Tackling Vulnerabilities through Corporate Duties

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Abstract

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. In a progressive manner, 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 within the vulnerability matrix.

Key world: Corporate Law, Vulnerability, Dependency, Resilience, Directors' Duties

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1. Introduction

Corporations have played a significant role in civilised 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 a profound 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. In this article, we would like to reassess corporations and directors' duties through the lens of vulnerability theory, as articulated through the work of Fineman and others. The 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 unique paradigm for thinking about the nature of the state and its social institutions including corporations, as well as a basis for defining collective responsibility of the states and corporations.[3] Fineman established a universal vulnerable subject, defined by its shared and constant vulnerability, and called for a responsive state, as well as stressing that the theme of vulnerability theory is the inequality of resilience between different parties.[4] This inequality allows us 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]

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[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 1, 5 (Martha. A Fineman & Jonathan W. Fineman eds., 2018).
[3] Martha. A. Fineman, *Universality, Vulnerability, and Collective Responsibility*, Emory Legal Studies Research Paper No. 1 1 (2021) https://ssrn.com/abstract=3869039.
[4] Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 YALE J. L. & FEM. 1, 9 (2008).
[5] Martha Albertson Fineman, Vulnerability and Social Justice, 53 VAL. U. L. REV. 341, 362 (2019).

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

Looking at the existing literature, the focus of debate has been mostly upon businesses themselves, viewing them as a legal person when applying vulnerability theory to corporations.[7] There is a lack of discussion in the domain of corporate law and governance focussing 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 realised in stakeholders' dependency on social arrangements, such as corporate decisions, the market or the economy in general.[13] This article challenges this constricted

[6] George Shepherd, Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders, 23 U. PA. J. BUS. L. 823, 853 (2021).
[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] For example, see Eric Brown, *Vulnerability and the Basis of Business Ethics: From Fiduciary Duties to Professionalism* 113 J. BUS. ETHICS 489 (2013).
[9] Marth Albertson Fineman, Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 ELDER L.J. 71, 84 (2012).
[10] 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] Marth Albertson Fineman, *Vulnerability and Inevitable Inequality* 4 OSLO L. REV. 133, 146 (2017).
[13] See Fineman *supra* note 4 at 3–4

view of vulnerability and makes an attempt to analyse 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, including: how can we situate corporations and corporate responsibilities within the "vulnerability thesis" established by Fineman, and the theory of "protecting the vulnerable" proposed by Goodin? What is the rationale for improving the resilience of constituencies, considering the inadequacies of external regulation in supporting corporate behaviour towards the desired goals? Can an enlarged directors' duty, through which resilience is developed under scrutiny, be seen as an appropriate and effective approach to address the problem of the protection of vulnerable parties?

The originality of the article lies in our attempt to build our 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] We also consider the challenges of complicated business environments and stakeholder relationships when applying the theory in corporations, in order to reflect the dynamic business environment and focus on diverse business experiences. We aim 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 behaviours as reflected in policymaking.[15] Vulnerability theory recognises 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,

[14] See Nina A. Kohn, Vulnerability Theory and the Role of Government, 26 YALE J.L. & FEMINISM 1 (2014).
[15] ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITY 109 (1985).

or maintenance of privilege and disadvantage"[16]. We argue that dealing with vulnerability requires involvement from both an active state and accountable corporations, and that substantial equality can be only achieved 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 2 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 3 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 favour of a special responsibility for protecting the vulnerable stakeholder with the highest dependency. Section 4 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 5 clarifies the necessity to abandon the clear division between public and private law, in favour of a more coherent rationale for mandatory social responsibilities to be discharged by corporations and boards of directors. Section 6 evaluates the possibility of imposing directors' duties to promote the interests of the vulnerable, while Section 7 offers some conclusions.

2. Vulnerability Theory and Corporate Responsibility: Setting the Scene

Fineman's vulnerability thesis argues that we are all, as individuals, vulnerable, but vulnerability is particularly based on an individual's experience through personal relationships and relationships

[16] See Fineman, *supra* note 4 at 3–4.

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 "recognises that social justice is realised 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 the harms that inevitably occur over their life course.[22] To counter the inescapable vulnerability of all parties, we should create social institutions that are "resilience fostering", since 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 them to effectively steer their 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

[17] Martha Fineman, *The Vulnerable Subject and the Responsive State,* 60 EMORY L. J. 251, 268–269 (2011).
[18] Martha Albertson Fineman, Equality and Difference - The Restrained State, 66 ALA. L. REV. 609, 622 (2015).
[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 Fineman *supra* note 2 at 6.
[23] Fineman, *supra* note 17 at 263–66.
[24] See generally JOHN LOCKE, TWO TREATIES OF GOVERNANCE (2013).

cultivation through attention to the needs of others,[25] namely via the different resources available to different people at different points in their lives to mitigate their experience of vulnerability.[26]

Corporations, as the topic of this article, along with 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 organisations 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 to build resilience for stakeholders, either 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 analyse 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 parties whose vulnerabilities are not similarly situated.[28] In this context the attention of vulnerability theory is focussed on society, and on the impact of regulatory approaches on the stakeholders of companies.[29] In a corporate setting, vulnerability theory can be appropriately used in the context of relationship between company and many other stakeholders apart from employees, such as citizens of local communities where the corporation can destroy the resources

[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, Titti Mattsson, Ulrika Andersson eds. 2017)

available to these citizens at its whim, with no recourse for the citizenship of local community. Companies, especially MNEs, are always very powerful over the employees and their local community, who are always at the corporation's mercy. Every stakeholders of the corporations are "uniquely unprotected from their vulnerability to the corporations".[30] Apart from employees, stakeholders such as the community, the environment, the unions, are also unprotected from their vulnerability.[31]

Vulnerability theory gives us new perspective to investigate corporate responsibility and directors' duties. Instead of focussing on shareholder primacy, vulnerability theory rationalises scholarly arguments for non-profit goals in response to the needs of vulnerable parties, and will also allow corporate law to deal with institutional responsiveness to corporate damages incurred after irresponsible behaviour, and on the creation of resilience in various stakeholders as a response to corporate power.[32]

Considering the issues globally and focusing on MNEs, which are a relevant topic since they have been criticised for causing social, environmental and human rights problems, resilience must be obtained from social institutions such as corporations through internal mechanism or public enforcement,[33] or from states via 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 the 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]

[30] Shepherd, *supra* note 6, 853
[31] Shepherd, *supra* note 6, 854-855.
[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 (2019) 5.
[33] Such as the Australian Securities Investments Commission.
[34] 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).

If corporations are seen as social institutions that foster resilience, vulnerability theory makes progressive corporate law approaches more convincing by allowing us 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 limitations of both legal approaches are suggested by the "too many masters" argument,[35] 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 on the same company.[38]

In response to this difficulty, we believe that, first, directors should be competent and responsible for striking a balance, as well as for implementing strategic management policy with regard to the conflicting interests of vulnerable parties. The boards of directors need be competent to mediate between competing vulnerabilities in a meaningful way, with a reasonable expectation of competencies as party 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 what we should expect of corporate laws and the underlying interactions among various constituencies in the company, together with the relationships that organise companies and affect the lives of every single stakeholder.[40] Of course, we will not ignore the necessity of prioritising among vulnerable individuals in situations of restricted resources, which

[35] Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective,* 43 U. TORONTO L.J. 401, 423 (1993).
[36] Robert H. Campbell, Directors: 'The Brokers of Balance,' DIRECTORS & BOARDS (June 1996) 45 45–47.
[37] Macey & Miller, *supra* note 35 at 423.
[38] Kolinsky, *supra* note 1 at 54.
[39] Kolinsky, *supra* note 1 at 86.
[40] See Fineman, *supra* note 5 at 342.

we will discuss in detail in Section 4 after we clarify the importance of the involvement of corporate power.

3. 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 criticised 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 be likely to produce unequal results rather than producing 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 of us.[43] She argued for the acknowledgment of the inherent fragility of human experience by refuting the hierarchy-based legal paradigm for allotting rights, and by recognising 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 that 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 all sorts 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.

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[41] Kohn, *supra* note 14.
[42] See, for example, IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 156-191 (2011).
[43] Fineman, supra note 4 at 12.
[44] Fineman, supra note 4 at 12–13.
[45] Martha Albertson Fineman, *Vulnerability, Equality and the Human Condition* in GENDER, SEXUALITIES AND LAW 53, 53 (Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson eds 2011).

Investigation within the vulnerability paradigm focusses 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 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 vulnerabilities "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 provides 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 Friedman and Chicago economics,[52] taking a more realistic and comprehensive view of corporations due to the

[46] Fineman, supra note 4 at 9.
[47] Fineman, supra note 4 at 1.
[48] Fineman, supra note 4 at 10.
[49] Michele 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 (2014).
[52] See Milton. Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES SUNDAY MAGAZINE, (September 13, 1970).

fact that "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 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 and lead to an increased dispersion of wealth in society and enhanced social democracy, [55] in line with strategies to mitigate this vulnerability as s 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 behaviour in relation to vulnerable parties, by embedding internally entrenched legislative approaches such as directors' duties or corporate structures. The articulation of a strategic plan symbolises the board's responsiveness to the interests of corporate constituencies, and enables board members to consider the interests of vulnerable parties when making business judgement, using entrepreneurial judgement[57] 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

[53] See KENNETH M. DAVIDSON, REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY (2011).
[54] Martha Albertson Fineman, 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 (May 09, 2017), http://www.grantthorntonni.com/news-centre/board-accountability-is-a-key-element-of-strong-corporate-governance/.

would allow board members to communicate with the public and establish a trust-based relationship, in order to generate additional resources for the business.[59] Overall, vulnerability theory can help board members to build public confidence and cultivate a sustainable corporate culture through a collective commitment to equality.

4. 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, but we are aware that Fineman is against an approach that focusses on targeted groups within the context of vulnerability, as it "ignores its universality and inappropriately constructs relationships of difference between individuals and groups within societies".[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] Fiduciary duties were proposed to be imposed on carers, 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, while the theory itself fails to provide any guidance on how to prioritise among vulnerable individuals when allotting financial resources to competing parties. The universal nature of the theory seems here to be a mission

[59] Susan M. T. Coombes & Michael H. Morris et al., *Behavioural Orientations of Non-Profit Boards as a Factor in Entrepreneurial Performance: Does Governance Matter?* 48 J. MGMT. STUD. 829, 830 (2011).
[60] Fineman, *supra* note 9 at 85.
[61] Fineman, *supra* note 54 at 639.
[62] Fineman, *supra* note 54.
[63] Fineman, *supra* note 9 at 94.

impossible, as result of it "being asked to do something it is simply not equipped to do".[64] This is particularly true when we try 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. Applying it to corporations, it is primarily the directors' role, rather than the government's, to categorise the levels of vulnerability that apply to a particular company. Helpfully, vulnerability theory explains the rationale by which to introduce or reform legislation in order to provide additional social support by imposing enlarged duties. Vulnerability theory can help policy makers and corporations to set aside benefits or design coping mechanisms in order 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 scholarly 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, we think it is worth discussing the importance and necessity of protecting vulnerable stakeholders with highest dependency in corporations. We do not ignore the universality of vulnerability, but it is necessary to mitigate this inherent limitation of vulnerability theory,[66] namely its failure to prioritise among vulnerable individuals within a restricted budget. Universal vulnerability within the corporation is not in conflict with variation in the dependencies

[64] See Kohn, *supra* note 14 at 14.
[65] Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics* in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 16 (Martha Albertson Fineman & Anna Grear eds 2013).
[66] Kohn, *supra* note 14 at 21.

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 sub-committees should organise 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 seen as a matter of forestalling threatened harms.[68] The principle of responsibility as conceived by Goodin is: "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 an agent capable of exercising effective choices over whether to cause or to prevent a threatened harm.[70] That agent in the corporate field is the director, who represents the company.[71] They are fiduciaries, 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] They are capable of making business judgements that can affect stakeholders in either beneficial or harmful ways.

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[67] Fineman, *supra* note 4 at 9–10.
[68] Goodin, *supra* note 15 at 10.
[69] Goodin, *supra* note 15 at 117–118.
[70] Goodin, *supra* note 15 at 112.
[71] See *TCB Ltd v Gray* [1986] Ch 621 (Chancery Division).
[72] *Bristol & West BS v Mothew* [1998] Ch 1, 18.

One of the advantages of Goodin's argument for protecting the vulnerable is that it allows for and justifies the allocation of responsibilities to individuals.[73] The logic is that if A is vulnerable to B with respect to X, B (as the agent) should be responsible for A (with a particular focus on the issues in relation to X). The logic therefore supports the imposition of responsibilities upon the board of directors to consider the interests of particular stakeholders with respect to the issue that means these stakeholders are the most dependent. A good example of this hypothetical relationship is that employees in the mining, oil and gas industries in developing countries are vulnerable to companies' decisions and policies with regard to their employees' health and exposure to pollution.[74] By the same token, Deakin also notes that employees are examples of stakeholders "whose specific investments in skills, location and social relations make them extremely vulnerable to the cost of corporate restructuring".[75]

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 prioritise 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 depends not only on the relationship between A and B, but also on X as an external factor. In additional to the employment relationship, the relationship between customers and a company (e.g. with respect to faulty or dangerous products), the relationship between local communities and a company (e.g. with respect to water pollution), the relationship between employees and a company (e.g. with respect to redundant workers with few transferable skills) or the relationship between a

[73] Goodin, *supra* note 15 at 112.
[74] See, for example, *Connelly v. RTZ Corp plc* [1999] CLC 533.
[75] Simon Deakin & Giles Slinger,, *Company Law as an Instrument of Inclusion: Re-regulating Stakeholder Relations in the Context of Takeovers* ESRC Centre for Business Research, University of Cambridge Working Paper No. 145 (1999).

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) in order 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 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 challenges [76] diverts discussions about protecting the vulnerable in companies towards approaches which are still primarily perceived as voluntary ones that are "beyond

[76] 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, Nicholas Capaldi, Samuel O. Idowu & Anika Stürenberg Herrera eds 2019).

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.[77] Voluntary approaches alone cannot significantly contribute to resolving "deeply rooted social and environmental problems" which often have a great impact on vulnerable stakeholders.[78] 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.

5. Division between Private Law and Public Law and Protecting the Vulnerable in Companies through the Actions of Responsible States

We have seen that protecting the vulnerable in corporations is supported by Fineman's and Goodin's theories. In the next two sections we will consider the legal protection that may be offered to vulnerable parties. In this section we will offer some insights about the complications inherent in building a regulatory framework to protect the vulnerable in hard laws, both private law and public law, with the participation of companies, board members, government authorities and states. We will 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 is contradictory with the nature, objectives and practice of corporations, especially MNEs, and makes it difficult to subordinate corporations to more rigid rules of behaviour that promote the public interest.[79] Management's "discretionary administrative power", as a quasi-public power in corporations, "is not fundamentally dissimilar from the type of power exercised

[77] Geoffrey Chandler, *The Curse of Corporate Social Responsibility*, 2 NEW ACAD. REV. 31 (2003).
[78] SIMON ZADEK, CIVIL CORPORATIONS: THE NEW ECONOMY OF CORPORATE CITIZENSHIP 56 (2001).
[79] Donyets-Kedar & Sitbon, *supra* note 32 at 13.

by the state in allocating public revenue streams committed by citizens."[80] Therefore, under the current economic climate the corporate practice and dominance of MNEs require us to reconsider the division of private and public law, so that we can 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, and 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, Kelsen found this distinction "useless" for "a general systematization of law",[81] and Verkuil argued that "the public-private distinction is like a dysfunctional spouse" and "it continues to fail as an organizing principle".[82] 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.[83] 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".[84] In order to understand the full institutional complexity of corporate law, its public dimensions of power, legitimacy, and accountability need to be broadly universally appreciated.[85]

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[80] 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).
[81] HELEN KELSEN, GENERAL THEORY OF LAW AND STATE 207 (1961).
[82] PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 78 (2007).
[83] Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law* in PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERCEPTIVE 34, 49-50 (Martha Albertson Fineman, Titti Mattsson & Ulrika Andersson eds 2017).
[84] For example, see 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).
[85] Moore, *supra* note 80,116.

Private law places emphasis on the value of corrective justice as a method to reinstate a previous state of affairs.[86] However, arguments in favour of focussing 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, 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.[87] 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.[88] 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.[89] Lastly, the concept and meaning of "responsibility" in private law is too thin, with a reliance on neoliberal morality and a focus on directors' autonomy but ignoring any consideration of justice that might be relevant to allocating responsibility.[90] 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".[91] 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

[86] ERNEST J WEINRIB, THE IDEA OF PRIVATE LAW 56–58 (1995).
[87] Jannifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 YALE J.L. & FEMINISM 7, 18–9 (1989).
[88] For example, Rosenberg used tort law as an example see David Rosenberg, The Casual Connection in Mass Exposure Cases: A Public Law Vision of the Tort System, 97 HARV. L. REV 849 (1984).
[89] Ralf Michaels & Nils Jansen, Private Law beyond the State - Europeanization, Globalization, Privatization, 54 AM. J. COMP. L. 843, 871–873 (2006).
[90] Donyets-Kedar, *supra* note 83 at 50.
[91] Donyets-Kedar & Sitbon, *supra* note 32 at 3.

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 centred 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.[92] 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 constrained, which is inconsistent with the business judgement rule of corporate law.[93]

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 and informal, national and transnational laws,[94] to promote ethical ends will be formed by a myriad of lawmakers, including public and 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 UK or the US, where the shareholder primacy norm is a default dogma,[95] 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

[92] Donyets-Kedar, *supra* note 83 at 46
[93] See Section 180(3) of the Australian Corporations Act.
[94] 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).
[95] See generally Robert J. Rhee, A Legal Theory of Shareholder Primacy, 102 MINN. L. REV. 1951, 1951 (2018).

both private and private actions if the actor has a substantial influence on the public sphere,[96] and to elevate the responsibilities to duties with the possibility of the imposition of liabilities.

With the growth and globalisation of MNEs and corresponding weakening of states, the distinction between private and public law is becoming increasingly irrelevant and can be no longer 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, emphasising individual autonomy and personal responsibility. With support from vulnerability theory and responsible states (from Fineman) and an emphasis on protecting the vulnerable (from Goodin), 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.

6. 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 an obligation on the state to ensure that social goods and security are generally open to all.[97] These opportunities are evenly distributed so that no parties are unduly privileged while others are disadvantaged.[98] This argument lends itself to a call for an even distribution of resources such as clean water, safe working

[96] Donyets-Kedar, *supra* note 83 at 49.
[97] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, Emory University School of Law, Research Paper No 10–130, http://ssrn.com/abstract=1694740 11 (2010).
[98] Ibid.

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 globalisation, which sometimes deepens vulnerability while diminishing the resilience required to adapt and mitigate vulnerability.[99] The "fundamental, universal, and perpetual"[100] nature of vulnerability reveals the necessity of contributions from corporations and states to interfere with the distribution of corporate profits.

"*Laws 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*".[101] 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 realise 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.[102] Unsecured creditors were recognised as vulnerable parties and extra rights were offered to them through insolvency law.[103] Also in a judgment that was subsequently affirmed by the Supreme Court, the Court of Appeal stipulated in *Lungowe v. Vedanta*[104] that a U.K. holding company's duty of care may, in certain

[99] Peadar Kirby, *Vulnerability and Globalisation: Mediating Impacts on Society* 2 J. HUM. RTS. & ENV'T 86 (2011).
[100] Fineman, *supra* note at 342.
[101] Fineman, *supra* note 5 at 354.
[102] See Section 994 of the UK Companies Act 2006.
[103] See S.176A of the UK Insolvency Act 1986.
[104] *Vedanta Resources PLC and another (Appellants)* v. *Lungowe and others (Respondents)* [2019] UKSC 20, on appeal from: [2017] EWCA Civ 1528

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 the directors is the designer, enforcer, facilitator and promoter of directors' duties, the directors' duties discussed in this article will mainly focus on the directors' duties.

6.1 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 labour law, environmental law and contract law.[105] This argument suggests that interfering with wealth maximisation as a corporate goal, specifically by forcing the internalisation of externalities by the corporation, is to create inefficiencies.[106] In this section we will consider 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*".[107]

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[105] See Friedman, *supra* note 52.
[106] Lawrence E. Mitchell, Vulnerability and Efficiency (of What), 2 BERKELEY BUS. L.J. 153, 153 (2005).
[107] Adam Winkler, *Corporate Law or the Law of Business: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 111 (2004).

Second, the existing legislative approaches in company law do allow for the protection of the vulnerable. In order to mitigate, ameliorate and compensate for vulnerability in the domain of corporate law, assets should be provided in the form of benefits or coping mechanisms.[108] The "duty to promote the success of the company" embodied in Section 172 of the UK Companies Act 2006, whereby directors 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 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 favour 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.[109]

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.[110] It is therefore necessary to rationalise the need to protect vulnerable parties with the highest dependency in a preventative as well as a compensatory manner. This preventative approach, starting from an internal influence on corporate behaviours and boards' decisions, also

[108] See Fineman, *supra* note 2 at 6-7.
[109] MARK BOVENS, THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANISATIONS (1998).
[110] 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.

diverts board members' attention towards a more active involvement in ethical initiatives before irreversible damage is done.

6.2 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, considering the fact that the power of MNEs is increasingly outpacing the international regulatory frameworks that aim to control them. After the UK Supreme Court's decision in *Lungowe v. Vedanta*[111] and the enactment of the UK Modern Slavery Act 2015,[112] the California Transparency in Supply Chains Act, and the recently enacted Modern Slavery Act 2018 in Australia,[113] 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 a number of 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

[111] [2019] UKSC 20
[112] See particularly on Section 54 of Modern Slavery Act: Transparency in supply chains.
[113] See particularly on Part 2 of the Act.

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.[114] 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 sometimes the government policy of a developing state. Some states 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. These powers may be criticised as they mean that states may be hesitant to demand any form of corporate accountability.[115] Directors' duties would seem to be a logical and coherent response in order to bridge the accountability gap created by globalisation 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 a reduction in public spending in tax haven states.[116] Therefore, government intervention, likely in the form of directors' duties, must be inevitable considering the externalities associated with unstable market conditions and imperfect information.[117]

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[114] STEVEN LUKES, POWER: A RADICAL VIEW, 56 (2005).
[115] Julian Arato, Corporations as Lawmakers, 56 HARV. INT'L L.J. 229 (2015).
[116] BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC 34 (2019).
[117] 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, 475–476 (2007).

6.3 What Duties?

The Oxford English Dictionary defines "duty" as "a moral or legal obligation; a responsibility".[118] In the legal sense, a duty is seen 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. Countless variations tailor the general obligation to specific contexts,[119] 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' duty. The duty of care rests primarily on the law of negligence to guard against managerial incompetence. 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.

We believe that 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 emphasising the interests of vulnerable parties or the vulnerable parties with highest dependency, and 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 claimants against companies' controllers, seeking redress by turning to "corporate veil piercing",[120] "direct liability"[121] or the "enterprise approach".[122]

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[118] OXFORD DICTIONARY OF ENGLISH 548 (2010).
[119] See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV.1399, 1399–1400 (2002).
[120] For example, see *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966).
[121] For example, see *Chandler v Cape* [2012] E.W.C.A. Civ 525.
[122] PHILLIP L. BLUMBERG, THE MULTINATIONAL CHALLENGES TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 63 (1996).

6.3.1 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 behaviour.[123] Corporations should be regarded as economic institutions with both social and economic goals. In order 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.[124]

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.[125] 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. Although 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 the company law legislation via directors' duties, by asking directors or sub-committees to map stakeholder relationships in order to ascertain the these parties and understand external variables and their impact on these parties. Directors may need to

[123] Shepherd, *supra* note 6, 830-832.
[124] 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)
[125] See generally ANDREW KEAY, THE CORPORATE OBJECTIVE (2011).

adapt their business judgement and practices in order 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 the interests of vulnerable parties, should be introduced.[126] Obviously, we are aware that 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, and ultimately these changes will have an impact on directors' behaviours. Prevention is better than cure, and the fulfilment of prospective legal responsibilities will be more desirable than punishing nonfulfillment, or repairing its consequences.[127] Prevention may be achieved by prospective responsibilities which "play an important role in facilitating cooperative and value-generating human activity".[128]

6.3.2 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 recognise 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".[129]

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[126] See generally Lyman P. Q. Johnson & David Millon, Recalling Why Corporate Officers Are Fiduciaries, 46 WM. & MARY L. REV. 1597 (2005).
[127] PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 31 (2002).
[128] Ibid at 31–32.
[129] UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, REPORT ON THE WORLD SOCIAL SITUATION: SOCIAL VULNERABILITY: SOURCES AND CHALLENGES 14 (2003).

It is worth mentioning a recent case judgement in *Vedanta Resources Plc and Another v Lungowe*,[130] 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.[131] The judgement 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 globalisation while exploiting regulatory gaps created by the dissimilarity 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. 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 off-shore affiliates. 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.[132] 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

[130] [2019] UKSC 20, on appeal from [2017] EWCA Vic 1528. Lord Briggs gave the leading judgement, with which all members of the Court agreed.
[131] *Vedanta Resources Plc and Another v Lungowe* [2019] UKSC 20, at [52]–[53], *per* Lord Briggs.
[132] See generally Mark B. Taylor, *Due Diligence: A Compliance Standard for Sustainable Companies* 11 EUR. COMPANY L. 86 (2014). See also Art. L. 225-102-4 of the French Commercial Code.

victims can now get access to justice by bringing actions in France for damages that have occurred in another state.

6.3.3 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.[133]. 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 may be more effectively included in the board's decision-making agenda.[134] 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".[135] For example, co-determination measures such as facilitating interactive effective interaction between companies and employees representatives 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.[136] In the UK for example, Labour Government published its White Paper in May 1998 Fairness at Work, which outlines its proposals on employee representation and recognition from trade union as legitimate and effective deliberative partners with the companies to promote social responsibility and mitigate vulnerability.[137] For another example, trade unions also play a crucial role in promoting the interests of vulnerable employees in the Chinese corporate governance system, carrying out their activities to protect the lawful rights and interests of the employees. According to Chinese

[133] Fineman, *supra* note 91 at 28–31.
[134] 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 (1997).
[135] RICHARD MICHAEL CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963).
[136] Norbert Kluge, *Corporate Governance with Co-Determination — A Key Element of The European Social Model* 11 TRANSFER: EUR. REV. LAB. & RES. 163 (2005).
[137] Geraint Harvey, Andy Hodder & Stephen Brammer, *Trade Union Participation in CSR Deliberation: An Evaluation* 48 INDUS. REL. J. 42, 42(2017).

Company Law, the company shall provide necessary conditions for its trade union to carry out activities.[138] "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".[139]

Despite its effectiveness to promote board diversity, trade unions can be destroyed if the corporations decide to move from union areas to non-union areas. The corpora duty would allow employees and local communities to enjoy certain resilience that to be protected from their vulnerability to the corporations and therefore protect the members of the trade union.

A sub-committee may also help to 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 by these vulnerable parties. The establishment of a sub-committee of representatives with different interests could include the voices of each stakeholder and help boards to make corporate decisions jointly,[140] promoting the effectiveness of boards since they will be able to play an active role in delegating tasks and fewer decisions will be necessary.[141] This sub-committee could be assigned tasks such as formulating CSR policy to identify and mitigate vulnerability. The committee embraces the triple formulation of sub-committees in terms of corporate legitimacy, accountability and strategy,[142] which are all related to the knowledge, dynamic capability and strategic agility required for the directors to fulfill their duties.[143]

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[138] Article 18 Chinese Company Law 2018.
[139] Article 18 Chinese Company Law 2018.
[140] See generally D. Black, *The Theory of Committees and Elections* (Cambridge: Cambridge University Press 2011).
[141] See generally Laura F. Spira, Ruth Bender, *Compare and Contrast: Perspectives on Board Committees* 12 CORP. GOV.: INT'L REV. 489 (2004).
[142] See generally J. Richard Harrison, *The Strategic Use of Corporate Board Committees*, 30 CAL. MGMT. REV. 109 (1987).
[143] See generally Andrew Crane & Dirk Matten, *COVID19 and the Future of CSR Research,* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7675286/

It is hoped that 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 when boards make decisions through stakeholder dialogues and stakeholder engagements. 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 enquiries from stakeholders in promoting social responsibilities and mitigating vulnerabilities, in order to minimise negative social impacts and maximise positive social impacts.[144]

6.3.4 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.[145] 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 thought the derivative action mechanism, which functions as part of a series of approaches surrounding minority shareholder protection, who are normally seen as vulnerable shareholders comparing with institutional shareholders. In terms of derivative actions within existing legislation, a broader range of applicants is adopted in Canada and Singapore by including

[144] Thomas Dyllick & Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRAT. ENVTL. 130, 136 (2002).
[145] See Christian Witting , A. Witting, Liability of Corporate Groups and Networks 174–185 (2018); Meredith Dearborn, Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups, 97 CALIF. L. REV. 195 (2009)..

certain creditors[146] or securities holders,[147] or "any other person who, in the discretion of a court, is a proper person to make an application". [148] It was also suggested by accountancy professionals and academics, in response to the UK Green Paper, that "the list of people who can bring derivative actions – currently restricted to shareholders – should be broadened".[149] Of course, derivative actions by stakeholders could generate various problems such as 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 criticised for been ineffective, and 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".[150] The notion of vulnerable stakeholders, identified by the sub-committee for example, may help to define the scope of stakeholders who may bring such actions.

Focussing on the theme of protecting vulnerable parities, public enforcement does have a function in pursuing litigation that yields a "public good".[151] 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 2001.[152] 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.[153] Such

[146] Section 216A (1)(c) of the Singaporean Companies Act 2006.
[147] Section 238 (a) of the Canada Business Corporations Act 1985.
[148] Section 238 (d) of the Canada Business Corporations Act 1985.
[149] Department for Business, Energy & Industrial Strategy, Corporate Governance Reform: The Government Response to the Green Paper Consultation (August 2017) Section 4.7; p.44.
[150] Andrew Keay, *Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006*, 16 J. CORP. L. STUD. 39, 46 (2016)..
[151] Maureen Brunt, *The Role of Private Actions in Australian Restrictive Practices Enforcement*, 17 MELB. UNIV. L. REV. 582, 608 (1990).
[152] Section 50, Australian Securities and Investments Act 2001.
[153] A similar argument was made by Keay when trying to link public enforcement with enforcement of Section 172 (1) in Andrew Keay, *The Public Enforcement of Directors' Duties: A Normative Inquiry* 43 COMMON L. WORLD REV. 89, 108–1092014)

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.[154]

Additionally, public procurement may be another lever to promote vulnerable parties' interests. Public 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.[155] 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".[156] 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 labour markets, socially responsible public procurement procedures can also be closely related to the inclusion of vulnerable parties.[157]

6.4 Duties and Vulnerability Paradigm: Forms and Stages of Resilience

In using directors' duties to protect the vulnerable, enhancing resilience, as a positive action, involves the effectiveness of directors' duties as a mechanism to promote the interests of vulnerable parties, and the ability of systems to absorb and recover from the impact of disruptive corporate behaviours. We argue 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*

[154] Brunt, *supra* note 136 at 608.
[155] EUROPEAN COMMISSION, STUDY ON 'STRATEGIC USE OF PUBLIC PROCUREMENT IN PROMOTING GREEN, SOCIAL AND INNOVATION POLICIES FINAL REPORT 10 (2015)
[156] Christopher McCrudden, *Corporate Social Responsibility and Public Procurement* in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 279, 283 (Doreen McBarnet, Aurora Voiculescu, Tom Campbell eds. 2007).
[157] European Commission *supra* note 140 at 53.

since directors' duties may offer guidance and act as guidance or a reminder 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 misconducts 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 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 subject 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 realise resilience. The movement of resilience from one stage to the next depends on the successful accomplishment of the tasks in earlier stages.[158] 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.

[158] Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 83 (2016).

7. Conclusion

Corporations as social institutions, together with their stakeholder networks, constitute complex relationships of interdependence and interconnectedness.[159] In this era of globalisation 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, in order 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;[160] they should be regarded as mechanisms by which all constituencies should be able to accrue the resources necessary to increase their resilience. Reflecting 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.

"Vulnerability 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."[161] Acknowledging vulnerability assists us to build authentic, tangible connections with others and build trust.[162] 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 behaviours impact upon society. Meanwhile the concept of resilience has particular utility for the development

[159] See Gerard Hanlon, *The Entrepreneurial Function and the Capture of Value ± Using Kirzner to Understand Contemporary Capitalism* 14 EPHEMERA 117 (2014).
[160] Shepherd, *supra* note 8,845.
[161] Fineman, *supra* note 12 at 134.
[162] 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

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 making holding companies legally responsible for their misconduct. With increasingly vague divisions between public and private law, the authorisation 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.[163] 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.[164] These abilities, or lack thereof, will decide the different patterns of vulnerable parties with the highest dependency. We have accordingly clarified the necessity of establishing a vulnerability matrix and identifying the vulnerable parties with the highest dependency on a corporation. Instead of being pre-determined, the identities of the most vulnerable parties will vary continuously depending on the nature, location and commercial performance of the company.

[163] Fineman, *supra* note 4 at 11–12.
[164] Fineman, *supra* note 4 at 10–12.

It is unlikely that the changes to directors' duty that we propose, 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 control of individuals.[165] However, the changes are crucial for a full discussion of vulnerability, sustainability development and company law, which is needed to achieve fairness at 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.

[165] Fineman, *supra* note 5 at 362–363.