….there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value*"[27] is a testament to the profound impact of America's corporate governance standards on the rest of the world.

Situated as a response to the position Hansmann and Kraakman describe as dominant, i.e. that the corporation should be run to maximize shareholder value,[28] the stakeholder model has had a long history in India which has accelerated in recent times.[29] The legal and regulatory framework governing corporate purpose in India, namely, the Companies Act, 2013 and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 is clear and unambiguous as regards its stakeholder-oriented approach[30] in that it requires directors to treat the interests of various specified stakeholders on an equal footing without creating any hierarchy amongst them.[31] India appears like a textbook case of having a long history of a corporate governance philosophy with stakeholderism at its core.[32] In fact, the legal and regulatory framework governing corporate purpose in India has been referred to as "a radical experiment with corporate purpose"[33] and "the most dedicated attempt to date to implement a formal pluralistic,

[25] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed* in the RESEARCH HANDBOOK ON SHAREHOLDER POWER 515 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[26] Dan W. Puchniak, *supra* note 21, at 14-15.
[27] Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law* 89 GEORGETOWN LAW JOURNAL 439, 439 (2001).
[28] *Id*.
[29] Dan W. Puchniak, *supra* note 21, at 18.
[30] *Id*. at 19.
[31] Umakanth Varottil, *The Legal and Regulatory Impetus Towards ESG in India: Developments and Challenges*, NUS LAW WORKING PAPER NO. 2023/003 1, 8 (2023). The final version of this paper is scheduled to be published as a chapter in the RESEARCH HANDBOOK ON ENVIRONMENTAL, SOCIAL, AND CORPORATE GOVERNANCE (Thilo Kuntz ed., forthcoming, 2024).
[32] Dan Puchniak, *supra* note 21, at 19.
[33] Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective* 40 SEATTLE UNIVERSITY LAW REVIEW 465, 466 (2017).

stakeholder-oriented duty”.[34] However, a holistic analysis of the stakeholder governance model is indicative of certain fundamental challenges associated with the broader corporate governance framework in India that make the implementation of stakeholderism difficult in practice and demonstrate that the stakeholder approach adopted by it is not as extensive as it is made out to be.[35]

Against this context, this article seeks to present the foundational theoretical groundwork for re-thinking corporate purpose by examining the stakeholder-governance model embraced by India and placing it at the centre of the re-evaluation of corporate purpose exercise. In doing so, this article looks to the past and traces the historical trajectory of the doctrine of corporate purpose in the U.S., the U.K. and India. This is important in order to: (i) critically analyze the theoretical foundations of the shareholder primacy doctrine; and (ii) demonstrate the reasons as to why when viewed through an American lens and when tested against the American standards of “good” corporate governance, Asian economies such as India which belong to the Global South[36] seemingly do not perform well despite the fact that three of Asia’s largest economies (including India) comprise three of the four largest economies in the world.[37] The overarching objective with respect to looking at the past is to provide a comprehensive understanding of the corporation primarily through the lens of corporate law doctrines with the underlying argument being that the tracking of the history of the corporation, and debates around it, demonstrates that there is need for re-evaluation. Further, a historical analysis of the scholarship that led to the predominance of shareholder primacy in Anglo-American corporate governance adds value by contextualizing the scholarship which in turn helps to: (i) provide a much needed and helpful basis for considering the manner in which Western, specifically American conceptions of the corporation have informed

[34] Amir N. Licht, *Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporation*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, LAW WORKING SERIES IN LAW NO. 476 1, 13 (2019).

[35] Mihir Naniwadekar and Umakanth Varottil, *The Stakeholder Approach Towards Directors’ Duties Under Indian Company Law: A Comparative Analysis*, NUS WORKING PAPER NO. 2016/006 1, 20-21 (2016).

[36] This article, in line with the growing trend in comparative corporate governance literature, uses the term Global South and replaces it for the use of terms such as “developing economies” or “emerging markets". Stated briefly, such replacement in terminology serves to address two issues: (i) the strong hierarchical connotation underlying the traditional usage of terms such as “developing economies” or “emerging markets”; and (ii) the negation of jurisdiction-specific social, economic and political challenges which are critical to the understanding of corporate law and governance arrangements. For a more detailed understanding on the usage of terminology, see Mariana Parglender, *The Global South in Comparative Corporate Governance*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, LAW WORKING PAPER NO. 751/2024 1, 3-5 (2024), Forthcoming in the OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds.).

[37] Dan W. Puchniak, *supra* note 25, at 511; Dan W. Puchniak, *supra* note 21, at 15.

and dominated much of the discourse around corporate governance, particularly the shareholder-stakeholder as well as the inter-connected convergence debates globally; and (ii) underline the fact that it is fundamentally untenable and misleading to apply the lens of American corporate governance standards that has largely shaped corporate law discourse globally to the economies of Asian countries such as India. Studying developments around corporate purpose in light of the historical context in which they unfolded can perhaps serve to inform a more synoptic understanding of contemporary corporations and inform their reconceptualization.

This article is structured as follows: Section I presents an overview of the fundamental importance of the corporate purpose doctrine in corporate law. It delves into insights from stakeholder-oriented thinkers for providing strong theoretical and practical justifications for enabling a broader and more equitable corporate purpose and re-conceptualizing the corporation as an independent entity that can generate profits responsibly. Section II traces the evolution of corporate purpose in India and examines its current legal and regulatory framework along with its shortcomings. Section III traces the trajectory of the corporate purpose doctrine in the U.S. and the U.K. It also examines scholarship on corporate purpose that led to the notion of shareholder primacy taking centre stage in Anglo-American company law and corporate regulation. Section IV discusses the implications of our analysis on comparative corporate governance scholarship in terms of the need for re-evaluation of corporate purpose and the importance of adopting jurisdiction-specific assessment of legal and regulatory corporate purpose frameworks. Section V sets out certain learnings and areas for further research with the aim of contributing to the corporate purpose debate in India and beyond.

I. Corporate Purpose and Stakeholderism: Significance and Theoretical Approaches

This Section discusses the fundamental importance of the corporate purpose doctrine in corporate law. It advances the real-entity theory of the corporation and draws on valuable insights from thinkers who endorse a broader corporate purpose than that envisaged by shareholder primacy, namely, Edward Freeman, John Kay, Colin Mayer, Edith Penrose, Martin Lipton and William Savitt to argue for a renewed consideration of the corporation centred around its purpose with such purpose being rooted in stakeholderism. It also relies on and draws connections in academic

research on legal, economic and managerial theories of the corporation for aiding the understanding of the concept of corporate purpose, placing it in a larger economic, legal and social context and for justifying its proposed reconceptualization.[38]

A. Significance of Corporate Purpose

Corporate purpose concerns the core question of corporate law and corporate governance.[39] It relates to the raison d'etre of the company, which is, the very reason for its existence and operation.[40] It is a complex, multi-faceted concept with far-reaching implications for modern life.[41] Purpose is the driving force behind the creation, existence and future aspirations of the corporation and consequently, the fundamental determinant of corporate conduct and behaviour.[42] Given that "purpose drives everything", there is a growing realization of the fundamental nature of corporate purpose[43] in the sense of it being understood as an overarching management philosophy, a steering instrument for all the activities of a company."[44] Purpose is considered as "a concrete goal or objective for the firm that reaches beyond profit maximisation."[45] It is not about what ones *does*, but what one *is*, the reason for being and the reason for the organisation to come together as the intersection point between 'hard' elements such as vision, strategy and operational priorities which drive performance, and 'soft' elements such as brand, values and culture, which work to create a distinctive organisational climate.[46] Therefore, in considering the future of the corporation, the starting point should be from a more fundamental question about its purpose, for one to then consider the resulting changes to business practice, policy, education and research that are required to deliver it.[47]

[38] Blanche Segrestin, Armand Hatchuel and Kevin Levillain, *When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose* 171 JOURNAL OF BUSINESS ETHICS 1, 2-3 (2021).
[39] Amir N. Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 407 (Elizabeth Pollman & Robert B. Thompson eds., 2021).
[40] *Id.*
[41] *Id.*
[42] Colin Mayer, *supra* note 5, at 898.
[43] *Id*. 888.
[44] Holger Fleischer, *Corporate Purpose: A Management Concept and Its Implications for Company Law*, EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 161, 166 (2021).
[45] Colin Mayer, *supra* note 5, at 889.
[46] *Id.*
[47] *Id.* at 888.

Despite extensive literature on the subject, scholars, policymakers and the public at large are all rightly concerned and continue to be concerned with the question of corporate purpose.[48] Globally, the scholarly debate on corporate purpose continues at both the normative and descriptive levels.[49] While the shareholder-stakeholder debate is not new, the explicit acceptance of the view that corporations should operate in a manner that benefits society and corporations' stakeholders, is relatively recent.[50] A number of justifications in support of enhanced corporate duties to the public and a resultant broader, pluralist, more public-oriented corporate purpose have been advanced by commentators.[51] The most common ones are based on traditional social contract theory and, relatedly, on the status of corporations as providers and/or beneficiaries of public services.[52] Additionally, and arguably most convincingly, in the context of today's large and multinational corporations, other justifications advanced are based on four separate factors that individually and collectively support a broader purpose, which are: (i) the considerable power that corporations wield; (ii) their emerging role as influencers or makers of policies and rules; (iii) their ability to engage in international arbitrage; and (iv) negative externalities stemming from corporate activities.[53]

B. Theoretical Approaches to Stakeholderism

Any analysis of corporate purpose or the objective of the corporation, must necessarily be intricately related to the status and role of corporate stakeholders.[54] These include its shareholders, creditors, employees, suppliers and customers, the communities in which it operates and the general social and natural environment.[55] The stakeholder theory is commonly attributed to Professor Edward Freeman, who associates the concept of stakeholderism with "*a very old tradition that sees business as an integral part of society rather than an institution separate and*

[48] Veronica Root Martinez, *supra* note 16, at 50.
[49] Lyman P. Q. Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose* in the RESEARCH HANDBOOK ON FIDUCIARY LAW 269 (D. G. Smith & Andrew S. Gold eds., 2018).
[50] Lisa M. Fairfax, *supra* note 11, at 1165-1166.
[51] Martin Petrin, *Beyond Shareholder Value: Exploring Justifications for a Broader Corporate Purpose* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 348 (Elizabeth Pollman & Robert B. Thompson eds., 2021).
[52] *Id.* at 348-349.
[53] *Id.* at 348-355.
[54] Amir N. Licht, *supra* note 39, at 387.
[55] *Id*.

purely economic in nature."[56] Freeman states, "*capitalism works because entrepreneurs and managers put together and sustain deals or relationships among customers, suppliers, employees, financiers and communities*."[57] According to the stakeholder theory, economic value is created by voluntary relationships among many parties who cooperate to create successful businesses.[58] It is both a management theory that deals with creating and managing successful companies and an ethical theory about the values of management in relationships with those parties.[59]

This theory does not in any way dismiss the importance of shareholders *as* stakeholders in the firm.[60] What it rejects is the notion that advancing shareholders' interests is the primary purpose of the firm.[61] From a stakeholder perspective, successful companies incorporate and rely on multiple social and natural components, such as an educated and skilled workforce, physical infrastructure for production, transportation and distribution of goods, a supportive and efficient effective legal system, natural capital inputs of air, water, commodities and the like.[62] Since some significant portion of the components of corporate success, including financial components, are indisputably contributed by parties other than shareholders, the stakeholder theory asserts that those parties also have interests that need to be considered by the firm, its managers and directors.[63]

This articulation of corporate purpose based on the stakeholder theory is a major theoretical competitor to shareholder primacy based on the nexus of contracts theory.[64] The nexus of contracts approach treats the corporation as an "empty shell" and denies the reality of the corporation as a social unit.[65] From the contractarian or the nexus of contracts perspective, the corporation's boundaries are defined by the relative transaction costs of market-based and hierarchical organisation.[66] It treats issues of both corporate management and corporate governance as

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[56] Cynthia A. Williams, *For Whom is the Corporation Managed and What is its Purpose? A Stakeholder Perspective Based on the Law of Delaware* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 171-172 (Elizabeth Pollman & Robert B. Thompson eds., 2021).
[57] *Id*. at 172.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.; Steven L. Schwarcz, Bondholder Governance, Policy Brief No. 122, Centre for International Governance Innovation, (Feb. 2018), available at https://www.cigionline.org/static/documents/documents/PB%20no.122.pdf.
[63] *Id*.
[64] Cynthia A. Williams, *supra* note 56, at 171-172.
[65] John Kay, *The Concept of the Corporation*, 61 BUSINESS HISTORY 1129, 1134 (2019).
[66] *Id.* at 1129.

principal-agent problems to be resolved by the establishment of appropriate incentives.[67] This approach has had considerable influence on corporate behaviour and public policy as a consequence of which shareholder value prioritization and incentive-based schemes of executive remuneration have become widespread.[68]

Three central components of the stakeholder concept of the corporation identified by Freeman serve to distinguish it from the shareholder value or nexus of contracts approach.[69] Briefly stated, they are as follows:[70] (i) the corporation is a social organisation and not an assemblage of agents who find it profitable to do business with each other; (ii) the corporation cannot be divorced from its social context - viewing the firm as an entity that is separate from its social context takes away the legitimacy of corporate organization in the absence of which it cannot create value for any stakeholder, including shareholders; and (iii) the corporation is necessarily a cooperative venture - multiple combinations of distinctive factors as well as customers, suppliers, employees, managers and investors (i.e. various stakeholders) play a role in contributing to the long-term success of the corporation.[71]

Professor John Kay argues that the nexus of contracts model of the corporation has increasingly failed to capture the historic essence and evolving nature of the twentieth century corporation and it is in the twenty first century that its shortcomings as a description of corporate organisation have been thrown into the harshest light.[72] He states that the era of shareholder value has been bad not only for the corporation but also for scholarship related to it.[73] In line with other scholarship on stakeholderism, we argue that the shareholder value or nexus of contracts model is reductionist and fails to provide a coherent account of the legitimacy of corporate activity. This, in turn, calls for a recalibration in the understanding of corporations and the importance of recognizing their independent legal status as well as their social and public character.

[67] *Id.*
[68] *Id.*
[69] *Id*. at 1138.
[70] *Id*. at 1138 -1140.
[71] *Id*. at 1139.
[72] *Id.* at 1138.
[73] *Id.* at 1140.

C. Contextualizing Corporate Purpose

1. *Corporate Purpose Beyond Wealth Maximization and Credible Commitment*

Professor Colin Mayer, an academic pioneer of the purpose concept in management studies,[74] in his book titled "Prosperity" (2018), also known as the new "bible" of corporate governance that "is destined to change the world", contends that corporations should no longer be governed for the sole purpose of maximizing shareholder value.[75] According to Mayer, prosperity includes profitability, but with the essential caveat that profitability be informed by the broader concepts of corporate purpose and values.[76] Including "purpose and value" as limits on the drive to profitability in a discussion on corporate purpose seems glaringly self-evident.[77] However, it is significant to note that there is an important basis for success being suggested in the use of the term "prospering," which implies using resources efficiently, with restraint and according to sound values.[78] For this, it is imperative that every company start with a clear purpose and set of values that go beyond generating wealth.[79] Here, it is important to take note of the British Academy's definition of business purpose: "*The purpose of business is to profitably solve the problems of people and the planet, and not profit from creating problems*."[80] Purpose is therefore about finding ways of solving problems profitably where profits are defined net of the costs of avoiding and remedying problems.[81] By defining purpose and profits in this way, purpose is associated with enhancing the wellbeing and prosperity of shareholders, society and the natural world.[82] It does not disadvantage any party because profits are only legitimate if they are not earned at the expense of other parties and corporate purposes are only valid if they are profitable in this sense.[83]

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[74] Holger Fleischer, *supra* note 44, at 163.
[75] Dan W. Puchniak, *supra* note 21, at 14.
[76] Cynthia A. Williams, *supra* note 56, at 168.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*. at 184; Policy and Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme, The British Academy (2021), available at https://www.thebritishacademy.ac.uk/publications/policy-and-practice-for-purposeful-business/.
[81] Colin Mayer, *supra* note 5, at 889.
[82] *Id.*
[83] *Id.*

Mayer's scholarship on corporate purpose focuses on articulating how appropriately defined notions of corporate purpose can help promote not only better social outcomes but also enhanced functioning of firms and markets.[84] "Prosperity", according to Mayer's analysis, is therefore the combination of acting to promote a clearly articulated corporate purpose while enhancing profitability.[85] Mayer links his analysis on purpose and profits to corporate governance and emphasizes that the true goal of corporate governance is not to align the interests of management with shareholders but "*to ensure that the corporation abides by its stated purposes, values and principles at all times*".[86] He asserts that corporations are first and foremost instruments for upholding commitments as opposed to enforcing contracts or imposing incentives.[87] According to him, the fundamental but often underestimated concept of 'credible commitment' i.e. a corporation's ability to engage in credible commitment to its purposes, values and principles determined by its ownership and governance structures and the legal context in which it operates, provides much needed guidance in this regard.[88] The structures of ownership and governance accord a separate entity status, or a personality to corporations and this personality is inextricably linked with corporations' purposes and values.[89] The amalgamation of the corporation's explicitly and publicly stated purposes and values with the discretion exercised through its board of directors in their decision-making constitutes the basis on which the corporation can make credible commitments.[90] In this way, commitment and the governance structures associated with it place the corporation in a social and political context.[91]

2. *Stakeholderism, Corporate Personhood and a Broader Corporate Purpose*

In line with Freeman's theorization, Mayer presents an alternative view of capitalism in which capitalism is an economic and social system that enables producing profitable solutions to problems of the people and the planet.[92] Capitalism in this sense is a system that provides others

[84] *Id.* at 887.
[85] Cynthia A. Williams, *supra* note 56, at 169.
[86] Colin Mayer, *Conceiving Corporate Commitment: Creation and Confirmation* in the RESEARCH HANDBOOK ON SHAREHOLDER POWER 212 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[87] *Id*.
[88] Jennifer G. Hill and Randall S. Thomas, *Introduction* in the RESEARCH HANDBOOK ON SHAREHOLDER POWER 4 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[89] Colin Mayer, *supra* note 86, at 223.
[90] *Id*.
[91] *Id*.
[92] Colin Mayer, *supra* note 5, at 889.

with the capacities and capabilities to fulfil their purposes[93] and in this process of facilitating the fulfilment of other parties' purposes, enables them to assist others to achieve their purposes.[94] According to this reconception of capitalism, anchoring corporate objectives on purpose is not simply an extension of conventional managerial tools but a profound reconceptualization of the nature of economic activity and the manner in which economies can contribute to society and well-being.[95] This reconception of capitalism is in line with Professor Edith Penrose's "Theory of the Growth of the Firm" proposed in 1959.[96] She laid out a perspective very different from what would become the transactions cost or the markets and hierarchies school of thought which underpins the nexus of contracts approach - *"...all the evidence we have indicates that the growth of a firm is connected with attempts of a particular group of human beings to do something*".[97] Her central and valuable insight was that a firm was not so much a nexus of contracts as a collection of capabilities wherein capabilities entail the creation of "a particular group of people" or might indeed *be* the "particular group of people, or the relations between them".[98] The acknowledgment that "the growth of firms is inextricably linked with the attempt of a particular group of people to do something" underlines the emphasis on stakeholders rather than shareholders as critical elements of the corporation, its behavior and its impact on society.[99]

In a series of commentary discrediting shareholder primacy at both, individual and collective levels, lawyers Martin Lipton and William Savitt have presented convincing arguments along the lines that historically, the essential obligations of corporate directors and management have been to the corporation and not to shareholders.[100] Directors' obligations entail the nurturing of long-term economic growth that benefits the broader society and minimizes externalities caused by the operations of their corporations.[101] They submit that corporations are granted perpetual life and limited liability by governments for promoting the economy and providing opportunities for the

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[93] *Id*.
[94] *Id*.
[95] *Id*. at 889.
[96] John Kay, *supra* note 65, at 1135-1136.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 1136.
[100] Cynthia A. Williams, *supra* note 56, at 167; Martin Lipton and William Savitt, Wachtell Lipton Memo: Stakeholder Governance, Issues and Answers (Oct. 25, 2019), available at https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/.
[101] *Id*.

society as opposed to prioritizing wealth creation for shareholders.[102] They argue that shareholders will do well if and as the corporate entity succeeds in achieving its objectives, which success inevitably includes profitability as a prerequisite for sustainable organizational success.[103] However, this will be as a result of and not the very reason for the corporation's existence.[104] Conceived in this way, shareholder profit is not the sole objective of the corporation, but rather the by-product of a well-functioning corporate governance regime.[105] Therefore, fiduciary duties of directors are owed to all stakeholders directly (including shareholders) and the purpose of the corporation is to advance the interests of the corporation as a whole, by recognizing its personhood rather than enmeshing its separate legal personality with shareholder interests.[106]

As regards the theoretical nature of corporateness and the importance of recognizing the corporation as a separate legal entity, the debate in corporate law has been long-standing.[107] Historically, the principal legal theories of the corporation have been the aggregation theory, the concession or artificial entity theory and the real entity theory.[108] However, given the predominance of the nexus of contracts theory globally, company law has in the recent past focused on the contractarian school of thought according to which the nature of the company is best explained in terms of a mere contract amongst its various participants in various capacities.[109] An important element of the call for recalibration of the corporation around its purpose in terms of the discussion above is the acknowledgment of the undoubted and growing positive law recognition of the corporation as a distinct legal person.[110] Recognition of the separate legal personality of the corporation forms the basis of the real entity theory according to which the corporation is 'real' in the sense of being empirically observable, with its underpinning being that corporate identity is not a simple aggregation of individual preferences, rights or interests, but is distinctive in its own

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[102] *Id.*
[103] *Id.*; Lyman P. Q. Johnson, *supra* note 49, at 269.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Jonathan Hardman, *Review of Company Law: A Real Entity Theory by Eva Micheler* 2023 LAW QUARTERLY REVIEW 173, 173 (2022).
[108] Lyman P. Q. Johnson, *supra* note 49, at 264. Briefly, the aggregation theory views the corporation as simply an aggregate of freely-associated private individuals; according to the concession or artificial entity/fiction theory, the corporation derives its separate legal personality as a concession or a grant from the State; and the real entity theory views the corporation as an entity separate and distinct from its various constituents. For a detailed analysis, see David Millon, *Theories of the Corporation* 1990 DUKE LAW JOURNAL 201, 201-262 (1990).
[109] Jonathan Hardman, *supra* note 107, at 173.
[110] Lyman P. Q. Johnson, *supra* note 49, at 265.

capacity.[111] Shareholder interests and well-being are accordingly better understood as an outcome of the corporate entity's success and not necessarily the very reason or point of business enterprise.[112] The recognition of distinctive legal personhood aids both the formulation and pursuit of corporate goals and objectives which may be distinct from and not align with individual beliefs and preferences of persons associated with it.[113] Moreover, as different corporations pursue different entity-specific objectives, this is an important feature of an expanding institutional pluralism not just in the corporate sector, but also in modern society more generally.[114]

Such reconceptualization of corporate purpose illustrates the possibilities of a broader, more inclusive stakeholder oriented corporate purpose and can serve to effectively challenge the overly simplistic and misleading orthodoxy of the shareholder primacy theory of the corporation.[115] This is also a comprehensive, coherent and consistent view of capitalism within which purpose is about solving problems profitably by both owners and directors who in turn engage and enable other parties through relations of trust as well as contracts.[116] Stated differently, this understanding of the corporation is in tune with the demands of modern day capitalism in that it recognizes the corporation as an important pluralistic body with an array of possible purposes distinct from the interests of shareholders and does not disregard its legal personhood by conflating corporate purpose with shareholder value.[117]

It is this reconceptualization of the corporation and its purpose that this article renders critical to stakeholder-oriented corporate governance frameworks. Building on an inclusive view of the potential for corporate law to embrace a wide range of interests, it advocates for giving conceptual weight to the corporation as an independent legal entity that can generate profits responsibly.[118] The overall goal is to underline the importance of basing corporate governance frameworks in sound foundations of corporate purpose as a starting point for implementing stakeholderism

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[111] *Id*.
[112] *Id*. at 261.
[113] *Id*. at 260.
[114] *Id*. at 261.
[115] *Id*. at 269.
[116] Colin Mayer, *supra* note 5, at 897.
[117] Lyman P. Q. Johnson, *supra* note 49, at 274.
[118] Elizabeth Pollman and Robert B. Thompson, *Corporate Purpose and Personhood: An Introduction* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 12 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

beyond mere rhetoric. As will be shown in the next Section of this article, the overarching challenge with respect to the implementation of stakeholderism in India is that its framework is not rooted in a strong purpose-oriented vision of the corporation. In linking this Section with the next, we will demonstrate that despite embracing a pluralistic stakeholder approach, the lack of a strong purpose-oriented vision of the corporation renders operationalization of India's stakeholder governance framework difficult.

II. Corporate Purpose in India: Historical Evolution and Current framework

In this Section, we examine the following: (i) the historical trajectory and oscillations regarding corporate purpose owing to the legal, economic, political and social factors that have influenced the slant of corporate law in India towards a particular purpose at different points in time, thereby underlining their importance; and (ii) the extant legal and regulatory framework governing corporate purpose in India and its limitations, including its shortcomings taking into account the reconceptualization of the corporation around its purpose as set out in Section I.

The evolution of and developments in the legal and regulatory framework governing corporate purpose in India deserve analysis for a number of reasons:[119] (i) it is the world's largest democracy and fourth largest economy with a population of around 1.4 billion and therefore, legal developments in India can significantly impact the lives of millions of people; (ii) it attracts significant foreign investment and many Indian companies compete in the global products (and services) and capital markets as a result of which their corporate governance has far-reaching implications; and (iii) its reforms in and around corporate purpose have garnered global attention and can inform other countries' efforts towards stakeholder governance.[120] The historical trajectory of corporate purpose in India towards a pluralistic model could potentially assist other jurisdictions in reconceiving the corporation beyond shareholder wealth maximization by acknowledging stakeholder considerations.[121] Moreover, India's current framework governing corporate purpose and the limitations and challenges faced by it may provide some guidance to its

[119] Umakanth Varottil, *supra* note 31, at 2-3.
[120] *Id*.
[121] Afra Afsharipour, *supra* note 33, at 496.

lawmakers and could perhaps offer some lessons to other jurisdictions in terms of enrichening the discourse on corporate purpose.

A. Historical Evolution of Corporate Purpose in India

The historical survey of the evolution of corporate law in India conducted by Professor Umakanth Varottil brings to light many interesting revelations worth noting. He identifies an oscillation between the stakeholder and shareholder primacy models of the corporation in the development of Indian corporation law starting from 1850.[122] Imposed by England, Colonial India's corporate law was influenced by English corporate law and treated the company as a private matter with limited focus on non-shareholder constituencies - a view that persisted till the early days of independence.[123] This was consistent with the role of management in ensuring shareholder value maximization[124] and can be attributed to England's own focus in that direction at the time.[125] In the years following India's independence in 1947, and consistent with the socialist economic policies of the time, company law underwent amendments that incorporated the requirements for companies to act not only in the interest of their shareholders, but also in the "public interest".[126] Post decolonization in 1947, the purpose of the company underwent significant transformation and the public nature of the company and the impact of its conduct on society was given considerable importance.[127] By the 1960s, India's embrace of socialism led to a change in its company law which had developed the view that companies had a public character and not just a private one.[128] This resulted in the inclusion of additional protections for constituencies including employees, creditors and consumers.[129] The emphasis on the public role of the corporation was driven by the socialist policies of the Indian government between the 1960s and the 1980s.[130] Therefore, while colonial India has been described as "unequivocal in its zeal to protect shareholders so as to enable

[122] Umakanth Varottil, *The Stakeholder Approach to Corporate Law: A Historical Perspective from India* in the RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 382 (Harwell Wells ed., 2018).
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] Dan W. Puchniak, *supra* note 21, at 19.
[127] Umakanth Varottil, *supra* note 122, at 386-387.
[128] *Id*. at 387.
[129] *Id*.
[130] Afra Afsharipour, *Lessons from India's Struggles with Corporate Purpose* in the RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 378 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

companies to attract capital," post-colonial India emphasized the role and public nature of corporations.[131]

In the 1980s, the Supreme Court of India stated that "a company is now looked upon as a socio-economic institution wielding economic power and influence on the life of the people".[132] In essence, the company was no longer just a private contractual construct between the entity and its shareholders, but a separate legal entity which embodied a wider form and had societal impact.[133] Post economic liberalization in 1991, shareholder interests emerged as a focal point for corporate governance reforms in India, especially in the face of efforts to attract foreign investment to support India's economic growth.[134] The stakeholder trend was reversed in the 1990s, with deregulation and adoption of new corporate governance requirements and a disclosure-based securities law regime, both targeted at protecting shareholders.[135] Even during this period, stakeholder interests continued to play at least a rhetorical role.[136] Since the late 2000s, India's approach with respect to corporate purpose has been multipronged[137] owing to a combination of multiple factors, such as major corporate scandals and continued inequality in the face of India's massive economic growth.[138] Following years of debates and attempts at reforms that began in the late 1990s, reform efforts culminated in the enactment of the Companies Act, 2013 which represents a marked departure from the shareholder wealth maximization approach (based on the nexus of contracts theory) and a move towards a broader corporate purpose (based on the stakeholder theory of the company).[139]

To summarize, the historical survey of the evolution of corporate law in India reveals some interesting findings. It shows that having originated in English company law, Indian law signifies considerable diversion from its colonial underpinnings as a consequence of India's distinctive economic and political imperatives.[140] For the most part (1850 to 1960), corporate law in India

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[131] *Id*.
[132] Dan W. Puchniak, *supra* note 21, at 19.
[133] *Id*.
[134] Afra Afsharipour, *supra* note 130, at 378.
[135] Umakanth Varottil, *supra* note 122, at 389-390.
[136] Afra Afsharipour, *supra* note 130, at 378.
[137] *Id*. at 366.
[138] *Id*. at 365.
[139] Umakanth Varottil, *supra* note 122, at 391-392.
[140] *Id*. at 394.

was predominantly shareholder-centric with negligible focus on stakeholders or public interest.[141] It did not play any role in taking into consideration interests of non-shareholder constituencies.[142] However, during the peak of the socialist era (1960 to 1991), the ideology of corporate law underwent significant change as a result of which the public nature of the company became prominent in the discourse.[143] This change in philosophy began taking shape in the 1960s with amendments to the Companies Act, 1956, and was consistent with the escalation of the socialistic sentiment of the period.[144] In the 1990s and early 2000s, corporate purpose tilted backwards in the direction of shareholderism due to economic liberalization and the need to attract more capital, especially from foreign investors.[145] This shareholder-centric phase appears to have come to an end with the enactment of the Companies Act, 2013 which expressly acknowledges non-shareholder constituencies as well as the public character of the company.[146] Like other jurisdictions, India and its corporate law has grappled with the pressing question of whether companies should be run primarily for the benefit of their shareholders or whether the interests of other stakeholders must also be taken into account.[147] While it is difficult to discern any consistent pattern in the approach, it is clear that the slant of corporate law towards a particular purpose has largely been driven by the economic and political imperatives of the time.[148]

B. Legal and Regulatory Framework Governing Corporate Purpose in India

1. *Companies Act and SEBI Listing Regulations*

The extant Indian legal and regulatory framework governing corporate purpose comprises the Companies Act, 2013 (hereinafter, the "**Companies Act**") (governing both private and public companies) and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter, the "**SEBI Listing Regulations**") (governing

[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 253, 311 (2016).
[145] Umakanth Varottil, *supra* note 122, at 394.
[146] *Id*.
[147] *Id*. at 398.
[148] *Id*.

publicly listed companies). The framework is representative of the stakeholder-oriented approach in terms of board fiduciary duties, mandated corporate social responsibility ("**CSR**") requirements and mandated sustainability disclosures for India's largest companies.[149] More specifically, three elements in the extant framework are indicative of the move towards the pluralistic or stakeholder-oriented approach:[150] (i) it requires directors to treat the interests of various specified stakeholders on an equal footing without any hierarchy;[151] (ii) globally, the Indian framework is amongst one of the very few frameworks that has a prescriptive status when it comes to CSR obligations of large companies;[152] and (iii) environmental, social and governance ("**ESG**") considerations have gained significant legal and regulatory impetus in India in recent years.[153]

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.[154] However, 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 maximization should no longer be the primary lens for decision-making by Indian boards.[155] In this regard, one of the most essential provisions of the Companies Act, Section 166(2), provides that corporate 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."[156] Moreover, the Companies Act's Code for Independent Directors requires independent directors to "safeguard the interests of all stakeholders", "balance the conflicting interests of stakeholders"[157] and "assist in protecting the legitimate interests of the company, shareholders and its employees".[158] In short, the Companies Act requires that decision-making by boards (including by independent directors) must consider the interests of various stakeholders and make balanced decisions after considering the requisite

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[149] Afra Afsharipour, *supra* note 130, at 366.
[150] Umakanth Varottil, *supra* note 31, at 2-5.
[151] Companies Act, 2013 § 166(2); Umakanth Varottil, *supra* note 31, at 8.
[152] Umakanth Varottil *supra* note 31, at 2-3.
[153] *Id*. at 3.
[154] Companies Act, 2013 § 3; Afra Afsharipour, *supra* note 33, at 466-467.
[155] Afra Afsharipour, *supra* note 33, at 467.
[156] Companies Act, 2013 § 166(2).
[157] Companies Act, 2013, Schedule IV, paras. II (5) and (6); Companies Act, 2013 § 149(8).
[158] Companies Act, 2013, Schedule IV, para. III (12); Companies Act, 2013 § 149(8).

trade-offs.[159] The statutory enactment process as well as the express language of the provision indicates that there is a positive duty on directors requiring them to consider various stakeholder interests.[160] In that sense, it is an obligatory provision rather than merely a permissive one.[161]

The Supreme Court of India has also interpreted Section 166(2) of the Companies Act and its stakeholder orientation broadly.[162] The Court has treated the duty of directors "to consider the protection of the environment" at par with their duties to other stakeholders, including shareholders.[163] In stipulating this, the Court sourced the definition of the term 'environment' from the meaning ascribed to it under Section 2(a) of the Environment (Protection) Act 1986, which defines the word to include the "inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property".[164] The Court held that the scope of the term 'environment' under Section 166(2) is wide enough to include within its ambit various ESG risks.[165] Moreover, as per the opinion of Indian legal counsel, decisions taken by boards in the financial interest of the company and its shareholders, but detrimental to the environment, can be interpreted as being in violation of the duties specified under Section 166.[166] Hence, as per the Companies Act, taking into account ESG considerations such as climate risks and sustainability are not merely optional for directors but carry legal ramifications in terms of breach of their duties.[167]

2. *CSR and ESG Framework*

India is amongst very few jurisdictions globally that prescribe mandatory CSR requirements for large companies, which is, at least two percent of average net profits made during the three immediately preceding financial years in pursuance of their CSR policy towards specified

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[159] Afra Afsharipour, *supra* note 130, at 383.
[160] Umakanth Varottil, *supra* note 31, at 7-8.
[161] *Id*. at 7.
[162] Dan W. Puchniak, *supra* note 21, at 19.
[163] M. K. Ranjitsinh v Union of India, (2021) SCC Online SC 326; Umakanth Varottil, *supra* note 31, at 8.
[164] *Id*.
[165] *Id*.
[166] Shyam Divan, Sugandha Yadav and Ria Singh Sawhney, *Legal Opinion: Directors' Obligations to Consider Climate Change-Related Risk in India* 13 (Sep. 7, 2021), available at https://ccli.ubc.ca/wp-content/uploads/2021/09/CCLI_Legal_Opinion_India_Directors_Duties.pdf.
[167] Umakanth Varottil, *supra* note 31, at 8.

activities.[168] Initially, the Companies Act provided that the obligation was to be implemented on a 'comply-or-explain' basis which was eventually altered into a mandatory obligation ('comply-or-be-penalized') by amendments made to the statute in 2021.[169] The definition of CSR under the Companies Act is broad and includes a range of social objectives involving external stakeholders, such as eradicating hunger, poverty and malnutrition, promoting education, promoting gender equality and empowering women, ensuring environmental sustainability, contributing to the Prime Minister's National Relief Fund etc.[170] However, the focus of regulatory attention in recent years has shifted from CSR to ESG-related concerns given the conceptual dissatisfaction around the CSR framework in India.[171]

In 2010, as part of efforts towards increasing disclosures on sustainability matters, the Ministry of Corporate Affairs ("**MCA**") issued the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business ("**NVGs**") which were revised in 2011.[172] The NVGs comprised nine core principles and other related components which formed the basis of the ESG-related disclosures regime for Indian companies and were updated and released as National Guidelines on Responsible Business Conduct ("**NGRBC**") in 2019.[173] In 2012, SEBI issued a circular mandating that the top 100 listed companies based on market capitalization submit Business Responsibility Reports ("**BRRs**") as part of their annual reports[174] - this was the original version of Business Responsibility and Sustainability Reporting ("**BRSR**").[175] While initially, SEBI encouraged listed companies to voluntarily disclose information on their ESG performance in the BRR format, the regulatory framework quickly transformed into a mandatory one for the largest listed companies.[176] In 2015, the BRR requirements were expanded to the top 500 listed

[168] Companies Act, 2013 § 135; *Id*. at 2-3.
[169] The Companies (Amendment) Act, 2020 (amendment effective from January 22, 2021); Companies Act, 2013 § 135.
[170] Companies Act, 2013, Schedule VII; Companies Act, 2013 § 135.
[171] Umakanth Varottil, *supra* note 31, at 3.
[172] Umakanth Varottil, *supra* note 31, at 13; National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, Ministry of Corporate Affairs, Government of India (2011), available at https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.
[173] National Guidelines on Responsible Business Conduct, Ministry of Corporate Affairs, Government of India (Dec. 10, 2018), available at https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.
[174] Business Responsibility Reports - Frequently Asked Questions (FAQs) Securities and Exchange board of India (May 10, 2013), available at https://www.sebi.gov.in/sebi_data/attachdocs/1368184343037.pdf.
[175] Umakanth Varottil, *supra* note 31, at 13.
[176] Afra Afsharipour, *supra* note 130, at 384.

companies by market capitalization.[177] In 2017, to enhance the disclosure regime further, SEBI announced that the top 500 listed companies may voluntarily adopt integrated reporting.[178] In early 2020, SEBI extended this reporting requirement to the top 1000 listed companies.[179] In 2021, the BRSR framework, based on the NGRBC, replaced the BRR filing format and was made mandatory for the top 1000 listed companies (by market capitalization).[180]

The stakeholder governance model embodied by the Companies Act and the SEBI Listing Regulations encapsulates the corporate purpose orientation of the Indian legal and regulatory framework. Shareholder considerations or interests are only one among several considerations that directors are required to take into account in their decision-making processes.[181] This represents the pluralist approach as it does not create any hierarchy amongst the interests of stakeholders (which includes shareholders).[182] The judiciary has also rendered an expansive reading of the duty specified under Section 166(2)[183] by interpreting the expression 'environment' under the section as adequately capable of accommodating ESG risks.[184] Therefore, according to the jurisprudence on corporate purpose in India, directors ought to consider the long-term interests of the company and conduct that involves sacrificing long-term interests of the company in favour of short-term

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[177] Report of the Committee on Business Responsibility Reporting, Ministry of Corporate Affairs, Government of India 12 (2020), available at https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf.

[178] Circular on Integrated Reporting by Listed Entities, Securities and Exchange board of India (Feb. 6, 2017), available at https://www.sebi.gov.in/legal/circulars/feb-2017/integrated-reporting-by-listed-entities_34136.html.

[179] SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2019, available at https://www.sebi.gov.in/legal/regulations/dec-2019/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-fifth-amendment-regulations-2019_45511.html.; Regulation 34(2)(f), SEBI Listing Regulations.

[180] Regulation 34(2)(f), SEBI Listing Regulations; Master Circular for compliance with the provisions of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 by listed entities, Circular No. SEBI/HO/CFD/PoD2/CIR/P/2023/120, (July 11, 2023), available at https://www.sebi.gov.in/legal/master-circulars/jul-2023/master-circular-for-compliance-with-the-provisions-of-the-securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-by-listed-entities_73795.html. SEBI vide Circular on Business Responsibility and Sustainability Reporting, Circular No. SEBI/HO/CFD/CMD-2/P/ CIR/2021/562 (May 10, 2021), had prescribed the BRSR reporting requirements which were subsequently incorporated into the Master Circular referred to herein, available at https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html. SEBI has issued a Consultation Paper dated May 22, 2024 seeking public comments on the report submitted by the Expert Committee for facilitating ease of doing business with respect to the BRSR, available at https://www.sebi.gov.in/reports-and-statistics/reports/may-2024/consultation-paper-on-the-recommendations-of-the-expert-committee-for-facilitating-ease-of-doing-business-with-respect-to-business-responsibility-and-sustainability-report-brsr-_83551.html.

[181] Dan W. Puchniak, *supra* note 21, at 19.

[182] *Id.*

[183] *Id.*

[184] M. K. Ranjitsinh v Union of India, (2021) SCC Online SC 326.

profitability would militate against the legislative framework.[185] The statutory duties and responsibilities of directors along with other provisions on CSR requirements, ESG considerations and disclosures are categorical in their stakeholder-oriented purpose for Indian corporations.[186]

C. Limitations and Challenges in the Indian Framework on Corporate Purpose

Despite the ostensible clarity showcased by the corporate governance framework in India with respect to its stakeholder capitalism stance, academics and scholars have identified several challenges and limitations attributable to the framework that render its implementation or operationalization rather difficult. They are briefly discussed below.

1. *Implementation-related issues*

In relation to the Companies Act and the SEBI Listing Regulations, scholars have pointed out that while the provisions encompass the pluralistic model, a comprehensive analysis demonstrates that they are lacking in many respects, especially in terms of implementation, which ultimately results in restricting the rights of stakeholders substantially.[187] At a fundamental level, there are certain key features of Indian corporate law, particularly in terms of the significance of shareholder voting rights, that privilege shareholders in a way that is likely to impede stakeholder governance embodied under Section 166(2) of the Companies Act. One such key shareholder-centric feature pertinent to the discussion on corporate purpose is the right of shareholders to appoint directors[188] i.e., those controlling a majority of voting shares can select the board. This strong shareholder-oriented voting right coupled with other exclusive rights such as the right to enforce director's duties (through derivative claims)[189] are reflective of essential aspects of the Companies Act that

[185] Umakanth Varottil, *Directors' Liability and Climate Risk: White Paper on India* (COMMONWEALTH CLIMATE AND LAW INITIATIVE) (Oct. 4, 2021), available at https://ccli.ubc.ca/wp-content/uploads/2021/10/Directors-Liability-and-Climate-Risk-White-Paper-on-India.pdf.
[186] Dan W. Puchniak, *supra* note 21, at 19.
[187] Mihir Maniwadekar and Umakanth Varottil, *supra* note 35, at 3.
[188] Companies Act, 2013, § 152(2).
[189] Companies Act, 2013, §§ 241- 244.

are shareholder-oriented which ultimately impede the consideration of stakeholder interests and concerns and hence weaken the effectiveness of the stakeholder governance framework.[190]

Additionally, in both, the Companies Act and the SEBI Listing Regulations, there is lack of clarity with respect to the language and mandates as regards directors' duties.[191] The broad wording of Section 166(2) provides directors with substantial (and arguably, somewhat unfettered discretion) that makes room for fostering self-interest and non-accountability.[192] A related concern is that the language of stakeholder duties as provided for in the Companies Act and the SEBI Listing Regulations fail to clarify the universe of stakeholders and potential stakeholders.[193] The absence of 'creditors' as a category of stakeholders under Section 166(2) adds to this lack of clarity with respect to ascertainable categories of stakeholders under the section.[194] Further, Section 166(2) includes a broader range of stakeholders (employees, community and environment) as compared to the Code for Independent Directors which accommodates a relatively narrower group of stakeholders (minority shareholders and employees).[195] Overall, there is little direction in the framework as to who the stakeholders are and the manner in which directors must identify, weigh and balance the interests of various stakeholders.[196]

2. *Enforcement-related issues*

The Indian legal framework governing corporate purpose lacks clarity with respect to enforcement of directors' duties to consider stakeholder interests.[197] Despite the adoption of the pluralistic stakeholder governance model by the Companies Act, the means through which stakeholders may enforce their rights as well as remedies available to them are largely lacking in the statutory

[190] On the importance of the right to elect directors in the context of corporate purpose, See Brian Cheffins, *supra* note 15, at 50-51, 62-63.
[191] Afra Afsharipour, *supra* note 33, at 490.
[192] *Id*.
[193] Companies Act, 2013, § 166; Companies Act, 2013, Schedule IV, para. II (5) and para III (12); SEBI Listing Regulations, Regulations 4(2)(d) and 4(2)(f).
[194] Mihir Maniwadekar and Umakanth Varottil, *supra* note 35, at 14; on the applicability of the derivative action mechanism to creditors during insolvency and borderline insolvency, see M.P. Ram Mohan and Urmil Shah, *Director Liability Framework During Borderline Insolvency and Corporate Failure in India*, 18 UNIVERSITY OF PENNSYLVANIA ASIAN LAW REVIEW 32, 59-61 (2022).
[195] Companies Act, 2013, § 166; Companies Act, 2013, Schedule IV, para. III (12).
[196] Afra Afsharipour, *supra* note 33, at 490.
[197] Dan W. Puchniak, *supra* note 21, at 19.

framework.[198] Shareholders, on the other hand, have been provided with various remedies under the Companies Act.[199] However, these remedies also have significant limitations.[200] Aggrieved shareholders may approach the National Company Law Tribunal (quasi-judicial body that adjudicates disputes arising under the Companies Act) for redressal of their grievances on grounds of oppression and mismanagement under the Companies Act.[201] The Companies Act also provides for the concept of class action suits, thereby empowering shareholders to sue a company for "oppression and mismanagement" and claim damages.[202] Further, while derivative suits are available in India pursuant to its common law roots, they are rarely utilized owing to a variety of complex substantive law and procedural barriers.[203] These barriers include a dearth of case law on director fiduciary duties and limitations related to concentrated ownership patterns of Indian companies where controlling shareholders often ratify corporate actions.[204] The enforcement mechanism and remedies available to shareholders under the Companies Act are not only limited in terms of practical impact, but can also not be utilized by them to ensure protection of stakeholder rights.[205]

3. *CSR and ESG-related issues*

A criticism that is frequently levied against the CSR regime in India is that its focus has predominantly been on ensuring compliance with CSR requirements in terms of corporate spending rather than addressing the broader questions of corporate purpose.[206] Further, scholars argue that the corporate purpose debate in the Indian context tends to be enmeshed with the

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[198] Afra Afsharipour, *supra* note 130, at 382-382.
[199] *Id*. at 383.
[200] *Id*.
[201] *Id*; Companies Act, 2013, §§ 241-244.
[202] *Id*.; Companies Act, 2013, § 245; See generally 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 333-358 (Robin Hui Huang and Nicholas Calcina Howson eds., 2017).
[203] Afra Afsharipour, *supra* note 130, at 383; See generally Vikramaditya Khanna and Umakanth Varottil, THE RARITY OF DERIVATIVE ACTIONS IN INDIA: REASONS AND CONSEQUENCES IN THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan W. Puchniak, Harald Baum and Michael Ewing-Chow eds., 2012); and Vikramaditya Khanna, *supra* note 202, at 333-358.
[204] *Id*.
[205] Afra Afsharipour, *supra* note 130, at 384.
[206] Dan W. Puchniak, *supra* note 21, at 19; Akshaya Kamalnath, *A Post Pandemic Analysis of CSR in India* ANU COLLEGE OF LAW LEGAL STUDIES RESEARCH PAPER SERIES, 1-26 (2021).

statutorily mandated CSR requirements under corporate law.[207] Rather than addressing the broader questions of corporate purpose as regards implementing stakeholderism effectively, the government's focus has been on ensuring compliance with CSR requirements by mandating corporate spending.[208] Experts also argue that the CSR regime in India has failed to focus on the negative externalities generated by regular business operations of companies.[209] Given that the CSR provisions are geared towards corporate philanthropy through mandatory spending instead of a more inclusive and comprehensive view that managements must adopt on the public interest character of their corporations and the impact of their operations on the larger society, displays a certain degree of conceptual ambiguity in the corporate purpose framework in India.[210] Moreover, while philanthropic spending has increased in areas such as health, education and sanitation, concerns have been raised regarding India's CSR framework which operates under its concentrated ownership system in terms of the framework's failure to address the country's deep-rooted social and economic problems.[211]

As regards enhanced disclosure requirements for ESG and sustainability reporting, while disclosures have increased, studies conducted on sustainability disclosures provided by large Indian companies have found that largely, the disclosures are not integrated with other reporting and their quality is sub-standard.[212] In a study by the MCA, it was found that "both the accuracy and clarity of information" provided in BRRs was weak, and that the variance in disclosures made comparability challenging.[213] Moreover, till as recently as 2023, the BRSR framework lacked comprehensiveness, did not benchmark against international standards and had been found to be "minimal and generic, a boilerplate arrangement for disclosures, silent on specific sectoral requirements and improperly structured when compared to international frameworks such as that of the European Union or the Task Force on Climate-Related Financial Disclosures ("**TCFD**")."[214]

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[207] *Id*.
[208] *Id*.
[209] Umakanth Varottil, *supra* note 31, at 3.
[210] Dan W. Puchniak, *supra* note 21, at 19.
[211] Mariana Parglender, *supra* note 36, at 16; Dhammika Dharmapala and Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013*, 56 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 92 (2018); Afra Afsharipour, *supra* note 130, at 367, 375 and 377.
[212] Afra Afsharipour, *supra* note 130, at 385.
[213] Report of the Committee on Business Responsibility Reporting, Ministry of Corporate Affairs, Government of India 24 (2020), available at https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf.
[214] Umakanth Varottil, *supra* note 31, at 16.

In 2023, the BRSR framework was revised to be interoperable with other internationally accepted reporting frameworks such as the Global Reporting Initiative, Sustainability Accounting Standards Board and the TCFD.[215]

4. *Challenges Associated with Concentrated Ownership Patterns*

A key challenge in the legal and regulatory architecture governing corporate purpose in India is regarding the efficacy of its stakeholder oriented framework within a system in which companies are characterized by controlled ownership patterns. In other words, the concern is whether stakeholder governance i.e. the stipulation that directors must consider and balance the interests of all stakeholders is effectively possible in a concentrated shareholder environment.[216] This concern is applicable and even gets exacerbated in the context of independent directors given the role that controlling shareholders play in processes involving their appointments and removal.[217] The director nomination and selection process in India hampers independent decision-making by directors, including cases or situations wherein directors want to consider and balance the interests of stakeholders.[218] This is on account of the process being subject to the voting power of controlling shareholders as a result of which directors associate an allegiance to controlling shareholders and hesitate to contradict or stand against corporate actions proposed by such shareholders.[219]

In sum, while the strong stakeholder model of corporate law makes India somewhat of a pioneer among jurisdictions, critics contend that if history is any lesson, it is not clear how long this tendency will last.[220] Experts and scholars are of the opinion that the pluralistic stakeholder governance framework in India is still a work-in-progress in that it evinces rhetoric in favour of stakeholders without providing them with any effective rights enforceable in law.[221] According to

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[215] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023; Regulation 34(2)(f), SEBI Listing Regulations.
[216] Afra Afsharipour, *supra* note 33, at 494.
[217] Companies Act, 2013 Schedule IV; Companies Act, 2013, § 149, § 152 and § 169.
[218] Afra Afsharipour, *supra* note 33, at 494-495.
[219] *Id*; Companies Act, 2013, § 178; SEBI Listing Regulations, Regulation 19.
[220] Umakanth Varottil, *supra* note 122, at 398.
[221] Mihir Maniwadekar and Umakanth Varottil, *supra* note 35, at 13; Devarshi Mukhopadhyay and Rudresh Mandal, *The End of Shareholder Primacy in Indian Corporate Governance? Says Who?!* 46 COMMONWEALTH LAW BULLETIN 595, 605 (2020); Umakanth Varottil, *supra* note 31, at 20-21; Dan Puchniak, *supra* note 21, at 18-20.

them, "the directorial duty and stakeholder remedy models towards stakeholder protection lack any legal bite in the Indian corporate landscape".[222] Concerns raised with respect to the CSR regime which prescribes a legal mandate for large companies to contribute a minimum sum towards social activities are well-founded as they bring to light the fact that the framework gears towards corporate philanthropy rather than being anchored in a strong and compelling public interest vision of the corporation.[223]

Critics have also been skeptical with respect to the successful implementation of a broader corporate purpose as envisaged by the Companies Act and the SEBI Listing Regulations in terms of whether it will in fact lead to substantive "structural change" given the various institutional impediments that hamper redefining the purpose of Indian companies.[224] They argue that stakeholderism in India represents a "severe mismatch between theory and practice"[225] and reflects their reservations about its practical implementation on account of the extent of rhetoric surrounding it. This is in line with criticisms levelled at the statements of the Business Roundtable which are that "they express aspirational stakeholder-oriented goals, but are in reality illusory, articulating a lofty stakeholder discourse with little accountability for corporate managers."[226] The Indian experience attests to the fact that tackling questions centred around corporate purpose are anything but simple.[227] It also presents an important vantage point to the corporate purpose debate by virtue of its powerful controlling shareholders corporate governance system.[228]

D. Stakeholderism, Controlling Shareholders and Credible Commitment

Despite concerns with the controlling-shareholder model as discussed above, there are arguments that a broader, pluralistic corporate purpose might not be at odds with controlling shareholder dominance.[229] Scholars have argued that companies with controlling shareholders may be better at protecting the interests of stakeholders as they are motivated by the long-term interests of the

[222] Devarshi Mukhopadhyay and Rudresh Mandal, *supra* note 221, at 605.
[223] Umakanth Varottil, *supra* note 31, at 3-4.
[224] Afra Afsharipour, *supra* note 130, at 363-386; Afra Afsharipour, *supra* note 33, at 496.
[225] Afra Afsharipour, *supra* note 130, at 379.
[226] *Id*.
[227] *Id*.
[228] *Id*. at 367.
[229] Afra Afsharipour, *supra* note 33, at 496.

company as compared to short-term shareholders in widely-dispersed companies.[230] Professor Ronald Gilson, in his article "Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy" presented the foundational framework for a better understanding of the incidence of controlling shareholders around the world and its implications.[231] He explained that there is a survival and stability bias in favour of controlled companies which is not present in the case of widely-held companies that are relatively more prone to becoming targets of hostile acquisitions and takeovers.[232] The agency costs in shareholder controlled systems are costs associated with private benefits of control (also referred to as the private benefits agency problem) as opposed to the principal-agency costs (also referred to as the managerial agency problem) that arise from separation of ownership and control.[233] In concentrated ownership systems, while the presence of controlling shareholders reduces managerial agency costs, this reduction comes at the price of the private benefits agency problem.[234] The focus of corporate governance in controlled ownership systems must therefore be on minimizing costs associated with private benefits of control instead of minimizing managerial agency costs.[235]

Gilson also made an extremely valuable contribution to comparative corporate governance by creating a distinction between "efficient" and "inefficient" controlling shareholder systems, and between pecuniary and nonpecuniary private benefits of control.[236] Drawing on Gilson's analogy, it is important to emphasize that an "efficient controlling shareholder system" in the Indian context would necessarily require that corporate governance measures be aimed at ensuring better protection of minority shareholders and stakeholders for its stakeholder governance model to be effective. In this regard, the theory of credible commitment (discussed briefly in Section I) offers an important benchmark for assessing the viability of stakeholder-oriented frameworks such as India, as it provides valuable insights with respect to the issue regarding whether corporate actors can be expected to honour the commitments underlying the embrace of stakeholderism by their

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[230] *Id*.

[231] Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs* 45 THE JOURNAL OF CORPORATION LAW 953, 953 (2020).

[232] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARVARD LAW REVIEW 1641, 1643 (2006).

[233] *Id*. at 1650-1652.

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

[235] Ronald J. Gilson, *supra* note 232, at 1652-1672.

[236] *Id*.

corporate law frameworks.[237] While the theory has its genesis in economics, its importance in the context of corporate purpose has been explicitly acknowledged by experts.[238]

Credible commitment theory, at its core, focuses on identifying mechanisms for regulating the exercise of discretionary power such that commitments made can be relied upon.[239] It recognizes the importance of ensuring that discretion is exercised in a manner that aligns with commitments.[240] Scholars even admit that while credible commitment is not an all-encompassing solution to the problem of ensuring corporate officers' and directors' compliance with their stated obligations, it is "overwhelmingly the most pressing".[241] In fact, Professor Edward Rock asserts that making commitments credible is among the most important features of corporate law.[242] More importantly, Professors Ronald Gilson and Alan Schwartz have stressed on the need for credible commitments for certain corporate governance structures, especially those involving controlling shareholders.[243] A significant portion of the skepticism around the Business Roundtable statement also stems from a lack of belief in the credibility of the commitment of corporations, or the lack of any means for ensuring that corporations will comply with the assurances made in terms of embracing stakeholderism.[244] This goes on to show that credible commitment is to a large extent the answer to the gap between empty rhetoric and substantive change.[245]

In light of the discussion on the limitations in the legal and regulatory framework governing corporate purpose in India, this article argues that the overarching challenge in terms of the operationalization of the framework is threefold: (i) at its core, the framework lacks a strong purpose-oriented vision of the corporation as laid out in Section I; (ii) the lack of specific articulation of corporate purpose in the framework renders its stakeholder-oriented provisions

[237] Lisa M. Fairfax, *supra* note 11, at 1186-1187.
[238] *Id*.
[239] *Id*. at 1188.
[240] Douglass C. North, *Institutions and Credible Commitment* 149 JOURNAL OF INSTITUTIONAL & THEORETICAL ECONOMICS 11, 11 (1993).
[241] *Id*. at 14.
[242] Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure* 23 CARDOZO LAW REVIEW 675, 685 (2002).
[243] Ronald J. Gilson and Alan Schwartz, *Corporate Control and Credible Commitment* 43 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 119, 120 (2015).
[244] Lisa M. Fairfax, *supra* note 11, at 1189.
[245] *Id*.

weak and arguably ineffective; and (iii) the lack of adequate corporate governance mechanisms to ensure effective protections to stakeholders in a controlling shareholder system hinders credible commitment towards the stakeholder governance model embraced by the framework. Overall, the "severe mismatch between theory and practice"[246] and the "gap between law in books and law in action"[247] that have been attributed to the Indian framework are on account of the fact that while its legislative design has adopted the pluralistic stakeholder governance model, its corporate governance architecture is not conducive for such stakeholderism to work in practice.

III. CORPORATE PURPOSE IN THE U.S. AND THE U.K.: HISTORICAL EVOLUTION, SCHOLARSHIP AND ITS IMPACT

In this Section, we trace the historical trajectory of the corporate purpose doctrine in the U.S. and the U.K. We also examine the evolution of scholarship on corporate purpose and its impact on establishing the predominance of shareholder primacy in not just Anglo-American corporate governance but also in company law and corporate regulation globally. Examining the evolution of corporate purpose historically is important in order to: (i) provide insights into the political, economic, legal and social factors that influenced the development of corporate governance norms in the U.S. and the U.K.; (ii) critically analyze the theoretical foundations of the shareholder primacy doctrine by contextualizing them; and (iii) provide a holistic understanding of areas that are the focus of contemporary corporate governance scholarship. Today, the agency theory or the contractarian conception of the corporation represents the primary point of reference that informs the analysis of corporations in Anglo-American corporate governance.[248] Therefore, it is critical to identify the precise content and context of this theorization to comprehend the significance and limitations of the principle of shareholder primacy in its entirety.[249]

[246] Afra Afsharipour, *supra* note 130, at 379.
[247] Umakanth Varottil, *supra* note 31, at 11.
[248] Olivier Weinstein, *Understanding the Roots of Shareholder Primacy: The Meaning of Agency Theory and the Roots of its Contagion* in THE OXFORD HANDBOOK OF THE CORPORATION 140 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).
[249] *Id*.

A. Historical Evolution of Corporate Purpose in the U.S. and the U.K.

In the West, much like in India, the history of corporate purpose can be characterized in cyclical terms, with the most recent shareholder-centric swing of the pendulum occurring in the 1980s on account of a wave of hostile takeovers.[250] Scholars such as Professor Marc Moore, whose works focus on analyzing the history of modern corporations, claim that while U.K. company law has always been shareholder-centric, the collection of legal rules and principles that establish such shareholder primacy in its corporate governance framework today have been contested more than they have been recognized.[251] Throughout the twentieth century, there has been considerable "doctrinal and ideological turbulence" in U.K. company law concerning the question of corporate purpose i.e. who must corporations primarily serve.[252] The deliberations regarding adopting an "industrial democracy" approach which would have provided for employees' representation on large companies' boards in the 1970s, an approach that was ultimately discarded, substantiates the extent of the dilemma around addressing the corporate purpose question.[253] Thus, while current U.K. corporate law embodies a predominantly shareholder friendly stance, this stance has not always fit with the nation's broader social and political currents, and could still prove vulnerable to the consequences of economic and demographic changes.[254]

Similarly, in the U.S., the evolution of corporate law showcases an inconsistency in terms of its approach to questions on corporate purpose. Professor Lyman Johnson has found a paradox in the development of U.S. corporate law in relation to larger demands for corporate social responsibility.[255] He states that since the late nineteenth century and beginning of the twentieth century, corporate law's focus became confined to the relationship between management and shareholders, despite the fact that the large corporation was being increasingly recognized as having a distinct legal personality and its influence on a wide range of stakeholders including

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[250] Brian Cheffins, *supra* note 15, at 64.
[251] Marc T. Moore, *Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law* in the RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 142-144 (Harwell Wells ed., 2018).
[252] *Id*.
[253] *Id*. at 157-160.
[254] *Id*. at 166-167.
[255] Harwell Wells, *Introduction* in the RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 12-13 (Harwell Wells ed., 2018).

employees, communities and the environment was escalating.[256] In conjunction with these developments, by the late twentieth century, corporate legal theory had largely set aside recognition of separate legal existence or corporate personhood (the real entity conception of the corporation) and accentuated emphasis on the aggregate of freely associated individuals view (the nexus of contracts conception of the corporation).[257]

In the late nineteenth and early twentieth century, the large publicly traded corporation became the dominant form of enterprise.[258] Historically, socialization of property undergirded the formation of the corporation i.e. the corporation was an extension of state power.[259] However, with the enactment of general incorporation laws, the set of privileges, including perpetual existence, limited liability etc. that were granted to specific corporations were extended to all forms of businesses, regardless of public interest considerations.[260] Another distinguishing feature of the corporation in the twentieth century was the merger of finance and industrial capital that had developed in large corporations as a consequence of the increasing demand for finance capital.[261] This development has been heralded as the "dawn of a new era of the financialization of the corporation" associated with a dramatic rise in profits attributable to finance and the reorientation of other manufacturing and service industries toward financial activities.[262] In other words, while the corporation was originally established by charter (which was the product of negotiation between the incorporators and state legislators)[263] to undertake public purposes, with the passing of general incorporation laws, the public benefit commitment that was intrinsic to the corporation, diminished.[264]

Therefore, the cyclical nature of the evolution of corporate purpose delineates the trajectory of the conceptualization of the objectives of the corporate form from an extension of state power to the

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[256] Lyman Johnson, *Corporate Law and the History of Corporate Social Responsibility* in the RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 579-585 (Harwell Wells ed., 2018).
[257] *Id*. at 571-572.
[258] William G. Roy, *Socializing Capital: The Rise of the Industrial Corporation* in THE OXFORD HANDBOOK OF THE CORPORATION 93 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).
[259] *Id*.
[260] *Id*. at 98-100.
[261] *Id*. at 109-111.
[262] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 10-11.
[263] Brian Cheffins, *supra* note 15, at 11.
[264] Colin Mayer, *supra* note 86, at 229.

current financialization of corporations and the manner in which general incorporation laws have led to the weakening of the public interest character of corporations.[265] Eventually, as ownership became more dispersed, discretion of management stifled to the extent that management, objectives and values on the one hand and share ownership, shareholders and share value on the other got inextricably entangled.[266] Further, owing to a wave of hostile takeovers during the mid and late1980s, directors' fiduciary duties were linked to maximizing shareholder value.[267] Despite corporations having adopted corporate social responsibility initiatives, such initiatives are lacking in the commitment to changing fundamental business models such that they align with the principles that underlie a broader corporate purpose.[268] The difficulties with addressing the complex and multifaceted concept of corporate purpose continue to the present day.[269] It is against this context that we now turn to analyzing scholarly debates and their influence on establishing shareholder primacy as the predominant norm in Anglo-American corporate governance.

B. Scholarship and its Impact on Anglo-American Corporate Governance

1. *The Berle – Dodd Debates: Corporate Purpose and Social Responsibility*

Adolf Berle and Merrick Dodd's 1931-32 debates in the Harvard Law Review over corporate managers' duties are considered to be the origins of corporate purpose debates by most corporate law scholars.[270] Contemporary debates on corporate purpose and more specifically, CSR, are often traced back to these debates, with Berle seen as an early advocate of shareholder primacy and Dodd a precursor to stakeholder views of corporate law.[271] In this exchange of views that has been

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[265] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 10-11.
[266] Colin Mayer, *supra* note 86, at 229.
[267] Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties* 21 STETSON LAW REVIEW 23, 23-44 (1991); Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty - First Century*, 67 FLORIDA LAW REVIEW 1033, 1089-1091 (2015);
[268] Thomas Clarke and Martijn Boersma, *Global Corporations and Global Value Chains: The Disaggregation of Corporations?* in THE OXFORD HANDBOOK OF THE CORPORATION 321 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).
[269] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 12.
[270] Veronica Root Martinez, *supra* note 16, at 50.
[271] Harwell Wells, *supra* note 255, at 12; See William W. Bratton and Michael L. Wachter, *Adolf Berle, E. Merrick Dodd and the New American Corporatism* in the RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 534-569 (Harwell Wells, 2018).

described as “groundbreaking” and “the beginning point for discussions of corporate purpose”,[272] Berle argued for what is now called "shareholder primacy" i.e. the view that the corporation exists only to make money for its shareholders.[273] Dodd vehemently opposed Berle's shareholder primacy thesis and argued for "a view of the business corporation as an economic institution which has a social service as well as a profit-making function."[274] According to Dodd, the proper purpose of the corporation was not confined to making money for shareholders and included ensuring secure jobs for employees, better quality products for consumers and greater contributions to the welfare of the community as a whole.[275] While the specificities of the debates will not be reiterated here, it is critical to draw attention to the intellectual reversals engaged in by both the scholars that had a cyclical aspect that is arguably analogous to broader corporate purpose trends.[276]

Berle and Dodd went back and forth and altered their stances very similar to the oscillation between shareholder primacy and a broader, stakeholder-oriented corporate purpose in debates on the issue of corporate purpose.[277] Dodd’s endorsement of shareholder - friendly jurisprudence subsequent to invoking pro-stakeholder rhetoric was far from the last change of heart that the participants in the debate underwent.[278] Despite Dodd’s concessions, in 1954, Berle accepted that the argument had ultimately been resolved in Dodd’s favor.[279] However, in 1959, Berle clarified that he did not intend to say that Dodd was “right all along” and that he was “not convinced” that what Dodd recommended was the “‘right disposition”.[280] Instead, all he had been saying was that Dodd’s assessment had ultimately matched up with “how social fact and judicial decisions turned out”.[281] Subsequently, in 1968, he backtracked even further which is explicable given that his shareholder-friendly stance has been well-established by his works.[282] In his 1931 article “Corporate Powers as Powers in Trust”, Berle argued that “*the powers granted to corporations or corporate officers under law resemble equitable fiduciary duties much like those that are owed by trustees to*

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[272] Brian Cheffins, *supra* note 15, at 15.
[273] Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 SOUTHERN CALIFORNIA LAW REVIEW 1189, 1189 (2002).
[274] *Id*.
[275] *Id*.
[276] Brian Cheffins, *supra* note 15, at 15.
[277] *Id*. at 16.
[278] *Id*.
[279] *Id*. at 18.
[280] *Id*.
[281] *Id*.
[282] Amir N. Licht, *supra* note 39, at 401-402.

beneficiaries".[283] The primary thesis of this essay was that "*all powers granted to a corporation or to the management of a corporation... are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears*."[284]

Dodd's 1932 article "For Whom Are Corporate Managers Trustees?" laid the foundation for the stakeholder debate.[285] Despite having accepted Berle's view that legal doctrine considered the sole function of the corporation to be the making of profit for its stockholders, Dodd prognosticated that in the reformed economy, there would be modifications to the "maximum profit for the stockholders of the individual company formula."[286] Berle retorted in his response article contending that Dodd had conflated the normative with the descriptive.[287] He argued that social responsibility was neither in fact pursued by corporations and their managers nor could it be pursued, despite it being desirable.[288] He was uncompromising in his stance that Dodd's idea of social responsibility as corporate purpose faced an insurmountable implementation problem under law.[289] His argument in this regard was that the view that corporations exist for the sole purpose of making profits for their shareholders cannot be dismissed unless and until stakeholderists are "*in a position to offer a clear and reasonably enforceable scheme of responsibilities to multiple non-shareholder stakeholders*".[290]

2. *Berle and Means: Corporate Purpose and Managerial Capitalism*

In the "Modern Corporation and Private Property" (1932), Berle and Gardiner Means argued that "*by surrendering control and responsibility over active property, shareholders have surrendered the right that the corporation be operated in their sole interest…they have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society*."[291] While scholars and commentators have criticized Berle for changing his views on

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[283] Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust* 44 HARVARD LAW REVIEW 1049, 1049 (1931).
[284] *Id*.
[285] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?* 45 HARVARD LAW REVIEW 1145, 1145 (1932); Amir N. Licht, *supra* note 39, at 402.
[286] E. Merrick Dodd, *supra* note 285, at 1151.
[287] Amir N. Licht, *supra* note 39, at 402.
[288] *Id*.
[289] Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note* 45 HARVARD LAW REVIEW 1365, 1367 (1932).
[290] Amir N. Licht, *supra* note 39, at 402.
[291] *Id*.

the subject, it is important to draw attention to the emphasis he continued to place on the difficulties that he associated with implementing stakeholder governance and the importance of devising a workable, convincing system that "*ensures effective legal protection of all stakeholders such that passive property rights yield before the larger interests of society*".[292] According to many scholars, the origins of the shareholder primacy doctrine are situated in the inversion of the ideals of Berle and Means by the financial economists who developed the agency theory subsequently.[293] In the "Modern Corporation and Private Property", Berle and Means raised issues regarding the purposes of the corporation and the means of ensuring accountability of the exercise of corporate power for the public good which continue to influence questions on corporate governance till the present day.[294]

While they recognized the collective nature of the corporate form and the profound implications of its accountability to the wider community, Berle and Means left an ambiguous legacy on the nature of the firm that was subsequently interpreted in two alternative and distinctly contrasting theoretical approaches, one collective and collaborative, the other individualistic and contractual.[295] Their recognition of the shift in the modern corporation from owner-entrepreneurs to professional managers framed the debate on the nature of corporations in terms of the new industrial state and the managerial revolution during the expansionary years of post-World War II recovery.[296] With respect to the transformative evolution of the modern corporation, Berle and Means identified that the development of the legal system had resulted in a new type of relationship between shareholders and corporations, whereby managers were given immense discretionary powers and shareholders' rights were drastically diminished.[297] It is in this context that they argued that "*the changed corporate relationships have unquestionably involved an essential alteration in the character of property*."[298] They split "property" into "passive property", lacking in control and accountability resulting in a limited set of rights in relation to the corporation (belonging to

[292] *Id*. at 403.
[293] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 11.
[294] *Id*. at 12.
[295] *Id*. at 11.
[296] *Id*. at 4.
[297] Olivier Weinstein, *supra* note 248, at 142.
[298] *Id*.

shareholders) and "active property" defined as power over the corporation (belonging to managers).[299]

The consequential result in Berle and Means' conception was the formation of new powers, completely disconnected with ownership and concentrated in a small number of individuals (or groups) i.e. corporate managers.[300] Accordingly, the key issue for them was to examine the nature of managerial power and investigate the means by which it can be controlled and regulated.[301] Their analysis heralded the arrival of and is an elucidation of the fundamental features of managerial capitalism in the U.S.[302] The agency theory was developed by them in order to address this critical concern and to offer solutions to the following inter-linked questions: (i) in whose interest should the corporation be managed, and with respect to whom should managers' obligations be defined?; and (ii) how can the corporation be brought to conform to the desirable objectives?[303] The identification of the separation between ownership and control and the agency costs associated with it has played a central role in transforming the relationship between shareholders and corporations, characteristics of capital markets and product markets and the understanding of corporations on the whole.[304] This recharacterization of the corporation, based on the agency theory which discards the conception of the corporation as a multidimensional institution embedded in a political and institutional system with a deeper and more expansive set of objectives, took place within the context of a project for a radical transformation of the American economy which was staunchly supported by economists who advocated for a return to the neoliberal order prevalent in the late 1960s.[305] Furthermore, this recasting of neoclassical microeconomics that accompanied the affirmation of neoliberal thought was championed explicitly by the Chicago School of Economics.[306] It is therefore imperative that the agency theory

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[299] *Id*.
[300] *Id*.
[301] *Id*. at 143.
[302] *Id*. at 162.
[303] *Id*. at 143.
[304] *Id*. at 145-146.
[305] *Id*. at 155-156; See John W. Cioffi, *Finance Capitalism, The Financialized Corporation, and Countervailing Power* in THE OXFORD HANDBOOK OF THE CORPORATION 237-273 (Thomas Clarke, Justin O'Brien, & Charles O'Kelley eds., 2019).
[306] *Id*.

and its reconceptualization of the corporation based on the recognition of separation between ownership and control be understood and analyzed in this context.[307]

3. *Jensen and Meckling: Corporate Purpose and Shareholder Primacy*

Michael Jensen and William Meckling's 1976 Journal of Financial Economics article "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" ("**Theory of the Firm**") is often cited as a key inspiration in moving shareholder primacy to the centre of the debate over corporate purpose.[308] The progression of the theory was consistent with the legal and regulatory developments and the broader social and political transformations that characterized the major capitalist countries in the aftermath of World War II as well as the evolution of the managerial firm until the 1970s.[309] The fundamentally political project embedded in the "Theory of the Firm" should be understood in this specific context.[310] Towards the end of the twentieth century, Jensen and Meckling influenced a narrower theorization of the corporate entity that was contractual and individualistic as opposed to collective and communitarian.[311] The renewed conception marked a significant departure in the conceptualization of the firm that was underpinned by managerial capitalism until the late 1960s and became an integral element of the new financial capitalism and neoliberalism-dominated political and economic order that became established in the 1980s.[312]

As regards Jensen and Meckling's theorization of agency costs, they stated that "*it should be no surprise to discover that the issues associated with the 'separation of ownership and control' in the modern diffuse ownership corporation are intimately associated with the general problem of agency*."[313] They even acknowledged the significance of Berle and Means' contribution to showcasing the potential for management and shareholder misalignment in large publicly traded American firms characterized by a separation of ownership and control.[314] With respect to the treatment of agency costs in the "Theory of the Firm", Jensen subsequently said that "*while the issues are general, we developed the theory in the context of the conflicts of interest between*

[307] Olivier Weinstein, *supra* note 248, at 147.
[308] Elizabeth Pollman and Robert B. Thompson, *supra* note 118, at 10.
[309] Olivier Weinstein, *supra* note 248, at 146.
[310] *Id*. at 140.
[311] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 4.
[312] Olivier Weinstein, *supra* note 248, at 139.
[313] Brian R. Cheffins, *supra* note 20, at 5.
[314] *Id*.

corporate managers and outside equity and debt holders."[315] The crucial point of departure for the agency theory as developed by Jensen and Meckling can be located in their characterization of the corporation as "*a legal fiction which serves as a nexus for a set of contracting relationships among individuals*".[316]

According to them, corporations must be exclusively treated as private arrangements.[317] They therefore opposed the conception of firms as real entities distinct from the individuals that are a part of them.[318] Two key features of Jensen and Meckling's theorization deserve attention: (i) the relationship between agents (corporate managers) and principals (providers of capital i.e. shareholders) is at the centre of the theory, wherein shareholders appoint managers (through contracts) and delegate certain decision-making powers to them, thereby legitimizing shareholder primacy; and (ii) the reconceptualization of the corporation based on an identification of the legal form that is merged with its economic and organizational characteristics.[319] The inherent lack of recognition of the critical distinction between the legal form on the one hand and the economic and organizational form of the corporation on the other in the agency theory renders its explanatory power rather weak.[320] Nevertheless, subsequent scholarship, debates and literature on corporate governance were heavily influenced by this seminal piece of work and in fact, the article has been characterized as "the dominant framework of analysis for corporate law and corporate governance".[321] It is considered to be one of the most canonic and influential articles in the field of theory of the firm"[322] and has been widely credited with providing the primary intellectual foundation for the development of an economically-oriented "contractarian" model of the corporation.[323] In the 1980s, the Theory of the Firm accelerated intense debates in corporate law circles, before moving to the theoretical forefront in the 1990s, especially in the U.S.[324] Since then,

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[315] Michael C. Jensen, *Agency Costs of Overvalued Equity* 34 FINANCIAL MANAGEMENT 5, 6 (2005).
[316] Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure* 3 JOURNAL OF FINANCIAL ECONOMICS 305, 311 (1976).
[317] Olivier Weinstein, *supra* note 248, at 149.
[318] *Id*.
[319] *Id*. at 149-150.
[320] *Id*.
[321] Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STANDFORD LAW REVIEW 1325, 1326 (2013).
[322] Ron Harris, *The History of Team Production Theory* 38 SEATTLE UNIVERSITY LAW REVIEW 537, 556 (2015).
[323] Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm* 24 JOURNAL OF CORPORATION LAW 819, 819 (1999); Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE LAW JOURNAL 456, 484 (2004).
[324] *Id*.

the nexus of contracts conception of the corporation has continued to be of paramount significance in company law scholarship.[325]

C. Shareholder Primacy and the Missing Historical Context

Professor Brian Cheffins has dissected Jensen and Meckling's "Theory of the Firm" and subsequent scholarship around it to demonstrate that making strong connections between the article and the shareholder-centric governance changes in corporation law in the U.S. is misconstrued and misleading.[326] Cheffins asserts that despite the "Theory of the Firm" having been cited as often as it has been, in actuality, it did not act as the catalyst for the changes that U.S. corporations underwent towards the end of the twentieth century in the manner that they presumably could have.[327] While various critics of the late twentieth century prioritization of shareholder value maintain that Jensen and Meckling provided pivotal intellectual cover for this trend, it is in fact the misinterpretation of what they said that has been incorrectly blamed for being responsible for key governance changes that many critics regard as having gone amiss.[328]

Having characterized the firm as a nexus of contracts, Jensen and Meckling also stated that it would be "*misconceived to seek to attribute a corporate purpose to this nexus*".[329] According to the two financial economists, by virtue of the corporation being a mere nexus of contracting relationships, the corporation in and of itself was of minimal independent analytical significance.[330] The corporation, logically, could not have any motivating purpose given that it was a mere contractual artefact.[331] In order words, as per Jensen and Meckling, asking questions such as "what should be the objective function of the firm" was in effect attributing separate legal personality or personalizing corporations which was "seriously misleading".[332] The extent to

[325] Grant M. Hayden and Mathew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICHIGAN LAW REVIEW 1127, 1130 (2022); Charles R.T. O'Kelley, *Coase, Knight, and The Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE UNIVERSITY LAW REVIEW 1246, 1246 (2012).
[326] Brian R. Cheffins, *supra* note 20, at 2-3.
[327] Brian R. Cheffins, *supra* note 20, at 2.
[328] *Id*.
[329] *Id*.
[330] *Id*. at 4.
[331] Michael C. Jensen and William H. Meckling, *supra* note 316, at 311.
[332] *Id*.

which the article has been credited with steering shareholder-centric corporate governance changes in large corporations, especially in the U.S., is therefore misconstrued as Jensen and Meckling's characterization of the firm as a nexus of contracting relationships did not provide the obvious foundation for shareholder-primacy based proclamations regarding corporate priorities.[333] Cheffins has established that the article dealt with board priorities, managerial incentives and corporate purpose only perfunctorily and did not furnish justifications for reform on any of these fronts.[334] In fact, Jensen's subsequent scholarship helps to explain why the "Theory of the Firm" has been credited erroneously for directly fostering influential late twentieth century corporate governance trends.[335] The proclivity of scholars and experts to continue theorizing on the nature of the corporation along the article's direction is not unexpected.[336] However, as Cheffins argues, while the enormous gap between what the economists actually and supposedly said is explicable, there is no reason for this trend to continue.[337] More importantly, Cheffins' explanation of this discrepancy provides a much needed basis for reconsideration of contemporary debates on corporate purpose.[338]

In addition to Cheffins' contextualization of Jensen and Meckling's theorization and its subsequent interpretation and impact, Professor Veronica Root Martinez has made a notable contribution to the re-evaluation of corporations. Martinez, by historically contextualizing traditional debates and scholarship on corporate purpose, contends that these debates, starting with Berle and Dodd in the 1930s, were in essence debates about power.[339] More specifically, the focus of the deliberations was on where the balance of white, male power should lie i.e. how should white, male shareholders ensure that the decisions made by white, male managers were aligned with their interests?[340] While the debates were not explicitly discriminatory and exclusionary in terms of their employment of the terms shareholders, managers, directors and stakeholders, they were indisputably shaped by the discriminatory and exclusionary social context of that time.[341] She submits that had it been the

[333] Brian R. Cheffins, *supra* note 20, at 11.
[334] *Id*. at 26.
[335] *Id*.
[336] *Id*.
[337] *Id*.
[338] Elizabeth Pollman and Robert B. Thompson, *supra* note 118, at 10.
[339] Veronica Root Martinez, *supra* note 16, at 55-56.
[340] *Id*.
[341] *Id*. at 55.

case that in the 1930s, these terms were broad enough to accommodate conceptions of demographically diverse groups, arguably, the resultant debates and scholarship on corporate purpose would have taken a substantially different form today.[342] In other words, if corporate purpose deliberations took place in a context which recognized a more demographically diverse set of shareholder interests, certain negative externalities that have occurred as a result of corporate decision-making, could possibly have either been addressed or at least formed part of the debates.[343] This contention is extremely valuable in terms of informing our understanding of the boundaries within which original debates on corporate purpose took place and which of the aspects of those debates should be discredited for the purposes of an informed analysis of contemporary corporations.[344]

In examining the historical context in this Section, our attempt has been focused on drawing attention to two key observations: (i) the context in which corporate purpose evolved and developed in India is markedly distinct from the evolution and development of corporate purpose in the U.S. and the U.K; and (ii) even within the Anglo-American context, it is important to note that a feature of the foundational debates on corporate purpose that has largely been overlooked is that the debates took place against the historical backdrop of exclusionary and discriminatory practices and hence are reflective of a certain degree of deficiency in terms of pursuance of a more inclusive, pluralistic corporate purpose.[345]

IV. IMPLICATIONS OF THE PREDOMINANCE OF THE SHAREHOLDER PRIMACY DOCTRINE

As discussed in Section III of this article, the contractarian model of the corporation based on the agency theory resulted in shareholder primacy taking centre stage in debates on corporate governance in the U.S. and the U.K. Within this individualistic and contractual conception of the corporation, maximization of shareholder value is paramount, resulting in directors' duties being

[342] *Id*. at 55-57.
[343] *Id*. at 63, 66.
[344] *Id*. at 54.
[345] *Id*. at 53; See Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STANFORD LAW REVIEW 515, 515-602 (2022) (for a detailed analysis of the implications of the concurrence of early twentieth century corporate law scholarship and a change in the gender composition of the shareholder class on corporate law theory, including (but not limited to) the separation of ownership and control, stakeholderism and board representation)).

oriented towards prioritizing shareholder wealth.[346] In sharp contrast to this is the collective and collaborative model of the corporation according to which the corporation has responsibilities to protect the larger interests of society as well.[347] Within this conception, directors have a multi-fiduciary duty to safeguard and balance interests that have a legitimate claim on the business.[348] Broadly, this collective conception underlies the stakeholder-oriented corporate purpose model adopted by India. Given that these two distinct approaches underpin the contemporary stakeholder-shareholder debate in corporate governance, and the unprecedented dominance that the shareholder value conception of the corporation has had across disciplines globally,[349] it becomes critical to analyze the implications of this dominance in terms of the following: (i) the need for re-evaluation of corporate purpose; (ii) corporate governance reforms in India especially on account of the fact that broad features of Indian corporate governance norms have been influenced by the U.S. and the U.K. models of corporate governance;[350] and (iii) the importance of adopting jurisdiction-specific assessment of legal and regulatory frameworks governing corporate purpose.

A. Importance of Contextualizing the Predominance of Shareholder Primacy

Over the last century, the analysis of corporations has focused heavily on corporations in the U.S. on account of the ascendancy of corporations such as General Motors, Exxon, Ford, IBM etc. dominating the American economy.[351] However, the contractarian model, much of which presupposes the Anglo-American conception of the corporation, has been increasingly demonstrated to be a relatively "hollow construct".[352] Intense debates concerning the fundamentals of governance and the direction of corporations, including the presupposed universality of principal-agent problems are occurring internationally, given the scale of the global financial crisis and its residual impact, and the challenges faced by contemporary organizations especially in the

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[346] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 11-12.
[347] *Id*. at 6-7.
[348] *Id* at 7.
[349] Olivier Weinstein, *supra* note 248, at 155-158.
[350] Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NATIONAL LAW SCHOOL OF INDIA REVIEW 1, 1-50 (2009); Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 335, 335-402 (2009).
[351] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 22.
[352] *Id*. at 7.

U.S.[353] A critically informed and in-depth analysis of contemporary corporations in the U.S. indicates that the theoretical and practical approaches informing it are currently failing fundamentally in certain aspects and points the way toward transformation.[354]

As discussed in Section III of this article, in the U.S., a balanced conception accommodating the view that the purpose of corporations is not only to produce returns for stockholders, but also to provide employment, produce quality products for customers, and be responsible corporate citizens, was replaced at the persistence of the Chicago School of free-market economics with the sole purpose of delivering shareholder value.[355] This overly simplistic prescription of prioritizing shareholder wealth maximization was built into the self-interest of corporate managers and executives resulting in a steep incline with respect to managerial incentives such as stock options.[356] The upshot has been that these incentive mechanisms rooted in shareholder primacy have substituted corporate objectives based on long-term investing for short-term dissemination of as much wealth as possible to shareholders.[357] In other words, shareholder primacy is discouraging U.S. corporations from pursuing long- term corporate priorities.[358] The U.S. Federal Reserve has also acknowledged the role played by corporations as regards the intensifying inequality in the U.S. and called for a reconsideration of the conception of the corporation as follows: "*The past several decades have seen the most sustained rise in inequality since the 19th century after more than forty years of narrowing inequality following the Great Depression. By some estimates, income and wealth inequality are near their highest levels in the past hundred years, much higher than the average during that time span and probably higher than for much of*

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[353] *Id*.

[354] *Id*. at 22; Peer Zumbansen, *The Corporation in an Age of Divisiveness*, 26 UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW 234, 276-277 (2023); Amna A. Akbar, Sameer M. Ashar and Jocelyn Simonson, *Movement Law*, 73 STANFORD LAW REVIEW 821, 825 (2021); William W. Bratton, *Shareholder Primacy Versus Shareholder Accountability*, 47 SEATTLE UNIVERSITY LAW REVIEW 405, 411, 434-435 (2024) (demonstrating the negative implications stemming from the fact that shareholder primacy does not consider corporate externalities (income inequality, environmental degradation etc.) as a governance problem)).

[355] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 25; Michael C. Jensen and William H. Meckling, *Can the Corporation Survive?* 34 FINANCIAL ANALYSTS JOURNAL 31, 31-37 (1978).

[356] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 25; Thomas Clarke, *Deconstructing the Mythology of Shareholder Value: A Comment on Lynn Stout's "The Shareholder Value Myth"* 3 ACCOUNTING, ECONOMICS AND LAW 15, 15-52 (2013); Lynn A. Stout, *The Shareholder Value Myth*, EUROPEAN FINANCIAL REVIEW (April-May, 2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277141.

[357] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 25.

[358] *Id*; Martin Lipton, *Stakeholder Governance and the Eclipse of Shareholder Primacy*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 7, 2024).

American history before then… it is appropriate to ask whether this trend is compatible with values rooted in our nation's history."[359]

The limitations of the nexus of contracts model of the corporation are glaringly evident in the twenty first century corporation, with its most severe limitation being its myopic and simplistic reduction of the corporation to a "private agreement" and its failure to analyze the corporation as a multidimensional institution, embedded in an institutional and political system.[360] Contemporary organizations have been transformed by globalization and digital technology to become more complex organizations.[361] Deregulation, increasing international competition, the impact of interconnected financial markets, increasing demands for responsibility and sustainability and the precipitous rise of Asian economies have transformed the existence and identity of corporations.[362] Moreover, the need for re-evaluation of corporate purpose based on the enduring significance of the stakeholder theory of the corporation takes on even greater significance given that the governance systems of Asia's most important economies have not predominantly been driven by the doctrine of shareholder primacy.[363]

B. Anglo-American Corporate Governance: Presupposed Benchmark for Best Practices Globally

Despite the fundamental limitations of the agency theory, it has had exceptional success in terms of providing the foundations for a radically new vision of the corporation and reshaping the institutional basis of capitalist economies.[364] Its influence has penetrated not just the field of corporate law and governance but also the domains of economics, finance, management,

[359] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 8; See generally Benedict Sheehy, *Sustainability, Justice and Corporate Law: Redistributing Corporate Rights and Duties to Meet the Challenge of Sustainability* 23 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 273, 273-312 (2022) - in practice, the shareholder-centric vision of the corporation (identified as a driver of short-termism in corporate governance) has led to greater distributive injustice, social inequality and increased environmental contamination.
[360] Olivier Weinstein, *supra* note 248, at 162.
[361] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 5.
[362] *Id*.
[363] Dan W. Puchniak, *supra* note 21, at 15.
[364] Olivier Weinstein, *supra* note 248, at 158.

organizational behavior and academics, globally.[365] Two ramifications of this success are critical to understanding the reasons as to why corporate purpose needs re-evaluation and the importance of adopting jurisdiction-specific assessment of legal and regulatory corporate purpose frameworks. First, for decades, corporate governance, especially in the U.S., has focused primarily on finding solutions to the fundamental problem identified by Berle and Means approximately ninety years ago, which is, minimizing shareholder-management agency costs that result from the inherent lack of power that dispersed shareholders have over corporate managers who effectively control large public corporations.[366] Second, corporate governance mechanisms that aim to empower dispersed shareholders vis- à- vis self- interested managers i.e. hostile takeovers, independent directors, shareholder litigation and proxy contests have become synonymous with American corporate governance and in the process have emerged as the "standard for good corporate governance around the world".[367]

More specifically, in the 1990s, the U.S. emerged as the sole global economic superpower accompanied by the steep decline of economies such as those of Germany and Japan that were seen as possible competitors to the U.S.[368] After all, throughout the 1990s, the New York Stock Exchange and London Stock Exchange stood out among global financial markets and their economic supremacy was unrivaled.[369] The U.S. and the U.K. also stood out as the only exceptions as regards countries whose public companies were dominated by dispersed shareholders.[370] It was against this context and in this economic climate that the dispersed ownership of America's large public companies came to be viewed as the predominant reason behind its economic success.[371] As a result, devising solutions to the problem underlying American corporate governance as identified by Berle and Means, which is, empowering dispersed shareholders by minimizing shareholder - manager agency costs, has come to be conceived as an explanation for the development of successful corporations, financial markets and economies.[372]

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[365] For a detailed examination of the impact of the agency theory across various disciplines, see Olivier Weinstein, *supra* note 248, at 155-158.
[366] Dan W. Puchniak, *supra* note 25, at 512.
[367] *Id*.
[368] *Id*. at 518.
[369] *Id*.
[370] *Id*.; Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never - Ending History for Corporate Law* 9 ASIAN- PACIFIC LAW & POLICY JOURNAL 7, 7-70 (2007).
[371] Dan W. Puchniak, *supra* note 25, at 519.
[372] *Id*. at 517-518.

The intellectual lens for comparative corporate governance analysis was supplemented by research by leading scholars that associated the development of successful financial markets and economies of the time i.e. the U.S. and the U.K. with dispersed shareholdings.[373] International organizations as well as law and finance literature have also played a considerably important role in advocating for empowerment of dispersed shareholders and bringing it to the forefront globally, with the result being that this viewpoint has become widely accepted and has influenced a range of corporate governance reforms.[374] These include corporate governance reforms imposed by the International Monetary Fund and the World Bank in response to financial crises, European Commission directives aimed at improving corporate governance in the European Union and various domestic corporate governance codes and corporate law reforms around the world.[375] In sum, corporate governance frameworks around the world are assessed against the benchmark set by the U.S. governance system on account of it having emerged as "the de facto gold standard for good corporate governance around the world", regardless of jurisdiction-specific peculiarities and context.[376]

C. The Comparative Corporate Governance Convergence Debate

A related strand in comparative corporate governance literature that the American shareholder primacy model of the corporation has influenced is that of the convergence debate. The primary focus of this debate has revolved around whether there has been, over the last century, convergence between different nations' corporate laws such that it makes sense to speak of a trend towards "a single, standard model" of corporate law underpinned by a shared ideological commitment to "the view that corporate law should principally strive to increase long-term shareholder value".[377] In general, therefore, a significant portion of the corporate governance convergence debate has revolved around which of the two distinct models of corporate forms i.e. the shareholder-oriented and dispersed ownership model or the stakeholder-oriented and concentrated ownership model,

[373] Id. at 519.
[374] *Id*. at 518-519.
[375] *Id*. at 519.
[376] *Id*. at 518.
[377] Harwell Wells, *supra* note 255, at 2.

has or will, triumph.[378] Most convergence theory scholars advance the primacy of the Anglo-American model of governance, arguing that this model is the "endpoint of an evolutionary development" and is "both desirable and inevitable”.[379] The seminal article written by Hansmann and Kraakman announcing “The End of History for Corporate Law,” elucidates this aptly: “*The point is simply that now…there is convergence on a consensus that the best means to this end - the pursuit of aggregate social welfare - is to make corporate managers strongly accountable to shareholder interests, and (at least in direct terms) only to those interests*”.[380] These scholars contend that given globalization and the increased interdependence of financial markets around the world, some level of uniformity and convergence in the direction of shareholder primacy will benefit countries and companies and will promote the global competitiveness of companies.[381]

While the argument that corporate law is converging towards the Anglo-American model has drawn acclaim, there are a significant number of scholars who contend this strand of the convergence theory.[382] They argue that emphasis on convergence ignores path dependence and the peculiarities of national history and political economy that continue to shape jurisdictions’ corporate laws.[383] Path dependence theory argues that "history matters, because it constrains the way in which institutions can change, and efficiency does not necessarily triumph.”[384] More recently, scholars have started recognizing a middle ground between the two opposing contentions of the convergence debate.[385] They argue that recognition of factors such as socio-economic conditions and politics are critical for effective corporate governance and that corporate governance models cannot simply be transplanted by changes in formal laws.[386] These arguments are consistent with theories of path dependence in that they recognize the impact of local cultures, national histories and legal systems on corporate law and its evolution.[387]

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[378] Afra Afsharipour, *supra* note 350, at 345.
[379] Afra Afsharipour, *supra* note 350, at 344.
[380] Henry Hansmann and Reinier Kraakman, *supra* note 27, at 441.
[381] *Id*. at 450-451.
[382] Afra Afsharipour, *supra* note 350, at 345.
[383] Harwell Wells, *supra* note 255, at 2.
[384] Afra Afsharipour, *supra* note 350, at 337.
[385] *Id*. at 346.
[386] *Id*.
[387] *Id*. at 347.

Closely linked to the convergence debate is the theme of legal transplantation. The classification of corporate law based on "legal origins" or along the lines of "legal families" can be attributed to the phenomenon of "legal transplants," specifically the importation of entire legal systems from empires to colonies that took place during colonial times in the eighteenth and nineteenth centuries.[388] In this regard, the specific "law and finance" theory that was advanced by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny ("**LLSV**"), popularly known as the "law matters" theory contended the following: (i) different nations' laws can be categorized into legal families based on their historical origins; (ii) legal rules protecting shareholders vary systematically among legal families; and (iii) laws of nations rooted in common law not only better protect investors than those of civil-law nations but consequently produce better economic outcomes in several areas.[389] The three key insights from the LLSV "law matters" hypothesis are as follows: (i) capital market structures are directly linked to companies' corporate governance frameworks, which includes the extent of protection to minority shareholders; (ii) in this respect, there is a distinction between jurisdictions with dispersed ownership structures and jurisdictions with concentrated ownership structures; and (iii) ownership structures and corporate governance regimes around the world are likely to converge around laws adopted in jurisdictions with dispersed ownership structures, such as the U.S. and U.K.[390]

While the concept of legal transplants has received considerable affirmation in legal scholarship, it has also garnered considerable skepticism[391] and scholars have commented on the exigencies inherent in transplanting elements from one legal system to another.[392] The importance of intangible factors, such as politics and culture in comparative law and reform have therefore been emphasized time and again by the path dependence theory.[393] Moreover, an examination of economies that are part of the Global South (such as India) is absent from the "law matters"

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[388] Umakanth Varottil, *supra* note 144, at 255; Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law* 2009 BYU LAW REVIEW 1813, 1812-1813 (2009); Mathias M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law* 52 MCGILL LAW JOURNAL 55, 55 (2007); Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, *The Transplant Effect* 51 AMERICAN JOURNAL OF COMPARATIVE LAW 163, 165 (2003).
[389] Harwell Wells, *supra* note 255, at 2.
[390] Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer and Robert W. Vishny, *Legal Determinants of External Finance* 52 THE JOURNAL OF FINANCE 1131, 1131-1150 (1997).
[391] Umakanth Varottil, *supra* note 144, at 255.
[392] Jennifer G. Hill and Randall S. Thomas, *supra* note 88, at 1.
[393] *Id*.

hypothesis as a result of which it is lacking in certain fundamental aspects and fails to provide a synoptic understanding of corporate governance systems and the evolution and direction of corporate purpose.

V. Learnings and Areas for Further Research

In light of the analysis conducted in the preceding Sections of this article and the implications examined above, we now turn to discussing certain learnings and areas for further research that can help refine and enhance the ongoing comparative corporate governance discourse on corporate purpose in India as well as other jurisdictions.

A. Examining Differences in Corporate Governance Systems for Comparative Analysis

The primary focus of comparative corporate governance literature has been on jurisdictions that form part of the Global North.[394] Despite rapid economic growth in several jurisdictions in the Global South, especially Asia, including the fact that Asian economies have propelled the world's economic growth for half a century,[395] academic inquiry with respect to specific corporate governance reforms in these economies is relatively scarce.[396] This dearth of analysis coupled with the examination of the evolution of corporate purpose in India, the U.S. and the U.K. as well as the ramifications of the predominance of shareholder primacy globally, present certain important learnings that can help in further enhancing and refining contemporary discussions on corporate purpose. As discussed in Section IV, one of the longstanding implications of the predominance of shareholder primacy in Anglo-American corporate governance has been that governance mechanisms aimed at tackling the manager-shareholder agency problems have become the "primary litmus test for good corporate governance" all over the world.[397] This has resulted in comparative corporate governance scholarship being replete with generalizations regarding the

[394] Afra Afsharipour, *supra* note 350, at 347.
[395] Dan W. Puchniak, *supra* note 21, at 15.
[396] Afra Afsharipour, *supra* note 350, at 338.
[397] Dan W. Puchniak, *supra* note 25, at 519.

Anglo-American model, the misleading consequence of which is that substantial differences in corporate governance systems even within common law jurisdictions get suppressed.[398]

Moreover, this growing trend in comparative corporate governance scholarship that focuses on benchmarking corporate governance systems against the Anglo-American model has led to certain flawed and misguided conclusions as this approach tends to obscure fundamental differences in ownership and governance structures. It considers controlling shareholder structures as the inefficient consequence of failing to provide adequate mechanisms for empowering dispersed shareholders.[399] The approach assumes that controlling shareholder systems are weak or inept because they lack appropriate governance mechanisms for empowering shareholders. It therefore completely obscures the fact that the mechanisms devised for empowering dispersed shareholders are not required in the case of controlling shareholders on account of the inherent power that they exercise on corporate governance systems directly through their voting rights.[400]

B. Situating India in Comparative Corporate Governance Scholarship

The tendency in comparative corporate governance scholarship with respect to evaluating corporate governance frameworks against the Anglo-American standard is reflective of another flawed assumption with respect to the convergence debate. The presupposition is that jurisdictions that are part of the Global South such as India are in a transitory stage on the path towards economic development and that once they reach development, shareholding in large public companies will become dispersed and Anglo-American mechanisms for reducing managerial agency costs will necessarily be required to be implemented in their governance frameworks.[401] However, historical as well as empirical evidence in support of this theory in favour of convergence towards the Anglo-

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[398] Christopher M. Bruner, *Introduction and Overview* in CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 4 (2013).

[399] Dan W. Puchniak, *supra* note 25, at 513.

[400] *Id*. at 513-514; Claessens, Stijn, Simeon Djankov and Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations* 58 JOURNAL OF FINANCIAL ECONOMICS 81, 81–112 (2000); La Porta, Rafael, Florencio Lopez- de- Silanes and Andrei Shleifer, *Corporate Ownership Around the World* 54 THE JOURNAL OF FINANCE 471, 471–517 (1999); Umakanth Varottil, *The Advent of Shareholder Activism in India* 1 JOURNAL ON GOVERNANCE 582, 582-628 (2012).

[401] Dan W. Puchniak, *supra* note 25, at 520-521; Dan W. Puchniak, *supra* note 370, at 7-70; Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers* 5 BERKELEY BUSINESS LAW JOURNAL 192, 195-262 (2009).

American model is insufficient.[402] In fact, in India, the underlying composition of equity ownership indicates that India can best be understood as a stable counter-example to the purported global trend towards shareholder activism.[403] The ownership structure of India's largest public companies continues to be tilted towards controlling inside shareholders or promoters (reflecting a legacy of family-owned business ventures and state nationalization).[404] Controlling shareholders continue to hold major stakes in large public companies, and there is scant evidence to suggest that their influence over corporate decision-making is on the decline.[405] Most of the evidence indicates that for all practical purposes, outside shareholder power remains largely irrelevant for large Indian public companies.[406] Put simply, outside shareholders own a relatively small portion of equity for them to influence corporate decision-making in any meaningful manner, and this historical fact does not appear to be changing.[407]

Recognizing the importance of differences in jurisdictions and the trajectory of the evolution of their legal systems therefore serves to inform the convergence debate. The "law matters" theory had argued that the continuance of concentrated ownership in some countries and the emergence of dispersed ownership in others was "a consequence" of common law or civil law orientation.[408] A critical examination of this theory reveals that its analysis is limited to Western jurisdictions or the Global North and does not include an assessment of jurisdictions in the Global South. The "law matters" theory is therefore lacking in terms of a comprehensive assessment which is reflected in its failure to explain the relative levels of shareholder protection and share dispersal across common law countries, or even within a given country over a period of time.[409] This failure is on account of the mainstream approach of comparative corporate governance which has traditionally based its theories on legal family taxonomies which in turn resulted in the division of jurisdictions

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[402] George S. Geis, *Shareholder Power in India* in the RESEARCH HANDBOOK ON SHAREHOLDER POWER 592 (Jennifer G. Hill & Randall S. Thomas eds., 2015).
[403] *Id.*
[404] *Id.*; Mariana Parglender, *supra* note 36, at 7-8; OECD Corporate Governance Factbook 2023, Table 1.1, 27, available at https://www.oecd-ilibrary.org/finance-and-investment/oecd-corporate-governance-factbook-2023_6d912314-en.
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] Christopher Bruner, *supra* note 398, at 6-7.
[409] Christopher Bruner, *Comparative Theories of Corporate Governance* in CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 116-119 (2013).

around the world into common law and civil law traditions.[410] As a consequence, the traditional view in comparative literature has understood jurisdictions in the Global South as either adaptations or mere failed transplants from the Global North.[411]

This view is limited as it decontextualizes as well as negates jurisdiction-specific factors that are critical to understanding corporate governance systems in their entirety. The direction that comparative corporate governance scholarship must take is that it must acknowledge path dependence in order to allow for more nuanced solutions to governance problems in different jurisdictions, instead of assuming the supremacy of the Anglo-American model. Moreover, it is also important to include the examination of jurisdictions in the Global South in the study of comparative corporate governance.[412] This inclusive focus has the potential to inform a more holistic understanding of the evolution and direction of corporate purpose.[413]

C. Corporate Purpose, Corporate Governance Structures and Corporate Ownership Patterns

As discussed above, it is important to understand that differences between jurisdictions and the historical path that the development of their legal systems have emerged from are of great theoretical as well as practical significance.[414] Corporate law systems all over the world are the products of and continue to bear the imprint of the historical paths, including the effects of the political, economic and social factors that have impacted these paths through which they have evolved.[415] One of the most important considerations that necessarily need to be taken into account in assessing corporate governance systems comparatively, is that of the pattern of corporate ownership. This is because differences in patterns of shareholding across jurisdictions correlate with differences in the structure of corporate law.[416] In this regard, it is critical to recognize that

[410] Mariana Parglender, *supra* note 36, at 9-11.
[411] *Id*.
[412] *Id*. at 28.
[413] *Id*.
[414] Christopher Bruner, *supra* note 398, at 4; Lucian Arye Bebchuk and Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance* 52 STANFORD LAW REVIEW 127, 127-170 (1999).
[415] John Armour, Henry Hansmann, Reinier Kraakman and Mariana Pargendler, *What is Corporate Law* in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 25 (Reinier Kraakman, John Armour et. al eds., 2017).
[416] *Id*. at 24-28.

corporate governance institutions and practices of economies that form part of the Global South such as India were not only founded on distinctly different values and preconceptions as compared to the West, but also exhibit strikingly different ownership patterns and therefore different governance problems.[417]

In fact, international studies have found that separation of ownership and control is actually the exception worldwide, and more specifically so in the Global South.[418] International research also finds that despite often adopting some of the rhetoric of Western or Anglo-American governance, it is the distinct institutional, national and cultural constituents that inform the survival of governance systems in the Global South.[419] The crucial distinction between ownership patterns in publicly listed companies in the U.S. and the U.K and in India is that while the former are widely dispersed, the latter are owned by controlling shareholders.[420] Therefore, the predominant governance problem identified by Berle and Means in terms of the misalignment of interests between diffused, outside shareholders and management[421] does not apply to India on account of its publicly listed companies being primarily controlled by a single or small group of inside shareholders also known as promoters. The governance problem resulting from such ownership structures is that of protection of minority shareholders on account of the immense power wielded by controlling shareholders. This power exercised by concentrated shareholders, directly through their voting rights, is much greater than the power that shareholders in the U.S. wield indirectly through hostile takeovers, independent directors, shareholder litigation, proxy battles and other means.[422] The realization that controlling shareholders in India exercise enormous power and effectively control the corporate governance in most large public companies and the implications of our analysis discussed above lead to crucial and inter-related lessons in terms of furthering our understanding with respect to the corporate governance landscape in India and consequently informing the corporate purpose debate. Key lessons and certain avenues for further research based on the preceding analysis are discussed below.

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[417] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 34.
[418] *Id*.; OECD Corporate Governance Factbook 2023, 17-20, available at https://www.oecd-ilibrary.org/finance-and-investment/oecd-corporate-governance-factbook-2023_6d912314-en.
[419] Thomas Clarke, Justin O'Brien and Charles R. T. O'Kelley, *supra* note 2, at 34.
[420] *Id*. at 35-36 (for a discussion on the characteristics of corporations in Asia and how they differ from corporations in the West).
[421] *Id*. at 34.
[422] Dan W. Puchniak, *supra* note 25, at 524-525.

D. Key Lessons and the Way Forward

The first lesson is with respect to understanding the reasons behind the unique and unexpected consequences that result from transplanting corporate governance mechanisms from the U.S. and/or the U.K. into India. For instance, the framework on independent directors in India has largely been derived from the U.S. and U.K. models on independent directors.[423] However, in the U.S. and the U.K., the institution of independent directors was conceived of in order to find solutions to the shareholder-management agency problem that is an inherent part of the diffused shareholding pattern of ownership in public companies in these jurisdictions.[424] In the controlling shareholder environment in India, the transplantation of this framework has inevitably resulted in unintended consequences[425] given the influence that controlling shareholders exercise in the appointment and removal processes of independent directors.[426] Therefore, in effect, the duty of independent directors to take into account the interests of all stakeholders in boardroom decision-making, which is part of the stakeholder-oriented corporate purpose framework adopted by India's legal and regulatory framework, is rendered rather weak.

Transmission of ideas from one legal system to another is a complex exercise and should not be undertaken without a comprehensive assessment of the various political, economic, social and institutional factors that shape a given jurisdiction's legal architecture.[427] Given the complexities involved in transplantation, it is also critical to evaluate the need for transplantation contextually based on an informed analysis. This is extremely important on account of the fact that when the process of importation is undertaken in the absence of an extensive analysis that ignores path dependence and local characteristics, the legal rules or statutory codes that are transplanted tend to take on very unique, localized forms and produce unexpected results.[428]

The second lesson, stemming from the first one, is with respect to rethinking corporate governance reforms which impact the stakeholder-governance model of corporate purpose in India. This re-evaluation necessitates that the corporate governance framework in India within which its

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[423] Umakanth Varottil, *supra* note 144, at 285-287; Madhuryya Arindam, *The Independent Director: Has it been Indianised Enough?* 6 NUJS LAW REVIEW 231, 234-237 (2013).
[424] Madhuryya Arindam, *supra* note 423, at 234-237.
[425] Dan W. Puchniak, *supra* note 25, at 512-513.
[426] Companies Act, 2013 Schedule IV; Companies Act, 2013, § 149, § 152 and § 169.
[427] Afra Afsharipour, *supra* note 350, at 335; Umakanth Varottil, *supra* note 144, at 322-324.
[428] Dan W. Puchniak, *supra* note 25, at 513.

corporate purpose model is situated, is assessed on its own terms i.e. the analysis should be specific to India and should take into account jurisdiction-specific peculiarities and institutional context.[429] In other words, it is crucial to be critical of conventional wisdom that presupposes the supremacy of the Anglo-American model of governance in order to effectively evaluate corporate governance reforms that impact the stakeholder governance corporate purpose framework in India.

The third lesson is with respect to the importance of understanding the power that controlling shareholders exercise in the concentrated shareholder environment in India which cannot be emphasized enough. To reiterate Gilson's thesis, in a controlling shareholder environment, the focus of corporate governance shifts from minimizing managerial agency costs to minimizing private benefits of control.[430] His analysis has also demonstrated that despite the broader concerns associated with concentrated ownership patterns, such patterns do not necessarily imply that stakeholder governance and controlling shareholder systems are inherently incompatible.[431] He has explained that controlling shareholders have stronger economic incentives to effectively monitor managers as well as the company as opposed to company structures where share ownership is widely dispersed.[432] Controlling shareholders therefore reduce the risk of managerial agency costs.[433] However, this reduction in costs comes at the price of another risk which is private benefits of control.[434] These benefits are those that controlling shareholders benefit exclusively from as a result of their controlling power (i.e. private benefits of control are not available to minority shareholders).[435] Therefore, in order to ensure that the stakeholder-oriented corporate purpose framework in India is implemented effectively, its corporate governance reforms need to be focused on making its controlling shareholder system "efficient",[436] which in turn entails understanding the role of private benefits of control in the Indian corporate governance landscape.

Professor Dan Puchniak, in his examination of shareholder power in Asia, has thrown light on the fact that not only has the concept of private benefits of control largely been overlooked in corporate law literature, but it has also been understood very narrowly despite it being a highly complex

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[429] *Id*. at 526-532.
[430] *Id*. at 526.
[431] Afra Afsharipour, *supra* note 33, at 496.
[432] Ronald J. Gilson, *supra* note 232, at 1651.
[433] *Id*. at 1651-1652.
[434] *Id*.
[435] *Id*.
[436] *Id*. at 1652-1657.

issue.[437] He argues that the conventional analysis of private benefits of control in corporate law scholarship is relatively limited in the sense of it being understood only in terms of the financial or pecuniary benefits of control exercised by controlling shareholders vis-a-vis the company and/or minority shareholders.[438] However, missing from this conventional analysis is an entire spectrum of potentially powerful benefits that controlling shareholders may benefit from which stem from sources external to the company, such as, political gains, cultural contingent benefits and institutional financial benefits.[439] Depending on how these external private benefits of control drive a particular controlling shareholder's behavior, they may impact minority shareholders positively or negatively, unlike internal private benefits of control which impact minority shareholders negatively.[440] However, external benefits of control have largely been neglected in corporate law scholarship.[441] In order to devise comprehensive governance mechanisms to minimize private benefits of control for ensuring protection of minority shareholders and other stakeholders, it is imperative to further analyze the distinction between internal and external private benefits of control.

The fourth lesson is with respect to addressing the key agency problem in the Indian corporate governance context, which is, the conflict between controllers and minority shareholders and its link with well-functioning and effective enforcement mechanisms. Research has indicated that enforcement of the law is critical to addressing governance issues, providing assurances to investors on the credibility of anti-expropriation measures and firm disclosures, and addressing investor concerns.[442] As discussed in Section II, under the current statutory framework, the means through which stakeholders may enforce directors' duties to consider their interests are ineffective. Therefore, one of the ways through which Section 166(2) and the pluralistic stakeholder governance model embodied by it may be meaningfully implemented is addressing the inefficacy of enforcement mechanisms under the current framework.[443]

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[437] Dan W. Puchniak, *supra* note 25, at 514.
[438] *Id*. at 527-528.
[439] *Id*.
[440] *Id*. at 531-532.
[441] *Id*. at 532.
[442] Vikramaditya Khanna, *supra* note 202, at 337.
[443] For an overview of public and private enforcement of corporate and securities laws in India and proposed reform measures, see Vikramaditya Khanna, *supra* note 202, at 333-358.

In Section II we also discussed that while the Companies Act requires directors to consider the interests of stakeholders, it also has a strong shareholder-friendly inclination, most distinctly with respect to appointment of directors. This shareholder-centric feature of corporate law has the potential to impede the stakeholder-oriented framework adopted by the Companies Act and the SEBI Listing Regulations, especially in a governance system that is dominated by powerful controlling shareholders. Therefore, in order to ensure effective implementation of stakeholder governance in India, it is suggested that board restructuring of publicly listed companies be considered such that the legal and regulatory framework should provide for mandated stakeholder representation on boards.[444]

The fifth lesson, linked with and assimilating all the four lessons discussed above, is with respect to the appropriate allocation of power between the board of directors and shareholders, especially in the Indian context of a controlling shareholder system. The recognition of the enormous power wielded by concentrated shareholders in India has significant ramifications in terms of strengthening its stakeholder governance framework. In this regard, we submit that corporate governance reform efforts aimed at effectively implementing stakeholderism in India must consider subjecting controlling shareholders to fiduciary duties. We draw on Professor Ernest Lim's study in which he builds a case for controlling shareholders' fiduciary duties in common law Asia.[445] We discuss two primary justifications put forth by Lim for imposing fiduciary duties on controlling shareholders. The first justification relates to extraction of private benefits of control as discussed above - in a controlling shareholder environment, the risk that controlling shareholders, through the exercise of their broad discretionary powers that impact the interests of the company, may exercise these powers in their own interests at the company's expense, is relatively high.[446] These powers include but are not limited to appointments and removal of directors, alteration of the company's constitution, approval of major transactions, authorization of transactions that would otherwise amount to a breach of director's duties, ratification of

[444] Accountable Capitalism Act, S. 3348, 115th Cong. 2018 § 2(2)(A), § 5(c)(1), § 6(b); for an overview of proposals to enact federal legislation mandating large corporations to provide for substantial stakeholder, namely, employee representation on their boards, see Grant M. Hayden and Mathew T. Bodie, *Codetermination in Theory and Practice*, 73 FLORIDA LAW REVIEW 321, 330 (2021).
[445] Ernest Lim, *Powers, Shareholders and Justifications for Duties* in A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 266-272 (Cambridge University Press, 2019).
[446] *Id*. at 267.

breaches of director's duties, exercise of management powers, directing directors to take or refrain from taking certain action and approval of board compensation.[447]

The second justification relates to information asymmetry - the problem of information asymmetry gets compounded in the case of controlling shareholders, particularly in publicly listed companies that are owned by families.[448] This is on account of the fact that the board and senior management are dominated by the controlling shareholder and/or his family members and have access to information.[449] This results in two untoward outcomes: (i) non-controlling or minority shareholders are not in a position to comprehensively evaluate the significance or consequences of controlling shareholders who voted for or against certain resolutions, including on matters related to exercise of managerial powers;[450] and (ii) controlling shareholders can extract private benefits of control at the expense of the company and minority shareholders basis their dominant position and consequent access to information.[451]

Therefore, given that imposing fiduciary duties on directors is a well-established mechanism for regulating information asymmetry,[452] the justification for imposing such duties on controlling shareholders becomes even stronger. The reason that corporate law makes control power the tipping point of fiduciary responsibility is to enable the affixation of accountability and responsibility on those who have control.[453] In a controlling shareholder dominated system, it is indisputably the controlling shareholders, by virtue of the wide powers that they exercise, who are in a position to determine a company's purposes and values and it is the board that is responsible for delivering such stated purposes and values.[454] Again, this is in sharp contrast to the diffused ownership system where there are no significant blocks of shareholders and shareholdings are

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[447] *Id*.
[448] *Id*. at 288-270.
[449] *Id*. at 268; Melvin Jameson, Andrew Prevost and John Puthenpurackal, *Controlling Shareholders, Board Structure, and Firm Performance: Evidence from India* 27 JOURNAL OF CORPORATE FINANCE 1, 9 (2014).
[450] Ernest Lim, *supra* note 445, at 269-270.
[451] *Id*.
[452] Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty* 37 OXFORD JOURNAL OF LEGAL STUDIES 770, 770 (2017).
[453] William W. Bratton, *supra* note 354, at 431-434.
[454] 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).

dispersed amongst a large number of institutional and individual investors.[455] In such systems, none of these shareholders are in a position to determine a company's purposes and values as a result of which the responsibility to both establish and deliver them is on the management.[456]

The difficulties associated with pinning accountability on shareholders in dispersed ownership systems leads to the largely overlooked question of whether there is a link between concentrated shareholder systems and effective stakeholderism on the one hand and dispersed ownership and shareholder primacy on the other. While there is no obvious answer at a theoretical level, it may be worthwhile to conduct further research on this aspect of corporate purpose based on a taxonomy that takes into account both, different types of controlling and dispersed shareholders as well as different types of control mechanisms.[457] It may, however, be argued, that the long-term orientation and commitment of controlling shareholders to the performance and growth of the company provides a relatively more conducive architecture for stakeholderism to work in practice as compared with dispersed ownership. However, as discussed earlier, this advantage comes at the cost of opportunities for self-dealing and expropriation (at the expense of minority shareholders and stakeholders) which impede stakeholder governance. Hence, it is imperative to ensure implementation of governance mechanisms that can ensure a balance between the encumbrances posed by the agency potential for expropriation and the benefits of controlling shareholders.

Therefore, in the Indian context specifically, subjecting controlling shareholders to fiduciary duties is critical to effective implementation of the pluralistic stakeholder governance model. In fact, in relation to the importance of effective enforcement mechanisms for ensuring implementation of stakeholderism, the absence of fiduciary duties owed by controlling shareholders has been identified as one of the causes that hamper the effectiveness of the class action and derivative suit mechanisms in India.[458] Subjecting controlling shareholders to fiduciary duties serves two crucial objectives: (i) it ensures an appropriate and much needed balance of power and responsibilities

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[455] *Id.*
[456] *Id.*
[457] Curtis J. Milhaupt, *The (Geo) Politics of Controlling Shareholders*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, LAW WORKING PAPER NO. 696 1, 21 (2023) (on whether controlled firms demonstrate improved ESG performance as compared to non-controlled firms); for early attempts at such empirical research, see Barry Hettler, Arno Frost, James Cordeiro and Stacy Chavez., *Excess Insider Control and Corporate Social Responsibility: Evidence from Dual - Class Firms*, 40 JOURNAL OF ACCOUNTING AND PUBLIC POLICY (2021).
[458] Vikramaditya Khanna, *supra* note 202, at 334-335, 342, 351, 355-358.

between the board and controlling shareholders; and (ii) it addresses the lack of articulation of corporate purpose and the lack of credible commitment towards the stakeholder-oriented model of corporate purpose in the legal and regulatory framework governing corporate purpose in India. In sum, effective implementation of stakeholderism in India necessitates that its corporate governance reforms take into account the differences as well as the peculiar complexities that accompany controlling shareholder systems as compared to dispersed ownership systems. India's corporate governance mechanisms must be cognizant of the immense power exercised by controlling shareholders of publicly listed companies in order to bridge the gap between rhetoric and substantive implementation of the stakeholder oriented corporate purpose framework in India. In this regard, three primary areas of focus for governance reforms and for further scholarly inquiry with respect to strengthening the stakeholder governance framework in India are as follows: (i) an in-depth and detailed understanding of the nature of private benefits of control, both internal and external, and the corporate governance mechanisms for containing them; (ii) consideration of mandating stakeholder representation on boards; and (iii) consideration of subjecting controlling shareholders to fiduciary duties.

CONCLUSION

This article, through a comparative analysis of the evolution of the doctrine of corporate purpose in India, the U.S. and the U.K., has provided a befitting platform for evaluating the limitations associated with conventional wisdom on corporate governance reforms that have predominantly been derived from the Anglo-American experience.[459] The endeavour has been to showcase the flawed assumptions underlying the claims that assume the universal applicability as well as the supremacy of the Anglo-American corporate governance apparatus, including claims made by certain convergence theories. In tracing the historical trajectory and evolution of corporate purpose in India and comparing it with the evolution of the nexus of contracts theory underlying the shareholder primacy doctrine in the U.S. and the U.K., the objective has been twofold: first, to emphasize the importance of contextualizing the scholarship that has influenced the development of corporate purpose and its course of direction; and second, to underline the fact that it is fundamentally untenable and misleading to benchmark corporate governance in India against the

[459] Dan W. Puchniak, *supra* note 25, at 512.

standards of the Anglo-American model on corporate governance on account of the profound incompatibility between these jurisdictions (based on critical differences in ownership and governance structures). As regards the Indian legal and regulatory framework that currently embodies a pluralistic stakeholder governance model of corporate purpose, this article has delineated the complexities associated with implementing stakeholderism in practice. Further, it has highlighted the importance of both, explicit articulation of corporate purpose and designing corporate governance mechanisms such that they enable corporations to credibly commit to their stated purposes and values.[460] In this regard, in the Indian context, this article argues that the near-term priorities with respect to corporate governance reforms centred around effective implementation of stakeholderism should focus on containing controller opportunism and protecting minority shareholders and other stakeholders.[461] More specifically, it contends that in the controlling shareholder governance system in India, understanding the nature of the complex issue of private benefits of control and ensuring a balance between powers and responsibilities of directors and controlling shareholders are critical to addressing the concerns identified with India's corporate purpose framework. Lastly, this article proposes certain areas for further inquiry that have significant implications for the theory and practice of the corporation and its purpose. The overall aim of this article has been to provide a theoretical framework for reconceiving the concept of the corporation around a broader and more inclusive corporate purpose embedded in stakeholder governance in the hope that this will contribute to and enable more nuanced deliberations on this pertinent issue.

[460] Colin Mayer, *supra* note 86, at 215, 219-221.
[461] George S. Geis, *supra* note 402, at 607.