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Tackling Vulnerabilities Through Corporate Duties

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Cover Page Footnote

Distinguished Professor, Guangdong University of Finance and Economics, Guangzhou, 510320, China. Professor of Law, Nottingham Law School, England, UK. I am greatly indebted to Professor Andrew Keay, Professor Jonathan Doak, and Professor Gerard McCormack for providing valuable comments on the drafts of this paper. This research is kindly supported by the Guangzhou Key Research Institute of Humanities and Social Sciences Co-construction Project (2023JDGJ18) "The Legal Mechanism to Support the Construction of Guangzhou's Modern Industrial System through the Lens of Doing Business Legal Environment."

TACKLING VULNERABILITIES THROUGH CORPORATE DUTIES

Jingchen Zhao⁺⁺

In this article, and drawing on the work of Fineman and others, we use a vulnerability lens as a device to emphasise the protection that could be offered to vulnerable parties in corporations through directors' duties. By situating corporations in the vulnerability paradigm, we will discuss the limitations of formal equality and clarify the role played by corporate law. The increasingly blurred distinction between private law and public law will be discussed to rationalise the protection of the vulnerable through collective responsibility. Vulnerability theory mediates conflicts between calls for "regulatory state policies" and "individual responsibility" to supervise and monitor corporate actions by improving resilience in four kinds and two stages. We observe that vulnerability is universal in corporations, but priority should be given to the vulnerable parties with the highest dependency, whose identity varies depending on both internal and external contexts. The vulnerability paradigm, assisted by Goodin's analysis of protecting the vulnerable, lays a solid theoretical base to explain directors' duties towards vulnerable parties, particularly those with the highest dependency, within the vulnerability matrix. These parties will periodically enjoy prioritised protection over other constituencies occupying less threatened positions.

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INTRODUCTION

Corporations have played a significant role in civilized society over the last two hundred years. However, the pattern, structure and objectives of corporations have changed significantly during this time. This is particularly the case because of the increasingly important role played by multinational enterprises (MNEs), which operate in a complex international environment. Corporations have evolved to become complex organisations inculcated with “personhood, institutional structure, and state-like qualities that have an encompassing impact on our society.”¹ One constant issue in the discourse on corporate responsibility and corporate objectives is how to address the problem of vulnerability and help the constituencies that are particularly vulnerable to the effects of corporate actions. This article reassesses corporations’ and directors’ duties through the lens of vulnerability theory, as articulated through the work of Martha Fineman and others. Vulnerability theory challenges the notion of a dominant and static “liberal legal subject,” according to which state intervention or regulation is perceived as a violation of a fully functioning being’s liberty; this includes a corporation as a legal person.²

“Vulnerability theory presents a different paradigm for thinking about the nature of the state and its social institutions,” including corporations, as well as a basis for defining the collective responsibility of states and corporations.³ Fineman established a universal vulnerable subject, defined by its shared and constant vulnerability, and called for a responsive state, stressing that the theme of vulnerability theory is the inequality of resilience between different parties.⁴ This inequality allows this article to argue for responsible and accountable corporations so that mechanisms can be put in place for building resilience as “a product of social relationships and institutions.”⁵ Various stakeholders’ groups of corporations “are uniquely unprotected from their vulnerability to the corporations.”⁶ Corporations should serve as the mediating institutions through which social goods are equitably allocated and social objectives are ideally achieved to mitigate individual vulnerability. Within the vulnerability paradigm, states and corporations should develop policies, rules, and processes

1. Heather M. Kolinsky, *Situating the Corporation within the Vulnerability Paradigm: What Impact Does Corporate Personhood Have on Vulnerability, Dependency, and Resilience*, 25 AM. U. J. GENDER SOC. POL’Y & L. 51, 52 (2017).

2. See Martha A. Fineman, *Introduction*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 3, 5 (Martha A. Fineman & Jonathan W. Fineman eds., 2018).

3. Martha A. Fineman, *Universality, Vulnerability, and Collective Responsibility*, 16 LES ATELIERS DE L’ETHIQUE: THE ETHICS FORUM 103 (2021).

4. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEM. 1, 8–9 (2008).

5. Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U.L. REV. 341, 362 (2019).

6. George Shepard, *Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders*, 23 U. PA. J. BUS. L. 823, 853 (2021).

to protect non-shareholder stakeholders from inevitable vulnerability to corporate misconducts.

The focus of debate in existing literature has been mostly on businesses themselves, viewing them as legal persons when applying vulnerability theory to corporations.⁷ There is a lack of discussion in the domain of corporate law and governance focusing on corporate power, responsibilities, and the interests of stakeholders, including shareholders, as vulnerable subjects. Also, while there is movement towards a recognition of the complex nature of companies and the position of vulnerable stakeholders,⁸ there is still an underlying tendency to see vulnerability as something that only affects narrow sections of society, termed “vulnerable populations.”⁹ These populations live within a fragile materiality that renders them constantly susceptible to change, both positive and negative, in corporations and society. No one is invulnerable, according to vulnerability theory.¹⁰ However, notwithstanding its universality and ubiquity, vulnerability is not similarly experienced,¹¹ and may be determined by particular circumstances or particular life stages.¹² Vulnerability is realized in stakeholders’ dependency on social arrangements, such as corporate decisions, the market, or the economy in general.¹³ This article challenges this constricted view of vulnerability and makes an attempt to analyze directors’ duties within the paradigm of vulnerability as an inherent and constant state in the corporate world.

This article aims to consolidate the justification for and necessity of protecting the vulnerable through the lens of corporate law and suggest how to use the analytical tools offered by vulnerability theory as an intellectual underpinning for corporate law. Three interrelated and incremental questions will be discussed. First, how can we situate corporations and corporate responsibilities within the “vulnerability thesis” established by Martha Fineman and the theory of “protecting the vulnerable” proposed by Robert Goodin? What is the rationale for improving the resilience of constituencies, considering the inadequacies of external regulation in supporting corporate behavior towards the desired goals? Can an enlarged directors’ duty, through which resilience is

7. Susan S. Kuo & Benjamin Means, *After the Storm: The Vulnerability and Resilience of Locally Owned Business*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 95, 95 (Martha Albertson Fineman & Anna Grear eds., 2013).

8. See, e.g., Eric Brown, *Vulnerability and the Basis of Business Ethics: From Fiduciary Duties to Professionalism*, 113 J. BUS. ETHICS 489, 489–90, 494 (2013).

9. Martha Albertson Fineman, *Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L. J. 71, 84 (2012).

10. See generally Camilla Sabroe Jydebjerg, *Vulnerability, Workfare Law and Resilient Social Justice*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 106, 106 (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018).

11. Kolinsky, *supra* note 1, at 53.

12. Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 146 (2017).

13. See Fineman, *supra* note 4, at 3–4.

developed under scrutiny, be seen as an appropriate and effective approach to address the problem of the protection of vulnerable parties?

The originality of this article lies in its attempt to build arguments beyond Fineman's vulnerability thesis, considering and mitigating the limitations of the theory in failing to help policymakers decide on how to allocate limited resources.¹⁴ It also considers the challenges of complicated business environments and stakeholder relationships when applying the theory to corporations in order to reflect the dynamic business environment and focus on diverse business experiences. This article aims to build an enriched and refined rationale for the responsibility to protect the vulnerable with reference to Goodin's central arguments, according to which the company should bear special responsibility for protecting those who are particularly vulnerable to the effects of corporate decisions and behaviors as reflected in policymaking.¹⁵ Vulnerability theory recognizes the ways in which societal relationships and institutions are "shaped, reinforced, and modified in and through law, and argues that the state is always actively involved in the allocation, preservation, or maintenance of privilege and disadvantage."¹⁶ This article argues that dealing with vulnerability requires involvement from both an active state and accountable corporations, and that substantial equality can be achieved only through shared responsibility. Corporations may cause harm and generate circumstances that exacerbate or exploit human vulnerability. However, if monitored effectively and fairly, institutions and corporations can also mediate, compensate for, and mitigate vulnerability.

The article proceeds as follows. Section I critically reviews the existing literature on vulnerability and protecting the vulnerable in order to explain the reasons for establishing a linkage between corporations and the vulnerability paradigm. Section II addresses limitations of formal equality and the potential problems generated from different experiences in the context of universal and constant vulnerability within the corporate field. Goodin's thesis will be referenced to argue in favor of a special responsibility for protecting the vulnerable stakeholder with the highest dependency. Section III explains the role played by states in promoting more socially responsible companies within the vulnerability paradigm by enhancing resilience in the form of advantages or coping mechanisms to mitigate and compensate for vulnerability. Section IV clarifies the necessity to abandon the clear division between public and private law in favor of a more coherent rationale for mandatory social responsibilities to be discharged by corporations and boards of directors. Section V evaluates

14. See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 4-5 (2014).

15. ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITY 109 (1985).

16. See MARTHA ALBERTSON FINEMAN, PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY 4 (Martha Albertson Fineman et al. eds., 2016).

the possibility of imposing directors' duties to promote the interests of the vulnerable, and the final section offers some conclusions.

I. VULNERABILITY THEORY AND CORPORATE RESPONSIBILITY: SETTING THE SCENE

Fineman's vulnerability thesis argues that people, as individuals, are vulnerable, but vulnerability is particularized based on individual experiences through personal relationships and relationships with social institutions, the state, and the resources disseminated through those institutions.¹⁷ Indeed, these relationships and institutions exist as an acknowledgement of human vulnerability and dependence.¹⁸ Fineman proposes developing a language of collective responsibility that "recognizes that social justice is realized through the legal creation and maintenance of just social institutions and relationships."¹⁹ The theory highlights the standing of the state and the state's responsibility for initiating and supporting mechanisms to promote resilience across the lifecycle of diverse people. Considering the universal nature of vulnerability, the theory also attempts to establish a comprehensive approach to addressing inequality and vulnerability, rather than adopting a piecemeal approach to intervene and promote equality on a case-by-case basis, which may fail to create substantial change.²⁰

The primary focus of vulnerability theory is the inequality of resilience as the counterpoint to vulnerability,²¹ defined as a measure of "an individual's ability to survive or recover from harm or setbacks that inevitably occur" over the course of his or her life.²² To counter the inescapable vulnerability of all parties, society should create social institutions that are "fostering resilience" because resilience is unique to individuals and circumstances, and provides assets such as capabilities, advantages, and coping mechanisms. Under the vulnerability framework, the state, together with public and private institutions, co-provide resilience for a vulnerable subject to allow him or her to effectively steer his or her life course.²³ The theory challenges the "autonomy myth" and the philosophy of liberal individualism.²⁴ Rejecting autonomy as a vehicle for egocentricity, Fineman advocates its cultivation through attention to the needs

17. Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 251, 268–69 (2011).

18. Martha Albertson Fineman, *Equality and Difference — The Restrained State*, 66 ALA. L. REV. 609, 622 (2014).

19. Fineman, *supra* note 5, at 342.

20. See Kohn, *supra* note 14, at 10.

21. See Fineman, *supra* note 2, at 5.

22. See *id.* at 6.

23. Fineman, *supra* note 17, at 269–72.

24. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 2.4 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

of others,²⁵ namely through the different resources available to different people at different points in their lives to mitigate their experience of vulnerability.²⁶

Corporations and their stakeholders, whether legal persons or natural persons, may also position themselves within the paradigm of vulnerability. They are legal fictions but also human-led organizations and are thereby open to imprisonment and corruption. Establishing a corporation may result in intensifying rather than alleviating the individual vulnerabilities of constituencies within the company. The state may act to monitor and regulate corporations and relationships when they do not function in a just manner. Regulating corporations will help build resilience for stakeholders, whether provided by the state or established internally through business judgement, corporate strategies, or voluntary responsibilities.

Concepts of vulnerability and resilience are often used in the context of employee-company relationships to analyze the situation of individuals and institutions in the context of the employment relationship.²⁷ However, the vulnerability theory can go further than that. Vulnerable parties in companies are also universally present, based on vulnerability theory, and may include corporations as fictional legal persons, board members or shareholders, and a variety of stakeholders in the form of institutions or individuals. However, corporations are comprised of “those whose vulnerabilities are not similarly situated.”²⁸ In this context, the attention of vulnerability theory is focused on society and the impact of regulatory approaches on the stakeholders, which can be applied in the context of companies and corporate stakeholders in a corporate setting.²⁹ Vulnerability theory applies in a corporate setting beyond just the relationship with employees. It also concerns the company’s impact on other stakeholders like local community citizens, who may suffer from the company’s unchecked use of resources without any recourse. Companies, especially MNEs, often overpower their employees and local community, leaving them at the corporation’s mercy. Stakeholders of corporations are “uniquely unprotected from their vulnerability to the corporations.”³⁰ Apart from employees, stakeholders such as the community, the environment, and unions are also unprotected from their vulnerability.³¹

Vulnerability theory provides an incentive to investigate corporate responsibility and directors’ duties. Instead of focusing on shareholder primacy, vulnerability theory rationalizes scholarly arguments for non-profit goals in

25. Fineman, *supra* note 17, at 261.

26. Fineman, *supra* note 4, at 20.

27. See Fineman, *supra* note 2, at 5.

28. Kolinsky, *supra* note 1, at 82.

29. See Martha Albertson Fineman, *Introduction*, in *PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERCEPTIVE* 1, 3–4 (Martha Albertson Fineman et al. eds., 2017).

30. Shepherd, *supra* note 6, at 853.

31. *Id.* at 854–55.

response to the needs of vulnerable parties. It will also allow corporate law to deal with institutional responsiveness to corporate damages incurred after irresponsible behavior and focus on the creation of resilience in various stakeholders as a response to corporate power.³²

Considering the issues globally and focusing on MNEs, which have been criticized for causing social, environmental, and human rights problems, resilience must be obtained from social institutions like corporations through internal mechanisms, public enforcement,³³ or from states through external regulation. Responsible states will then seek to build resilience to promote fair treatment for individuals not only in the corporations' home countries, but also beyond these countries, especially in lower and lowest-income countries. As a result, sustainability challenges are confronted by states by building resilience through corporations, in the context of accountability mechanisms such as directors' duties or other public levers such as public procurement.³⁴

If corporations are seen as social institutions that foster resilience, vulnerability theory makes progressive corporate law approaches more convincing by allowing people to focus on corporations in terms of their social and economic power and functions. However, they are also subject to a series of challenges and uncertainties, particularly in terms of the complexity of the recipients of that resilience. The "too many masters" argument³⁵ suggests that both legal approaches have limitations since a question will naturally arise as to which vulnerable party should have the greater voice when there is a conflict and limited resources.³⁶ It is assumed that all vulnerable parties will benefit from being the subject of directors' duties since the law inevitably weakens the bargaining position of other stakeholders by strengthening the position of one specific group.³⁷ It is a challenging job to provide resilience to vulnerable parties with competing claims against the same company.³⁸

In response to this difficulty, this article argues that, first, directors should be competent and responsible for striking a balance and implementing strategic management policy with regard to the conflicting interests of vulnerable parties. The boards of directors need to be competent to "mediate between competing vulnerabilities in a meaningful way" with a reasonable expectation of

32. Ronit Donyets-Kedar & Ofer Sitbon, *Social Change through Legal Education: Clinical Legal Education and Corporate Social Responsibility Proceedings of Vulnerability and the Organisation of Academic Labour*, Nottingham 5 (2019).

33. See, e.g., *Securities and Investments Commission Act 2001* (Cth) s 50 (Austl).

34. See Jordie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 *BERKELEY J. INT'L L.* 259, 263 (2012).

35. Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 *U. TORONTO L.J.* 401, 411–16, 423 (1993).

36. Robert H. Campbell, *Directors: 'The Brokers of Balance'*, 20 *DIRECTORS & BOARDS*, June 22, 1996, at 45.

37. See Macey & Miller, *supra* note 35, at 423.

38. Kolinsky, *supra* note 1, at 54.

competencies as part of their duty of skill, care, and diligence.³⁹ Second, considering that all resilience recipients are non-exceptionally embedded within the remit of vulnerability theory, it is important to ascertain expectations of corporate laws and the underlying interactions among various constituencies in the company together with the relationships that organize companies and affect the lives of each stakeholder.⁴⁰ Of course, this article will not ignore the necessity of prioritizing among vulnerable individuals in situations of restricted resources, which will be discussed in detail in section IV after clarifying the importance of the involvement of corporate power.

II. THE LIMITS OF FORMAL EQUALITY AND THE NECESSITY OF INVOLVEMENT FROM CORPORATE POWER

The “formal equality” approach to interpreting the role of government “has been heavily criticized for failing to achieve substantive equality.”⁴¹ Considering the fact that the established advantages and disadvantages of social groups differ, applying the same legal rules to these groups will likely produce unequal results rather than social equality.⁴² In response to the limitations of formal anti-discrimination laws, Fineman introduced detailed interpretations of dependency and interconnectedness into legal discourse as issues acknowledged and shared by all people.⁴³ She argued for the acknowledgment of the inherent fragility of human experience by refuting the hierarchy-based legal paradigm for allotting rights and recognizing a collective movement against institutions that exploit a variety of forms of dependency.⁴⁴

As an alternative to theories such as social justice and responsibility which focus on achieving formal equality, vulnerability theory is being accepted by legal scholars as a progressive thesis that can be applied to a wide range of legal problems with the aim of reducing the stigma associated with vulnerability in a variety of scenarios. The theory focuses on eliminating discrimination against historically disadvantaged parties.⁴⁵ It provides a powerful critique of formal equity and may be used as a functional framework to facilitate better understanding of substantive equality.

Investigation within the vulnerability paradigm focuses on managing common vulnerabilities through public ordering. States should be both responsive to and responsible for vulnerable parties so that all social parties have equal access to the social resources distributed by societal institutions; this reimagining is

39. *Id.* at 86.

40. *See* Fineman, *supra* note 5, at 342.

41. *See generally* Kohn, *supra* note 14, at 2.

42. *See, e.g.*, IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 158 (Princeton Univ. Press 2011).

43. *See, e.g.*, Fineman, *supra* note 4, at 12.

44. *Id.* at 12–13.

45. *See* Martha Albertson Fineman, *Vulnerability, Equality and the Human Condition*, in *GENDER, SEXUALITIES AND LAW* 53, 53 (Jackie Jones et al. eds., 2011).

essential to the goal of attaining a society with true equality.⁴⁶ The proposed vulnerability approach aims to develop our understanding of the topic beyond discrimination-based models in order to establish a substantive vision of equality.⁴⁷ Vulnerability theory highlights power and privilege as systems that “produce webs of advantages and disadvantages.”⁴⁸ Following this logic, corporations may either produce or exploit vulnerability, as well as mitigate or ameliorate it.

The theory and its implementation provide opportunities to reconsider ineffective methodologies within existing power structures.⁴⁹ To compensate for the limits of formal equality, “a vulnerability approach argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions.”⁵⁰ By the same token, the state should be responsive to vulnerabilities in the corporate context within wider stakeholder networks, and this task should also be shared by corporations since they are fundamentally state creations. The presumption must be that the state has the right to regulate its creations as it sees fit,⁵¹ so that any regulatory framework could be designed as a coping mechanism to mitigate vulnerability. Vulnerability theory and its implementation gives scholars the opportunity to reconsider corporations from the angle suggested by Milton Friedman and Chicago economics,⁵² taking a more realistic and comprehensive view of corporations because “the market works, but not by itself.”⁵³ In fact, the market works with inputs from constituencies who have different vulnerabilities.

Vulnerability theory enables us to move “away from the fragmentation of the legal subject to the creation of a vigorous universal conception that will bring under consideration not the differences among individuals, but the relationships

46. See Fineman, *supra* note 4, at 9.

47. *Id.* at 1.

48. *Id.* at 16.

49. See Michèle Alexandre, *Martha Fineman, More Transformative than Ever*, 67 EMORY L.J. 1135, 1142 (2018).

50. Fineman, *supra* note 12, at 134.

51. See Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 329–34 (2014).

52. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES SUNDAY MAGAZINE (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

53. See *Critical Acclaim of Philip Marsden, Director of the Competition Policy Forum and a Board Member of the UK Office of Fair Trading*, in KENNETH M. DAVIDSON, REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY (2011).

and complementary shared responsibilities of the individual”⁵⁴ Pursuing substantive equality is also consistent with the aims of progressive corporate law, which generally seeks to extend protection to vulnerable subjects, increase dispersion of wealth in society, and enhance social democracy⁵⁵ in line with strategies to mitigate this vulnerability as a universal constant.⁵⁶ In response to the ineffectiveness of anti-discrimination law, directors are required to consider the creation of a comprehensive map of stakeholder relationships so that everyone has an equal opportunity to benefit from corporate decisions.

Under the vulnerability paradigm, corporate law enables an examination of the internal influence of corporate decision-making behavior in relation to vulnerable parties, by embedding internally entrenched legislative approaches such as directors’ duties or corporate structures. The articulation of a strategic plan symbolizes the board’s responsiveness to the interests of corporate constituencies and enables board members to consider the interests of vulnerable parties when making business judgments using entrepreneurial judgment⁵⁷ beyond a discrimination-based model. Considering the universal nature of vulnerability, it is rational for directors to be responsible for their decisions and present a fair, balanced, and competent assessment of the company’s stakeholder-network blueprint.⁵⁸ A link between corporate responsibility and vulnerability theory would allow board members to communicate with the public and “establish trust-based relationships that can generate additional resources” for the business.⁵⁹ Overall, vulnerability theory can help board members build public confidence and cultivate a sustainable corporate culture through a collective commitment to equality.

III. LIMITATIONS OF VULNERABILITY THEORY AND RATIONALE FOR PROTECTING THE VULNERABLE PARTIES WITH HIGHEST DEPENDENCY

Vulnerability theory provides a helpful structure for understanding social responsibility and the role played by the state. The theory is regarded as a feasible basis for policy intervention; however, Fineman is against an approach that focuses on targeted groups within the context of vulnerability as it “ignores its universality and inappropriately constructs relationships of difference and

54. Martha Albertson Fineman, *Rethinking Identity Theories: Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 636 (2013).

55. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1244 (2002).

56. See Fineman, *supra* note 2, at 3–5.

57. Andrew Keay & Joan Loughrey, *The Concept of Business Judgment*, 39 LEGAL STUD. 36, 49 (2019).

58. Emma Andrews, *Board Accountability is a Key Element of Strong Corporate Governance*, GRANT THORNTON (May 09, 2017), <http://www.grantthorntoni.com/news-centre/board-accountability-is-a-key-element-of-strong-corporate-governance/>.

59. Susan M. T. Coombes et al., *Behavioural Orientations of Non-Profit Boards as a Factor in Entrepreneurial Performance: Does Governance Matter?*, 48 J. MGMT. STUD. 829, 830 (2011).

distance between individuals and groups within society.”⁶⁰ Law reform needs to go beyond identity visions to avoid discrimination and the distortion or corruption of societal structures.⁶¹ However, when the subject of older populations was discussed through the lens of vulnerability theory in relation to particular policies as an example of applying vulnerability theory to a concrete group, Fineman adopted an approach that concentrates on a particular group of people, namely the elder population, in order to promote age-sensitive policies.⁶² Fineman proposed imposing fiduciary duties on caregivers, lawyers, or bank officials who provide services to the older population, involving possibly tortious or criminal liabilities.⁶³ Condoning age-specific “protections,” Fineman appeared to abandon the post-identity and substantive equality approaches. Therefore, it may sometimes be unavoidable to create broad categories of vulnerability; however, the theory itself fails to provide any guidance on how to prioritize among vulnerable individuals when allotting financial resources to competing parties. The universal nature of the theory seems here to be a mission impossible, as result of it “being asked to do something it is simply not equipped to do.”⁶⁴ This is particularly true when trying to address the problems and complications of vulnerability at a more practical level.

This minor criticism does not aim to deny the prescriptive value of vulnerability theory. When applied to corporations, it is primarily the directors’ role, rather than the government’s, to categorize the levels of vulnerability that apply to a particular company. Helpfully, vulnerability theory explains the rationale by which to introduce or reform legislation to provide additional social support by imposing enlarged duties. Vulnerability theory can help policy makers and corporations set aside benefits or design coping mechanisms to provide more meaningful and substantial care for vulnerable stakeholders. The theory will set a vulnerability frame as a motivating phenomenon that would be beneficial for corporate law scholars and subsequently inform policy makers.

It seems that the recognition and protection of the vulnerable may be achieved through two consecutive stages in corporations. First, replacing autonomous and independent subjects with vulnerable subjects has a key impact on the role of social institutions, with the primary task of being responsive to and responsible for vulnerable subjects.⁶⁵ Second, in response to the different experiences of vulnerable parties and the failure of the theory to indicate how to allocate resources among vulnerable individuals, it is worth discussing the importance and necessity of protecting vulnerable stakeholders with the highest dependency in corporations. This article does not ignore the universality of vulnerability, but it is necessary to mitigate this inherent limitation of

60. Fineman, *supra* note 9, at 85.

61. Fineman, *supra* note 54, at 639.

62. Fineman, *supra* note 9, at 85–90.

63. *Id.* at 94.

64. Kohn, *supra* note 14, at 14.

65. Fineman, *supra* note 2, at 3–5.

vulnerability theory, namely its failure to prioritize among vulnerable individuals within a restricted budget.⁶⁶ Universal vulnerability within the corporation is not in conflict with variation in the dependencies of various constituencies as a fluid notion that goes through peaks and troughs over the lifetime of a stakeholder's relationship with the company.⁶⁷

Vulnerable parties with the highest dependence could have a specific connotation in corporate law, referring to those who are the most at risk from corporate misconduct and decisions at a given point in time. It is necessary to differentiate between competing needs among all vulnerable individuals, since decisions need to be made about how to distribute corporate profits, and ultimately benefit all vulnerable parties at different stages and under different conditions. Thus, limited corporate resources are allotted to the vulnerable parties with the highest dependency by virtue of their vulnerability status. The allocation will to a certain extent mitigate their vulnerability, and boards or their subcommittees should organize a vulnerability matrix by focusing on different vulnerable parties.

Concentrating on its philosophical foundation and the relationship between two parties (the vulnerable and the parties from whom they are at risk), "protecting the vulnerable is primarily a matter of forestalling threatened harms."⁶⁸ The principle of individual responsibility as conceived by Goodin is that "if A's interests are vulnerable to B's actions and choices, B has a special responsibility to protect A's interests; the strength of the responsibility depends strictly upon the degree to which B can affect A's interests."⁶⁹ Vulnerability "implies that there is some agent . . . capable of exercising some effective choice . . . over whether to cause or to avert the threatened harm."⁷⁰ That agent in the corporate field is the director, who represents the company.⁷¹ The director is a fiduciary, defined as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."⁷² Directors are capable of making business judgements that can affect stakeholders in either beneficial or harmful ways.

One of the advantages of Goodin's argument for protecting the vulnerable is that it "allows for [and justifies] the easy allocation of responsibilities to particular individuals."⁷³ The logic is that if A is vulnerable to B with respect to

66. Kohn, *supra* note 14, at 21.

67. See Fineman, *supra* note 4, at 9–10.

68. Goodin, *supra* note 15, at 110.

69. *Id.* at 118.

70. *Id.* at 112.

71. See *TCB Ltd v. Gray* [1986] Ch 621, 124 (Eng.) (explaining that § 9(1) of European Communities Act 1972 has made third parties able to rely on transactions with directors "given good faith").

72. *Mothew v. Bristol & W. Bldg. Soc'y* [1998] Ch 1, 18 (Eng.).

73. Goodin, *supra* note 15, at 117–18.

X, B (as the agent) should be responsible for A (with a particular focus on the issues in relation to X).⁷⁴ The logic, therefore, supports imposing on the board of directors the responsibility of considering the interests of particular stakeholders with respect to the issue that makes these stakeholders the most dependent. A good example of this hypothetical relationship is that employees in the mining, oil, and gas industries in developing countries may be vulnerable to companies' decisions and policies regarding their employees' health and exposure to pollution.⁷⁵ By the same token, Simon Deakin and Giles Slinger also note that employees are examples of stakeholders "whose specific investments in skills, location and social relations may make them extremely vulnerable to the costs of corporate restructuring."⁷⁶

In relation to the directors' use of entrepreneurial judgement in identifying the vulnerable parties with the highest dependency within the universal vulnerability model, Goodin's arguments can provide boards with additional insights and guidance, particularly in situations where the presence of multiple stakeholders may raise the question of how directors can prioritize the complex interest of different constituencies. Following the logic that if A is vulnerable to B with respect to X, B should be responsible for A with a particular focus on issues in relation to X, the construction of a vulnerability matrix and the identification of vulnerable parties with the highest dependency hangs not only on the relationship between A and B, but also on X as an external factor. In addition to the employment relationship, the relationship between customers and a company (e.g., with respect to faulty or dangerous products), local communities and a company (e.g., with respect to water pollution), employees and a company (e.g., with respect to redundant workers with few transferable skills), or a company and small investors (e.g., with respect to peer-to-peer lending) are also enlightening examples of Goodin's logic.

Internally, from the point of view of strategic management, directors can assess the nature of each stakeholder's interests and power (including their voting power, political power, and economic power) to understand the position of each stakeholder before deciding on the stakeholders with the highest dependency. Based on a comprehensive analysis of all the stakeholders' relationships, coalitions, nature, and priorities, a matrix of corporate responsibility towards all stakeholders in the context of universal vulnerability, and the vulnerable parties with the highest dependency in response to external factors, should be constructed alongside a corresponding policy on discharging the company's responsibility to protect the vulnerable.

The vulnerable parties with the highest dependency are those with capacity constraints, weak bargaining power, limited access to justice in their own

74. Goodin, *supra* note 15, at 118.

75. *See, e.g.,* Connelly v. RTZ Corp. & Anor [1999] CLC 533 (QB).

76. Simon Deakin & Giles Slinger, *Company Law as an Instrument of Inclusion: Re-regulating Stakeholder Relations in the Context of Takeovers* 6 n.3 (ESRC Ctr. for Bus. Rsch, Univ. of Cambridge, Working Paper No. 145, 1999).

jurisdictions, and information asymmetry. They may even become vulnerable parties with the highest dependency without express autonomy in terms of their contractual relationship—sometimes illegally—as with child workers or members of local communities who suffer from polluted environments as a result of company activities. A thorny problem here is that it is difficult to impose direct liabilities on MNEs for the working conditions at their suppliers, where employees may be particularly vulnerable. These problems become even thornier considering the complexity of international supply chains and multinational corporate groups.

Moreover, the “default” voluntary nature of the current “soft law” approach when dealing with sustainability challenges⁷⁷ diverts discussions about protecting the vulnerable in companies towards approaches which are still primarily perceived as voluntary ones that are “beyond compliance.” This voluntary approach and emphasis on self-compliance, without public regulation, have been regarded as inadequate, distracting attention from the need for effective external control.⁷⁸ Voluntary approaches alone cannot significantly contribute to resolving “deeply rooted social and environmental problems” which often have a great impact on vulnerable stakeholders.⁷⁹ Contributions from hard law seem essential and necessary to offer workable resilience for vulnerable stakeholders in corporations. Fineman’s and Goodin’s theories on vulnerability and protecting the vulnerable makes mandatory responsibility rational, providing benefits or coping mechanisms for the vulnerable and ensuring that they are monitored and even enforced by government.

IV. DIVISION BETWEEN PRIVATE LAW AND PUBLIC LAW AND PROTECTING THE VULNERABLE IN COMPANIES THROUGH THE ACTIONS OF RESPONSIBLE STATES

This article has shown that Fineman’s and Goodin’s theories support protecting the vulnerable in corporations. The next two sections consider the legal protection that may be offered to vulnerable parties. This section offers insights about the complications inherent in building a regulatory framework to protect the vulnerable in hard laws, both private and public, with the participation of companies, board members, government authorities and states. This section will also challenge the dominant concept of law in general, which still regards corporations as private entities subject to private law with minimum involvement from public. This view contradicts the nature, objectives, and

77. See Lars Isaksson & Nayan Mitra, *To Legislate or Not: That Is the Question—Comparing CSR Intent and Effects in Economies with Voluntary CSR and Legislated CSR*, in INTERNATIONAL DIMENSIONS OF SUSTAINABLE MANAGEMENT LATEST PERSPECTIVES FROM CORPORATE GOVERNANCE, RESPONSIBLE FINANCE AND CSR, 35, 35 (René Schmidpeter et al. eds., 2019).

78. Geoffrey Chandler, *The Curse of Corporate Social Responsibility*, 2 NEW ACAD. REV. 31 (2003).

79. SIMON ZADEK, THIRD GENERATION CORPORATE CITIZENSHIP PUBLIC POLICY AND BUSINESS IN SOCIETY 13 (The Foreign Policy Centre in Association with AccountAbility 2001).

practices of corporations, especially MNEs, and makes it difficult to subordinate corporations to more rigid rules of behavior that promote the public interest.⁸⁰ Management's "discretionary administrative power," as a quasi-public power in corporations, "is not fundamentally dissimilar from the type of power exercised by the state in allocating public revenue streams committed by citizens."⁸¹ Therefore, under the current economic climate, the corporate practice and dominance of MNEs requires reconsideration of the division of private and public law in order to offer more concrete proposals to protect the vulnerable through directors' duties. This enlarged directors' duty may be regarded as resilience produced within and through corporations, partially defined and reinforced by law.

The divisions between public and private law lie in the parties that each affect, the basis upon which the interactions among these parties take place, and whether they enjoy an equal position of autonomy. Conventionally the branches of public law regulate relations between states and individuals, while the branches of private law regulate relationships between societies and individuals. However, Hans Kelsen found this distinction "useless as a common foundation for a general systematization of law."⁸² Paul Verkuil also argued that "the public-private distinction is like a dysfunctional spouse," and "it continues to fail as an organizing principle."⁸³ The distinction between private and public law seems "illusory," and the nature of both bodies of law seems to be "hybrid" as they both draw power "from the authority of the state" and represent "public values."⁸⁴ Consideration of the value of individual liberty and autonomy does not preclude the involvement of public power and political elements that are closely connected with the private compass.⁸⁵ In order to understand the full institutional complexity of corporate law, its public dimensions of power, legitimacy, and accountability need to be broadly and universally appreciated.⁸⁶

80. Donyets-Kedar & Sitbon, *supra* note 32, at 13.

81. Marc T. Moore, *Understanding the Modern Company through the Lens of Quasi-Public Power*, in UNDERSTANDING THE COMPANY CORPORATE GOVERNANCE AND THEORY 91, 92 (Barnali Choudhury & Martin Petrin eds., 2017).

82. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 207 (Anders Wedberg trans., 1961).

83. PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 78 (2007).

84. Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law*, in PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERCEPTIVE 34, 49 (Martha Albertson Fineman et al. eds., 2017).

85. See, e.g., Larry Cata Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801 (2008).

86. Moore, *supra* note 81, at 116.

Private law places emphasis on the value of corrective justice as a method to reinstate a previous state of affairs.⁸⁷ However, arguments in favor of focusing on corrective justice are challenged by scholars who are not convinced by the deductive division between private and state action. In terms of the function of law, Jannifer Nedelsky suggested that the distinction between private and public law may be misleading, since private law also limits the parties' ability to legislate for themselves.⁸⁸ These absolute divisions may hinder the ability to hold companies responsible for their conduct. As far as the scope of law is concerned, private laws may also try to achieve public interest goals.⁸⁹ Furthermore, in many cases, the concrete content of private ordering is in fact imposed on parties by international business norms, while these norms reflect adherence to external international business practices instead of the parties' will.⁹⁰ Lastly, the concept and "meaning of 'responsibility' in private law is too thin," as it "over-relies on neoliberal morality, which focuses on the [directors'] autonomy" but "ignor[es] other considerations of justice relevant for allocating responsibility."⁹¹ Therefore, voluntary codes, self-compliance, or responsibility rooted in atomistic individuals protected by business judgement rules may not be the most effective ways to protect the vulnerable in corporations.

In terms of the paradigm of vulnerability, the division between public and private becomes less clear because universal and constant vulnerability is key to the design of social institutions, which are able to "either exploit vulnerability and perpetuate societal power imbalances, or afford the resources to enable resilience."⁹² In relation to building a vulnerability matrix and protecting the vulnerable parties with the highest dependency, if responsibility towards vulnerable stakeholders becomes a duty in the domain of corporate law, the law may offer advantages or coping mechanisms to vulnerable parties in order to promote substantive equality. This attempt may contradict the nature and characteristics of private law, since the special characteristics of private law, including corporate law, pertain to liberty-focused values centered on individual autonomy and free will with minimal state intervention, in contrast to the values embedded in public law such as distributive justice and public welfare.⁹³ This is a *de facto* call for more responsive states and for allowing states to interfere with resource allocation in private law as directors' discretions have been

87. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56–58 (1995).

88. Jannifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 18–19 (1989).

89. See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 *HARV. L. REV* 849, 906–07 (1984) (using tort law as an example).

90. See Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 *AM. J. COMP. L.* 843, 871–73 (2006).

91. Donyets-Kedar, *supra* note 84, at 50.

92. Donyets-Kedar & Sitbon, *supra* note 32, at 3.

93. Donyets-Kedar, *supra* note 84, at 46.

constrained, which is inconsistent with the business judgement rule of corporate law.⁹⁴

Therefore, in order to achieve substantial equality with a consideration of the vulnerable parties with the highest dependency, private law approaches need to be elevated to a hybrid approach with active state responses. The emergence of a hybrid regulatory framework, consisting of formal, informal, national, and transnational laws,⁹⁵ to promote ethical ends will be formed by a myriad of lawmakers, including public, private, state, and non-state. Such a hybrid approach should be able, at least to a certain degree, to address problems in relation to uneven social positions and reflect structural empowerment, enabling a more predictable allocation of responsibility with a consideration of vulnerable parties.

This approach should hold companies accountable for protecting vulnerable parties with the highest dependency through corporate power and board decisions. This change may be particularly relevant and important for jurisdictions such as the United Kingdom (“UK”) or the United States (“US”), where the shareholder primacy norm is a default dogma,⁹⁶ making it challenging and difficult to bring litigation against companies on account of detrimental effects on the interests of vulnerable parties with the highest dependency. Thus, instead of a clear-cut division between public and private law, it may be more sensible to consider “whether there are good reasons to apply enhanced norms of responsibility to both private and public action[s]” if the actor “has a substantial influence on the public sphere”⁹⁷ and to elevate the responsibilities to duties with the possibility of the imposition of liabilities.

With the growth and globalization of MNEs and corresponding weakening of states, the distinction between private and public law is becoming increasingly irrelevant and can no longer be justified in the context of current economic development. Locating corporations within the vulnerability paradigm, the argument for more responsible states offers a convincing reason for the involvement and interference of governments by requiring companies to perform their role in protecting the vulnerable in a mandatory manner. Protecting vulnerable parties with the highest dependency derives power from the authority of the state to reflect public interests and public values. An appreciation of the role of companies and relationships in producing resilience is central to vulnerability theory so that an ethical framework can be established to confront neoliberalism, emphasizing individual autonomy and personal responsibility. With support from vulnerability theory and responsible states (from Fineman) and an emphasis on protecting the vulnerable (from Goodin),

94. See *Corporations Act 2001* (Cth) s 180(3) (Austl).

95. See generally Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429 (2021).

96. See generally Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951 (2018).

97. Donyets-Kedar, *supra* note 84, at 49.

there are plenty of good reasons to apply hard and enforceable responsibility when it comes to vulnerable parties, especially in cases where corporate and public actors—board members and policy makers—have a significant impact on social welfare.

V. THE RATIONALE AND APPROACH FOR CORPORATE LAW REFORM:
DIRECTORS' DUTIES TO THE (MOST) VULNERABLE?

In the vulnerability paradigm, “true equality of opportunity carries with it the obligation on the state to ensure that access to . . . social goods, such as . . . security, is generally open to all.”⁹⁸ These opportunities “are evenly distributed so that no [parties] are unduly privileged while others are disadvantaged.”⁹⁹ This argument lends itself to a call for an even distribution of resources such as clean water, safe working conditions, security, and health. However, access to these resources is often seriously challenged by the misconduct of large corporations, and the situation becomes increasingly complicated with powerful MNEs and poor living and working conditions and environments in developing and the least developed countries. The growing corporate power of MNEs is partially problematic as the result of globalization, which sometimes “deepens vulnerability while . . . diminishing the resilience required to adapt or to mitigate that vulnerability.”¹⁰⁰ The “fundamental, universal, and perpetual”¹⁰¹ nature of vulnerability reveals the necessity of contributions from corporations and states to interfere with the distribution of corporate profits.

Fineman emphasizes that “[l]aws establish and regulate duties, obligations, rights, and privileges applicable to all members of a society, as well as define their relationships with each other and with the state and its institutions.”¹⁰² Corporate law also regulates directors’ duties and obligations, together with the rights and privileges applicable to both insiders and outsiders in corporations, and their relationships with the state. Mechanisms have been designed in corporate law to offer coping mechanisms or benefits for vulnerable parties in order to realize and enforce these duties and obligations, discharged by directors and enforced by corporate constituencies or public authorities. Taking English law as an example, the oppression remedy was introduced in response to the perceived need to protect vulnerable minority shareholders against unfair manipulation of the majority rule.¹⁰³ Unsecured creditors were recognized as vulnerable parties, and extra rights were offered to them through insolvency

98. Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 251, 256 (2010).

99. *Id.* at 11.

100. Peadar Kirby, *Vulnerability and Globalisation: Mediating Impacts on Society*, 2 J. HUM. RTS. & ENV'T 86, 104 (2011).

101. Fineman, *supra* note 5, at 342.

102. *Id.* at 354 (emphasis added).

103. *See* Companies Act 2006, c. 46, § 994 (UK).

law.¹⁰⁴ Also, in a judgment that was subsequently affirmed by the Supreme Court, the Court of Appeal stipulated in *Lungowe v. Vedanta*¹⁰⁵ that a UK holding company's duty of care may, in certain circumstances, extend not only to employees of a subsidiary, but also to third parties, in this case vulnerable local communities affected by a subsidiary's operations.

This section will investigate the rationale and possible contributions from corporate law through the lens of the wider directors' duties to address challenges in connection with vulnerability in the corporate world. As the board of directors is the designer, enforcer, facilitator, and promoter of directors' duties, this article will mainly focus on the directors' duties.

A. *Why Corporate Law?*

Instead of corporate law, many argue the negative externalities that evade market correction should be addressed by the state or by external laws or regulations such as labor law, environmental law, and contract law.¹⁰⁶ This argument suggests that interfering with wealth maximization as a corporate goal, specifically by forcing the internalization of externalities by the corporation, creates inefficiencies.¹⁰⁷ This section considers why corporate law should make a substantial contribution to promoting vulnerable parties' interests in order to mitigate the limitations of the formal equality offered in external law or the regulations mentioned above.

First, corporate decisions are made under mandatory legal rules embodied in external laws or regulations that protect various stakeholders, such as employment law, consumer protection law, environment law or insolvency law. The duties to comply with these laws are inseparable from corporate law and corporate governance. As a result, directors will find "their decision tree considerably trimmed and their discretion decidedly diminished by mandatory legal rules enacted in the name of protecting stakeholders."¹⁰⁸

Second, the existing legislative approaches in company law do allow for the protection of the vulnerable. To reduce and make up for vulnerability in corporate law, support for the vulnerable should come as benefits or ways to handle challenges.¹⁰⁹ The "duty to promote the success of the company" embodied in Section 172 of the UK Companies Act 2006,¹¹⁰ whereby directors

104. See Insolvency Act 1986, c. 45, § 176A (UK).

105. *Lungowe v. Vedanta Res. PLC* [2017] EWCA (Civ) 1528 (appeal taken from EWHC) (Eng.).

106. See Friedman, *supra* note 52.

107. Lawrence E. Mitchell, *Vulnerability and Efficiency (of What)*, 2 BERKELEY BUS. L.J. 153, 153 (2005).

108. Adam Winkler, *Case Studies in Conservative and Progressive Legal Orders: Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 111 (2004).

109. Fineman, *supra* note 2, at 6.

110. Companies Act 2006, c. 46, § 172 (UK).

are required to consider the long-term interests of the corporation and also to have regard to suppliers, employees, and communities, is an example of a legally mandated coping mechanism.

Third, many harms and damages done to vulnerable parties are irreversible. Therefore, it makes sense to get regulatory approaches involved at the decision-making stage to stop directors from making irresponsible decisions that may lead to irreversible social or environmental damage. In order to complement the defects of traditional soft law approaches to regulating corporations in relation to sustainability challenges, as well as changing directors' attitudes in favor of a more active involvement with ethical initiatives before irreversible damages are done to stakeholders and corporate reputations, the responsibility required by corporate law should enable companies to treat their responsibilities towards vulnerable parties as "*active responsibilities*," considering them as virtues.¹¹¹

Fourth, it is often difficult to establish a direct causal link between corporate misconduct and social, environmental, or human rights damages, and it is usually almost impossible to identify a single perpetrator.¹¹² It is therefore necessary to rationalize the need to protect vulnerable parties with the highest dependency in a preventative and compensatory manner. This preventative approach, starting from an internal influence on corporate behaviors and boards' decisions, also diverts board members' attention towards a more active involvement in ethical initiatives before irreversible damage is done.

B. Rationale and Scope of Enlarged Directors' Duty

In order to create legislative approaches to facilitate the protection of vulnerable parties, corporate law may impose internal regulations, such as creditors' meetings, mandatory diversity among board members or duties imposed on corporate directors towards particular stakeholders, and external regulations such as financial advantages or giving third parties a channel to bring litigation against corporate controllers. It is the consensus that the scope of vulnerable parties has increased in response to the paradigm shift from territorial corporations to global businesses and supply chains because the power of MNEs is increasingly outpacing the international regulatory frameworks that aim to control them.¹¹³ After the UK Supreme Court's decision in *Vedanta v.*

111. MARK BOVENS, *THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANISATIONS* 26, 32 (1998).

112. For example, no single company causes the totality of air pollution that ultimately leads to unhealthy air, and therefore, no single company should be liable for citizens who are vulnerable to lung cancer. See Michael Volgger & Songshan Sam Huang, *Scoping irresponsible behaviour in hospitality and tourism: widening the perspective of CSR*, 31 *INT'L J. CONTEMP. HOSPITALITY MGMT.*, 2526, 2535 (2019).

113. See generally Shuangge Wen & Jingchen Zhao, *The Bumpy Road of Home States' Regulation of Globalized Businesses – Legal and Institutional Disruptions to Supply Chain Disclosure under the Modern Slavery Act*, 69 *CATH. U. L. REV.* 125 (2020); Jingchen Zhao, *Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability*, in *CAMBRIDGE*

*Lungowe*¹¹⁴ and the enactment of the UK Modern Slavery Act 2015,¹¹⁵ the California Transparency in Supply Chains Act,¹¹⁶ and the recently enacted Modern Slavery Act 2018 in Australia,¹¹⁷ it is increasingly risky for corporate leaders, especially in MNEs, to ignore vulnerable parties, either as a result of direct contractual relationships or as contractual parties with their subsidiaries or even their extraterritorial suppliers. It is increasingly necessary and urgent to hold a focal company responsible for protecting all the vulnerable parties in its stakeholder network for several reasons.

First, company power justifies a corresponding imposition of duties towards the vulnerable. Endowing one side with power generates the necessity for an exercise of control to avoid the misuse of this power. The world is no stranger to corporate scandals where the power of companies results in an impact on vulnerable parties. The goal of identifying this power in relation to the vulnerable is to impose responsibility for the consequences that flow from this power.¹¹⁸ Company law could function outside its traditional box by making attempts to settle sustainability challenges and promoting the positions of the (most) vulnerable parties.

Second, the ability of companies to act as rule makers also explains why they should play an active role in creating rules to promote the positions of vulnerable parties. For example, MNEs may take advantage of a lack of administrative capacity and technical expertise in developing countries and may have an impact on the economic environment and the government policy of a developing state. Some states such as Zambia have granted MNEs the capacity to act on the international stage, including the capacity to bear international legal rights and enforce these rights through compulsory international adjudication. However, these powers may be criticized as they potentially render states “too hesitant to

HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 29, (Beate Sjøfjell & Christopher Bruner eds., Cambridge: Cambridge University Press 2020); Klaus E. Meyer & Chengguang Li, *The MNE and its Subsidiaries at Times of Global Disruptions: An International Relations Perspective*, 12 GLOBAL STRATEGY J. 555 (2022).

114. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20 (appeal taken from EWCA) (Eng.).

115. *See* Modern Slavery Act 2015, c. 30, § 54 (UK). §54 of Modern Slavery Act 2015 requires large businesses to publish an annual slavery and human trafficking statement in order to offer protection for vulnerable employees of the suppliers of large businesses. It focuses on protecting vulnerable employees from modern slavery and exploitation. *Id.*

116. *See* California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE § 1714.43. The Section focuses on transparency and disclosure, but its requirements and objectives indirectly contribute to the protection of vulnerable stakeholders by encouraging businesses to take steps to eliminate exploitative practices from their supply chains. *Id.*

117. *See* Modern Slavery Act 2018 (Cth) pt 2 (Austl.). Part 2 of the Modern Slavery Act 2018 (Cth) in Australia imposes reporting requirements on certain entities with the aim of increasing transparency and accountability in addressing modern slavery risks in their operations and supply chains. It sets out the criteria and content for Modern Slavery Statements and encourages organizations to take proactive measures to combat modern slavery. *Id.*

118. STEVEN LUKES, *POWER: A RADICAL VIEW* 58 (2d ed. 2005).

demand any form of corporate accountability.”¹¹⁹ Directors’ duties would seem to be a logical and coherent response to bridge the accountability gap created by globalization and the increasing power of MNEs and their corporate groups.

Third, the increasing and irreversible negative corporate externalities not only justify corporate law’s mission, but also make directors’ duties rational when it comes to protecting the vulnerable. Corporate impacts on vulnerable parties are increasing, ranging from negative environmental and human rights consequences in developing countries through exploiting and even initiating corruption, “to necessitating reductions in public spending in tax haven states”.¹²⁰ Therefore, government intervention, likely in the form of directors’ duties, must be inevitable considering the externalities associated with unstable market conditions and imperfect information.¹²¹

C. What Duties?

The Oxford English Dictionary defines “duty” as “a moral or legal obligation; a responsibility.”¹²² In the legal sense, a duty is seen as encompassing binding legal obligations supported by soft laws. For centuries, one of the sacred centrepieces, and also the messiest parts, of corporate law has been the substance of the duty to which company directors are subject—a topic both doctrinally complex and pragmatically vital to promoting entrepreneurship and the economy. “[C]ountless variations . . . tailor the general obligation to . . . specific context[s],”¹²³ but in all contexts, the two primary fiduciary duties that are required to be discharged by a company’s directors are the duty of care and the duty of loyalty; these form the major tenets of the directors’ duties. The duty of care rests primarily on the law of negligence to guard against managerial incompetence.¹²⁴ The fiduciary duty of loyalty, on the other hand, traces its origin back to the law of equity and refers to a trustee’s duty to administer a trust solely in the interest of the beneficiaries and following the terms of the trust.¹²⁵

The goals of dealing with vulnerability in companies may be achieved through an enlarged and elevated directors’ duty of loyalty, resulting in a broader interpretation of companies’ interests including and emphasizing the interests of vulnerable parties or the vulnerable parties with highest dependency and

119. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229 (2015).

120. BARNALI CHOUDHURY & MARTIN PETRIN, *CORPORATE DUTIES TO THE PUBLIC* 34 (2019).

121. Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 485–86 (2008).

122. *Duty*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

123. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1399–1400 (2002).

124. See Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 945 (1990).

125. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879–81 (1988).

possibly also considering long-term interests and global supply chains in a global regulatory framework. In the case of protecting vulnerable parties within corporate groups, vulnerable individuals may find themselves in the role of claimant against companies' controllers, seeking redress by turning to corporate veil piercing,¹²⁶ direct liability,¹²⁷ or the enterprise approach.¹²⁸

1. Widening the Scope of Duties in Good Faith

Reflected in legislation, this could either be done through more detailed or extended directorial duties in good faith. More detailed duties may require further interpretation of the consensus that directors owe their duties to the company as the legal entity. If vulnerable parties' interests are explicitly embedded in legislative duties in good faith, the duty of the directors should be seen as the duty to manage the company as officers of the public with special attention to groups that are vulnerable to the corporation's behavior.¹²⁹ Corporations should be regarded as economic institutions with both social and economic goals. To pursue the social responsibilities and accommodate a consideration of vulnerable parties, company law may need to encompass the board members' fiduciary duties to pursue the corporate mission without prejudice against the vulnerable.¹³⁰

Relevant arguments through the lens of directors' duties in company law have been active in addressing disagreements about the extent to which businesses should pursue or take into account the interests of non-shareholder third parties and the public.¹³¹ The range of contractual and public interests that MNEs need to take into consideration could be legitimately expanded in the international context, grounded in values of social and global justice, fairness, equality, and sustainability. Vulnerability is universal in the corporate world, and the nature of the vulnerable parties with highest dependency may vary significantly from one company to the next. Nevertheless, the term may be valuable for company law legislation through directors' duties by asking directors or subcommittees to map stakeholder relationships to ascertain the parties and understand external variables and their impact on these parties. Directors may need to adapt their business judgment and practices to identify and meet the needs of vulnerable stakeholders and achieve the goal of promoting the success of the companies.

A more inclusive conception of corporate purpose and fiduciary loyalty, which preserves some capacity for corporate decision-makers to show regard for

126. See, e.g., *Walkovszky v. Carlton*, 223 N.E.2d 6, 7 (N.Y. 1966).

127. See, e.g., *Chandler v. Cape* [2012] EWCA (Civ) 525.

128. PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 65–68 (1993).

129. Shepherd, *supra* note 6, at 845–46.

130. Julianna Browning, *Corporate Governance: How Non-Profit Boards Influence Organizational Decisions*, in *BOARD DIRECTORS AND CORPORATE SOCIAL RESPONSIBILITY* 82, 86 (Sabri Boubaker & Duc Khuong Nguyen eds., 2012).

131. See generally ANDREW KEAY, *THE CORPORATE OBJECTIVE* (2011).

the interests of vulnerable parties, should be introduced.¹³² Obviously, this approach will attract criticism for its vagueness and lack of direct enforceability. However, the preventive, educational, and guiding functions of the duties are valuable and essential for management operating within a sustainable and long-term oriented culture. Ultimately these changes will have an impact on directors' behaviors. Prevention is better than cure, and the fulfilment of prospective legal responsibilities will be more desirable than punishing nonfulfillment or repairing its consequences.¹³³ Prevention may be achieved by prospective responsibilities which "play an important role in facilitating cooperative and value-generating human activity."¹³⁴

2. Duties of Care, Skill, and Diligence

Extended duties may be introduced by implementing a plan or strategy as part of the directors' duties of care, skill, and diligence, requiring companies to inaugurate and effectively implement due diligence measures to identify and prevent violations in connection with the vulnerable parties with the highest dependency. In the plan, the directors should be required to take steps to recognize the most vulnerable parties and to identify and mitigate risks that damage the interests of parties with "a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences."¹³⁵

It is worth mentioning a recent judgment in *Vedanta v. Lungowe*¹³⁶ which consolidates the possibility of expanding the scope of parent companies' potential duty of care to communities neighbouring their subsidiaries' operations. As stipulated by Lord Briggs, with whom other Supreme Court judges agreed, there does not exist "a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them."¹³⁷ The judgment may have implications for MNEs and their corporate behaviours and decisions, and could open a route to justice for other vulnerable parties who have been adversely affected by corporate operations. By enjoying the benefits of globalization while exploiting regulatory gaps created by the dissimilarity

132. See generally Lyman P. Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005).

133. PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 31 (2002).

134. *Id.* at 32.

135. U.N. DEP'T OF ECON. AND SOC. AFFS., *REPORT ON THE WORLD SOCIAL SITUATION, 2003, SOCIAL VULNERABILITY: SOURCES AND CHALLENGES*, at 8, U.N. Doc. ST/ESA/284, U.N. Sales No. E.03.IV.10 (2003).

136. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20, [52]–[55] (appeal taken from EWCA (Eng.)). Lord Briggs gave the leading judgment, with which all members of the Court agreed.

137. *Id.* at [52].

between the global scale of production and the local scale of accountability, it is only fair to require MNEs like Vedanta, which operate and profit extraterritorially, to be accountable to vulnerable parties, including those located extraterritorially.

Another example is the “vigilance plan” in the French Commercial Code, which constitutes an effort to promote the position of vulnerable parties within the domain of company law by imposing an additional duty of skill, care, and diligence.¹³⁸ In this legislation, a due diligence statutory obligation is established for French parent companies to monitor extraterritorial human rights and environmental abuses against vulnerable parties committed by their offshore affiliates.¹³⁹ A section was adopted in the French bill creating an obligation for companies to prevent and mitigate environmental, health, and human rights harms resulting from their activities, including through subsidiaries and supply chains, in the form of a duty of care on parent and subcontracting companies.¹⁴⁰ The consideration of extraterritorial reach is intended primarily for the protection of the most vulnerable parties in developing and the least developed countries. These vulnerable victims can now get access to justice by bringing actions in France for damages that have occurred in another state.¹⁴¹

3. Empowering the Stakeholders through Board Diversity and Trade Unions

All in all, under vulnerability theory, states are seen as being constituted for the general and common benefit, not for the benefit of a selected few, and they should be responsive to vulnerability rather than a more limited response to discrimination.¹⁴² Much scholarly ink has also been spilled in relation to stakeholder participation and the law may require representatives of vulnerable parties to form part of committees. If participation in corporate governance by the vulnerable parties can be achieved as a formal mechanism, their wellbeing

138. See LOI 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law no. 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and ordering companies], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France, Mar. 28, 2017 [hereinafter “French Duty of Vigilance Law”]].

139. See generally Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?* 22 *HUM. RTS. REV.* 109 (2021); Debadatta Bose, *Decentering Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law*, 8 *BUS. & HUM. RTS. J.* 18.

140. See generally Mark B. Taylor, *Due Diligence: A Compliance Standard for Sustainable Companies*, 11 *EUR. CO. L.* 86 (2014); see also French Duty of Vigilance Law, *supra* note 138.

141. Code de Commerce [C. COM.] [French Commercial Code] art. 1 (requiring certain enterprises to formulate, implement and publish a vigilance plan), art. 2 (requiring remediation for harm that is caused and liability for failure to comply) (Fr.).

142. Fineman, *supra* note 98, at 28–31; see also Fineman, *supra* note 29, at 1.

may be more effectively included in the board's decision-making agenda.¹⁴³ Boards may be able to expedite more explicit recognition and appreciation of their concerns, giving them powerful and legitimate representation as a part of a company's "dominant coalition."¹⁴⁴ For example, co-determination measures such as facilitating effective interaction between companies and employees and the involvement of employee representatives in the decision-making of the companies have been identified as crucial components of corporate strategy to address vulnerability.¹⁴⁵ In the UK, for example, Labour Government published its White Paper "Fairness at Work" in May 1998 outlining its proposals on employee representation and recognition from trade unions as legitimate, effective, and deliberative partners with the companies to promote social responsibility and mitigate vulnerability.¹⁴⁶ As another example, trade unions also play a crucial role in promoting the interests of vulnerable employees in the Chinese corporate governance system by carrying out their activities to protect the lawful rights and interests of the employees. According to Chinese Company Law, the company shall provide necessary conditions for its trade union to carry out activities.¹⁴⁷ Chinese Company Law also states:

To make a decision on restructuring or any important issue relating to business operations, or to formulate any important bylaw, a company shall solicit the opinions of its trade union, and shall solicit the opinions and proposals of the employees through the assembly of the representatives of the employees or in any other way.¹⁴⁸

Despite its effectiveness at promoting board diversity, trade unions can be destroyed if the corporations decide to move from union areas to non-union areas. The corporate duty would allow employees and local communities to enjoy a certain resilience by protecting them from their vulnerability to corporations; it would also protect the members of the trade union.

A subcommittee may also help promote the interests of vulnerable parties. The scope of the vulnerable parties with the highest dependency could be ascertained by these committees, helping the board to assess and address the challenges associated with these vulnerable parties. The establishment of a subcommittee of representatives with different interests could include the voices

143. Ronald K. Mitchell, Bradley R. Agle & Donna J. Wood, *Toward A Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 876–77 (1997).

144. RICHARD MICHAEL CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 26–32 (Blackwell Publishers, 2d ed. 1992) (1963).

145. See generally Norbert Kluge, *Corporate Governance with Co-Determination — A Key Element of The European Social Model*, 11 TRANSFER: EUR. REV. LAB. & RES. 163 (2005).

146. JULIA LOURIE, *FAIRNESS AT WORK*, 1998, Cm. 3968 (UK), <https://researchbriefings.files.parliament.uk/documents/RP98-99/RP98-99.pdf>

147. Company Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 18, 2018 P.R.C. LAWS.

148. ROGER BLANPAIN, *SYSTEMS OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE: A COMPARATIVE STUDY* (2012).

of each stakeholder and help boards to make corporate decisions jointly,¹⁴⁹ promoting the effectiveness of boards since they will be able to play an active role in delegating tasks and fewer decisions will be necessary.¹⁵⁰ This subcommittee could be assigned tasks such as formulating CSR policy to identify and mitigate vulnerability. The committee embraces the triple formulation of subcommittees in terms of corporate legitimacy, accountability, and strategy,¹⁵¹ which are all related to the knowledge, dynamic capability, and strategic agility required for directors to fulfill their duties.¹⁵²

Hopefully, the participation of vulnerable stakeholders would enable and persuade companies to address social, environmental, and human rights challenges with the involvement of more varied voices. It is also important for these stakeholders to have their voices heard through stakeholder dialogues and stakeholder engagements when boards make decisions. Stakeholders' voices may sometimes apply pressure and place an extra burden on the board. However, it is to a company's advantage to respond to pressure, needs, and inquiries from stakeholders in promoting social responsibilities and mitigating vulnerabilities, to "minimiz[e] negative social impacts or maximiz[e] positive social impacts."¹⁵³

4. Enforcement of the Duties

In response to proposals in relation to directors' duties, the enforcement of the duty will probably require veil piercing, an equitable doctrine that allows plaintiffs access to the assets of a shareholder, or a move towards a form of "enterprise liability" by treating all corporations in a group as a single enterprise so they can be jointly responsible for harms cause by any entity in the group.¹⁵⁴ These duties may be enforced through private enforcement measures, such as derivative actions brought by vulnerable parties in their capacity as minority shareholders or through public enforcement by state-sponsored enforcement bodies.

As for the private enforcement, the minority shareholders are allowed to bring an action on behalf of the company through the derivative action mechanism, which functions as part of a series of approaches surrounding minority

149. See generally DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (Cambridge: Cambridge Univ. Press 2011).

150. Laura F. Spira & Ruth Bender, *Compare and Contrast: Perspectives on Board Committees*, 12 CORP. GOV.: INT'L REV. 489, 489, 493 (2004).

151. See generally J. Richard Harrison, *The Strategic Use of Corporate Board Committees*, 30 CAL. MGMT. REV. 109 (1987).

152. See, e.g., Andrew Crane & Dirk Matten, *COVID19 and the Future of CSR Research*, 58 J. MGMT. STUD. 280 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7675286/>.

153. Thomas Dyllick & Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRAT. ENV'T 130, 136 (2002).

154. See CHRISTIAN A. WITTING, *LIABILITY OF CORPORATE GROUPS AND NETWORKS* 174–85 (2018); Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 244–45 (2009).

shareholder protection, who are normally seen as vulnerable shareholders compared to institutional shareholders. In terms of derivative actions within existing legislation, a broader range of applicants is adopted in Canada and Singapore by including “any other person who, in the discretion of the Court, is a proper person to make an application under this section,”¹⁵⁵ securities holders,¹⁵⁶ or “any other person who, in the discretion of a court, is a proper person to make an application”¹⁵⁷ In response to the UK Green Paper, accountancy professionals and academics suggested that “the list of people who can bring derivative actions—currently restricted to shareholders—should be broadened.”¹⁵⁸ Of course, derivative actions by stakeholders could generate various problems such as determining who should be the qualified stakeholders, an extra burden for directors and the judicial system, and the possibility of malicious litigation. Moreover, derivative action as a mechanism for shareholder remedy has been criticized for being ineffective, so it is therefore hard to be optimistic in expecting it to be effective for stakeholders. However, largely due to the unpopularity of derivative action, the “danger of an avalanche of litigation” is argued to be “unlikely,” and “concern over a [potential] deluge of claims is . . . over-emphasised.”¹⁵⁹ The notion of vulnerable stakeholders, identified by the subcommittee, for example, may help to define the scope of stakeholders who may bring such actions.

Focusing on the theme of protecting vulnerable parties, “public enforcement has the characteristic function of pursuing litigation that yields a pure ‘public good.’”¹⁶⁰ The Australian experience is worth referencing here; public authorities will only take action when it is in the public interest to so do, with the concept of public interest being broadly interpreted according to the Australian Securities and Investments Act of 2001.¹⁶¹ “If a public authority [has] the power to bring proceedings[,] . . . it could take action against directors where they have breached their duty” by failing to consider factors related to the interests of vulnerable parties and consequent harm has been done to them.¹⁶²

155. Companies Act 1967 pt. 7 § 216(A)(1)(c) (Sing.).

156. Canada Business Corporations Act, R.S.C. 1985, c C-44, § 238(a).

157. *Id.* § 238(d).

158. DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, CORPORATE GOVERNANCE REFORM: THE GOVERNMENT RESPONSE TO THE GREEN PAPER CONSULTATION, 2017, 4.7 (UK).

159. Andrew Keay, *Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006*, 16 J. CORP. L. STUD. 39, 46 (2016).

160. Maureen Brunt, *The Role of Private Actions in Australian Restrictive Practices Enforcement*, 17 MELB. UNIV. L. REV. 582, 608 (1990).

161. See *Australian Securities and Investments Act 2001* (Cth) s 50 (Austl.).

162. Andrew Keay, *The Public Enforcement of Directors’ Duties: A Normative Inquiry*, 43 COMMON L. WORLD REV. 89, 108–09 (2014). Keay made a similar argument when trying to link public enforcement with enforcement of section 172(1). See *id.*

Such litigations aim to contribute “to the functioning of the economy as a whole” and “to the overall regulatory system by way of deterrence” and regulation.¹⁶³

Additionally, public procurement may be another lever to promote vulnerable parties’ interests. “[P]ublic procurement has . . . acquired a strategic role[,]” with governments “shifting away from” the principle that public procurement should be solely for administrative purposes and “increasingly using public tenders” to support “sustainable and social development.”¹⁶⁴ If a government wishes to offer coping mechanisms or benefits to vulnerable groups, the effects will be more direct and efficient if it places this duty on companies that are parties to public procurement contracts. Public procurement may be used as a tool to increase compliance, although “its relationship to law is complex and multi-faceted.”¹⁶⁵ Public procurement offers opportunities for governments or state enterprises to express interest and execute policies to deal with vulnerability through the marketplace. Public procurement may be able to encourage the participation of vulnerable and disadvantaged groups by awarding contracts directly to them; with a focus on “the inclusion of people at risk of exclusion from labor markets[,]” socially responsible public procurement procedures can also be closely related to the inclusion of vulnerable parties.¹⁶⁶

D. Duties and The Vulnerability Paradigm: Forms and Stages of Resilience

Directors’ duties can protect the vulnerable by effectively promoting their interests and enabling systems to withstand and recover from disruptive corporate actions. This article argues that, at least in corporations, the concept of resilience takes the following four broad forms: guiding, deterrence, correction, and liability. The first two are *ex ante* since directors’ duties may act as guidance for directors to consider and pay attention to vulnerable parties. This *ex ante* resilience will help to cultivate a progressive attitude among board members, in order to facilitate active involvement in ethical initiatives before irreversible damage is done. The last two are *ex post* since private and public enforcement may entitle public authorities or private individuals to bring proceedings to correct misconduct by directors, followed by the imposition of consequences such as liabilities.

From the perspective of stages of resilience, states will offer hard resilience to vulnerable parties by introducing, imposing, and widening directors’ duties in corporate law. This hard law increases the resilience of vulnerable parties through specific measures to reduce the probability of their being harmed

163. Brunt, *supra* note 160, at 608.

164. Eur. Comm’n, Directorate-Gen. for Internal Mkt., Indus., Entrepreneurship & SMEs, *Study on “Strategic Use of Public Procurement in Promoting Green, Social and Innovation Policies”*, at 10, COM (2015).

165. Christopher McCrudden, *Corporate Social Responsibility and Public Procurement*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 93, 114 (Doreen McBarnet et al. eds., 2007).

166. Eur. Comm’n, *supra* note 164, at 53.

through corporate power, prescribed and enacted by the state. Corporate officers need to enforce and discharge these duties by embedding ethical notions in their business judgements based on their skills and experience, in order to promote the positions of vulnerable parties. At this level, considering diverse vulnerability patterns, enforcement matrices will differ greatly from one company to another. This stage is likely to be softer, based on the subjective nature of business judgements and the voluntary nature of corporate ethical initiatives and decisions. Without fundamental changes in the nature of directors' duties, in particular an extension of the duties owed to the company to explicitly include the interests of the vulnerable, this mechanism may not be able to change corporate culture, board structure, and management policy to promote and realize resilience. The movement of resilience from one stage to the next depends on the successful accomplishment of the tasks in earlier stages.¹⁶⁷ Therefore, changes in corporate culture and directors' attitudes towards vulnerable parties in decision-making processes depend critically on the accomplishment of the initial step, namely the reform of corporate law to include resilience in the first stage.

Conclusion

Corporations as social institutions, together with their stakeholder networks, constitute complex relationships of interdependence and interconnectedness.¹⁶⁸ In this era of globalization, companies sometimes obtain revenue at the expense of vulnerable groups. It is therefore important to cast a critical eye over the concept of directors' duties, to consider whether the current scheme is still fit for current demands and markets. Corporations should be managed in the public interest as compensation for the limited liability granted to them by states, and governments should only distribute resources on the condition of corporations meeting their wider duties;¹⁶⁹ they should be regarded as mechanisms by which all constituencies should be able to accrue the resources necessary to increase their resilience. Reflecting on the nature and intensity of concerns about the harms and hazards of corporate misconduct, we have deployed a vulnerability lens to call for more responsible and accountable companies to mitigate vulnerabilities.

Fineman instructs that “[v]ulnerability theory provides a template with which to refocus critical attention, raising new questions and challenging established assumptions about individual and state responsibility and the role of law, as well as allowing us to address social relationships of inevitable inequality.”¹⁷⁰

167. See Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 63 (2016).

168. See generally Janice Dean, *Public Companies as Social Institutions*, 10 BUS. ETHICS, ENV'T, & RESP. 302 (2001); Gerard Hanlon, *The Entrepreneurial Function and the Capture of Value: Using Kirzner to Understand Contemporary Capitalism*, 14 EPHEMERA 177 (2014).

169. Shepherd, *supra* note 6, at 845.

170. Fineman, *supra* note 12, at 134.

Acknowledging vulnerability assists us to build “authentic, tangible connection[s]” with others and build trust.¹⁷¹ Situating corporations within the vulnerability paradigm, we have observed that different stakeholders carry an ever-present possibility of harm, injury, and discrimination due to events that may be accidental, intentional, or otherwise. Our examination suggests that the concept of vulnerability usefully diverts attention towards the key ways in which corporate behaviors impact society. Meanwhile, the concept of resilience has particular utility for the development of responses, offering a rich source of guidance for policies and actions aimed at responding to the complexities of vulnerability in the corporate world.

The public-private division is sometimes regarded as a barrier to holding companies legally responsible for their misconduct. With increasingly vague divisions between public and private law, the authorization of the state will make it logical and rationale to impose additional duties on corporations. The state should therefore introduce legislative measures, including in the corporate law domain, to generate resilience and to promote the public interest, including the interests of vulnerable parties in companies. These elevated directors’ duties—namely extended and more detailed duties of good faith and duties of skill and care supported by private enforcement, public enforcement, and other public levers such as public procurement—should be introduced to embrace and highlight the interests of the (most) vulnerable parties.

Both vulnerability theory and the rationale provided by Goodin for protecting the vulnerable open new avenues for critical reflection. The vulnerable legal subject is built around the notion of ‘life course,’ which reflects the range of developmental and social stages through which individuals are likely to progress during their life spans.¹⁷² Within this life course, vulnerability is universal in corporations. However, at different stages in the life spans of various stakeholders, directors, or companies themselves, their individual experiences will necessitate a wide range of differing and interacting abilities.¹⁷³ These abilities, or lack thereof, will decide the different patterns of vulnerable parties with the highest dependency. This article has accordingly clarified the necessity of establishing a vulnerability matrix and identifying the vulnerable parties with the highest dependency on a corporation. Instead of being predetermined, the identities of the most vulnerable parties will vary continuously depending on the nature, location, and commercial performance of the company.

It is unlikely that the changes to directors’ duties that this article proposes, with explicit reference to the vulnerable, will be implemented any time soon in company law legislation, considering the complexity of business judgement, the vagueness and variability of vulnerable parties, and the fact that resilience is built “over time through social structures and societal conditions” beyond the

171. Melissa W. Joyce, *The Power of Vulnerability and Authentic Connection*, HUFFPOST: LIFE (June 1, 2017), https://www.huffpost.com/entry/the-power-of-vulnerabilit_4_b_10184732.

172. See Fineman, *supra* note 4, at 11–12.

173. See *id.* at 10–12.

control of individuals.¹⁷⁴ However, the changes are crucial for a full discussion of vulnerability, sustainability development, and company law, which is needed to achieve fairness at a global level. A balance must be struck between corporate power, benefits from limited liability, poor accountability mechanisms in some states, fading trust in corporations, and universal vulnerability in the corporate world.

174. Fineman, *supra* note 5, at 362–63.

