

Legal Heterodoxy in the Global South: Priority of Workers versus Secured Creditors in Insolvency

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Abstract

This study examines how priority of workers' claims vis-à-vis secured claims in insolvency varies across jurisdictions and over time as a window into the shifting treatment of distributional or social justice considerations in private law. The comparative literature has traditionally focused on the extent to which laws in the Global South are legal transplants from European countries belonging to the same legal family or have more recently adhered to "neoliberal" prescriptions from the United States or international organizations. At the same time, recent scholarship on legal heterodoxy suggests that Global South jurisdictions have innovated in incorporating broader distributional or public policy objectives in private law. Our findings provide evidence of legal heterodoxy and highlight the limits of dominant views by documenting (i) Global South-driven legal innovation and diffusion, with Mexico's 1917 constitution granting workers' claims priority over secured claims nearly two decades before comparable French legislation was enacted, and (ii) significant persistence—and, in some cases, growing recognition—of priority for workers' claims across jurisdictions, despite strong contrary pressures from international organizations such as the World Bank and UNCITRAL. We also explore the role of state capacity in explaining legal heterodoxy in the Global South and describe the emergence of sub rosa legal reforms that circumvent workers' priority in bankruptcy through new categories of insolvency-proof security interests.

Keywords: insolvency, legal heterodoxy, priority, workers, secured creditors, Global South

JEL Classifications: F65, K19, K29

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Legal Heterodoxy in the Global South:

Priority of Workers versus Secured Creditors in Insolvency

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Introduction

Private law rules not only influence the creation of wealth but also shape distributive outcomes.² The rules that most directly implicate distributional issues are heavily contested, and their content varies significantly over time and across countries.³ This article attempts to shed light on the pattern of variation by examining a specific set of rules in a large number of countries over the course of the past two centuries. We are particularly interested in how distributively-significant aspects of private law in the Global South relate to comparable laws in the Global North.

Prominent general accounts of the evolution of private law in the Global South focus on the influence of external forces. The literature on transplantation and diffusion of legal norms suggests that Global South jurisdictions often copied the legal institutions of their colonizers or other European countries within the same legal family.⁴ Duncan Kennedy's famous account of the globalization of legal thought posits that France and Germany led the globalization of "the social" during the first part of the twentieth century.⁵ Another influential

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² See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. QUART. 470 (1923); KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019).

³ The appropriate role of distributional considerations in private law recently has been the subject of vigorous debate in the U.S. legal literature. See, e.g., Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016); Zachary D. Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2134 (2014). See also Anat Admati, *Capitalism, Laws, and the Need for Trustworthy Institutions*, 37 OXFORD REV. ECON. POL'Y 678 (2021). For earlier iterations of the debate see Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) and Duncan Kennedy, *Law-and-economics from the perspective of critical legal studies*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., 1998).

⁴ See Part I.A *infra*.

⁵ Duncan Kennedy, *The Three Globalizations of Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (Alvaro Santos & David Trubek eds., 2010) ("First Germany and later

narrative portrays the last few decades as a period of neoliberal triumph, with legal reforms inspired by the World Bank and the United States supposedly carrying the day in the name of financial markets and interests at the expense of social concerns.⁶

There is growing attention to how factors besides these external forces have influenced legal development in the Global South. Several works have suggested that lawmakers in at least some parts of the Global South asserted more agency during the colonial period and were less susceptible to the influence of former colonial powers in the post-colonial period than is commonly assumed.⁷ Other scholars have suggested that local actors have been more powerful in shaping legal outcomes, and international organizations less successful in imposing their preferences, than often assumed.⁸ Another body of literature has examined the role that actors based in the Global South played in the ‘globalization of the social’ in private law, emphasizing the European origins of the concept.⁹

Recent works on “legal heterodoxy” have drawn attention to private law doctrines in the Global South that deviate from templates used in the Global North to pursue distributive objectives (with the templates representing “legal orthodoxy”).¹⁰ These works suggest that

France were the fountains of the social, but it developed simultaneously in many places, even though most of those places imported elements from Germany and France and had relatively little influence back”). In Kennedy’s framework, the privileged legal fields of the globalization of “the social,” which lasted from 1900-1968, were labor law, administrative law, family law, and international law. *Id.* at 21. *See also* Alvaro Santos, *The Trouble with Identity and Progressive Origins in Defending Labor Law*, in CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID TRUBEK 217 et seq. (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2014) (challenging the prevailing narrative that Mexico’s pioneering recognition of workers’ rights in its 1917 constitution was a “national invention” and highlighting the influence of foreign laws and transnational social discourse).

⁶ UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008). *See also* Sarah Babb & Alexander Kentikelenis, *International Financial Institutions as Agents of Neoliberalism*, in SAGE HANDBOOK OF NEOLIBERALISM (Damien Cahill et al., 2018); Jonathan David Ostry, Mr. Prakash Loungani & Davide Furceri, *Neoliberalism: Oversold?*, 53 FIN. & DEV. 38 (June 2016). These narratives have been contested.

⁷ *See* Mariana Pargendler, *Politics in the Origins: The Making of Corporate Law in Nineteenth Century Brazil*, 60 AM. J. COMP. L. 805 (2012) (hereinafter “Politics in the Origins”); Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111 (2011).

⁸ *See, e.g.*, Susanne Soederberg, *The Promotion of ‘Anglo-American’ Corporate Governance in the South: Who Benefits from the New International Standard?*, 24 THIRD WORLD Q. 7, 13, 24 (2003); Terence C. Halliday & Bruce C. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007). For an account of the agency of semi-peripheral jurists in shaping international law, *see* ARNULF BERCA LLORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842-1933* (2015).

⁹ *See, e.g.*, Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOCIETY 201 (2001); Diego Eduardo López-Medina, *Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America* (S.J.D. dissertation, Harvard Law School 2001); Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENV’T L. J. 69 (2006); Jorge Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 116-124 (2008); Helena Alviar García, *The Unending Quest for Land: The Tale of Broken Constitutional Promises*, 89 TEX. L. REV. 1895 (2010); Isabel C. Jaramillo, *The Social Approach to Family Law: Conclusions from the Canonical Law Treatises of Latin America*, 58 AM. J. COMP. L. 843 (2010).

¹⁰ *See, e.g.*, Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485 (2022) (hereinafter “Contract Law and Inequality”); Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535 (2024) (hereinafter “Heterodox Stakeholderism”);

the incidence of these examples of legal heterodoxy can be explained by the combination of high levels of inequality and limited capacity of state institutions that make up the tax and transfer system, which puts greater pressure on private law institutions to help address inequality.

This account of legal change in the Global South differs sharply from those which emphasize diffusion of legal doctrines and concepts from Europe, or the diffusion of neoliberal prescriptions geared toward the interests of capital from the United States and international financial institutions. While the dominant accounts do not deny the existence of indigenous developments in private law doctrine, they do not attempt to analyze them systematically and across jurisdictions in the Global South. By contrast, the legal heterodoxy account goes beyond merely recognizing the existence of indigenous developments. It also identifies commonalities across jurisdictions, specifically, a relatively strong social orientation in private law doctrine, and explores whether they might be explained by economic, social, and institutional characteristics unique to countries in the Global South.

In this article, we explore the limits of these narratives by examining the extent to which factors besides external forces explain variation in aspects of private law with significant distributional dimensions. Specifically, we analyze variation across countries and over time in an area of law marked by conspicuous distributive conflict: the rules that govern priority between claims of workers and secured creditors in insolvency. In many jurisdictions, the rules favor secured creditors over workers, or, to put it more provocatively, capital over labor. Most notably, U.S. law grants the claims of secured creditors full priority over workers' claims for unpaid wages. Similar rules apply in the next three largest economies in the world, namely, China, Japan and Germany. Moreover, the World Bank and the United Nations Commission on International Trade Law (UNCITRAL), two of the most prominent international organizations involved in the development of business law, traditionally opposed elevating workers' claims for unpaid wages over those of secured creditors based on the view that "[p]ublic interests generally should not be given precedence

Kevin E. Davis & Mariana Pargendler, *Legal Heterodoxy in the Global South: Adapting Private Law to Local Contexts*, in *LEGAL HETERODOXY IN THE GLOBAL SOUTH* (Kevin E. Davis & Mariana Pargendler eds., 2025) (hereinafter "Legal Heterodoxy"). This literature adds to a growing number of works that highlight the exercise of legal agency in the Global South. *See, e.g.*, *TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA* (Oscar Vilhena Vieira, Upendra Baxi & Frans Viljoen eds., 2013); *RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH* (Fabio Morosini & Michelle Ratton Sanches Badin eds., 2017); DANIEL BONILLA MALDONADO, *LEGAL BARBARIANS: IDENTITY, MODERN COMPARATIVE LAW AND THE GLOBAL SOUTH* (2021); Matthew S. Erie & Ching-Fu Lin, *Inter-Asian Law*, in *INTER-ASIAN LAW* (Matthew S. Erie & Ching Fu Lin, 2025), <https://ssrn.com/abstract=4821151> (mapping the modification of Western ideas and innovation in Inter-Asian Law); Rochelle Cooper Dreyfuss, *Intellectual Property Lawmaking, Global Governance, and Emerging Economies*, in *PATENT LAW IN GLOBAL PERSPECTIVE* 53 (Ruth L. Okediji, and Margo A. Bagley eds., 2014); Amy Kapczynski, *Engineered in India — Patent Law 2.0*, 369 N. ENGL. J. MED. 497 (2013); Tshepo H. Mongalo, *The Social and Ethics Committee: Innovating Corporate Governance in South Africa*, in *CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY* 363 (2019);.

over private rights.”¹¹ In this study, we ask whether the pattern of capital prevailing over labor is replicated when examining a broader and more diverse set of legal systems.

Specifically, we map the evolution of the ranking of workers’ claims compared to secured claims in the five largest economies of the Global North (the United States, Germany, Japan, the United Kingdom and France) and of the Global South (China, India, Brazil, Mexico and Indonesia).¹² Previous scholarship on legal heterodoxy has relied heavily on examples drawn from arbitrarily selected countries and areas of law. Our analysis here is distinctive in its focus on all of the largest jurisdictions (in economic terms) in the Global South.¹³ Our study also concentrates on an area of law which conspicuously implicates the conflict between capital and labor, making it relatively easy to characterize the rules in any given legal system in terms of their *ex post* distributive orientation. Another distinctive feature of this body of law is that it deals with a scenario that inevitably arises in a capitalist economy. Both features of this area of law facilitate comparison across legal systems in terms of compatibility with theories of neoliberal hegemony and legal heterodoxy.

Our findings reveal that theories emphasizing the influence of external forces do not explain all of the variation and convergence that we observe in legal institutions in the Global South.¹⁴ First, we show that there is significant diversity in the Global North, including within

¹¹ See Part II.D *infra*.

¹² We use the term Global South to designate countries historically qualified as developing countries or emerging markets, in contrast to the First World, mature economies of the Global North. This use has become standard in the literature. See, e.g., Peter B. Evans, *From Embedded Autonomy to Counter-Hegemonic Globalization: A 60-Year Adventure in Exploring Comparative Political Economy*, 49 ANN. REV. SOCIO. 1 (2023) (noting how the Global South has become the favored terminology for what were previously called Third World or developing countries). Our analysis focuses on the largest economies by GDP according to World Bank data as of 2023. The selected Global South jurisdictions are classified as developing countries by the United States Conference on Trade and Development (UNCTAD) and as low- or middle-income countries by the World Bank. This led to the non-inclusion of the following borderline cases in neither grouping: Russia (not classified as a developing country by UNCTAD and never part of the Group of 77); South Korea (not classified as a developing country by UNCTAD and a high-income country); Turkey (never part of the Group of 77); Saudi Arabia, the United Arab Emirates, and Singapore (all classified as high-income countries). For an exploration of different terminology and a critique of the “emerging market” label, see Mariana Pargendler, *The Global South in Comparative Corporate Governance*, ECGI Law Working Paper No. 751/2024, in OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., forthcoming), http://ssrn.com/abstract_id=4699188, at 4 (noting that “the terminology of emerging markets has the disadvantage of reifying the image of Global South jurisdictions—most of which are former colonies—as mere sites of foreign economic opportunity or exploitation,” while abstracting from and obscuring “the politics and societies of these jurisdictions”).

¹³ The theoretical underpinnings of legal heterodoxy suggest that it is most likely to appear in large jurisdictions in the Global South characterized by relatively high levels of economic inequality. Davis & Pargendler, *supra* note 10.

¹⁴ Numerous studies have mapped workers’ and secured creditors’ priority in insolvency from a comparative perspective. Our analysis differs from previous efforts both by (i) analyzing the evolution of legal regimes over time, (ii) encompassing more recent developments, (iii) comparing jurisdictions along Global North-Global South lines, and (iv) examining these developments in view of prominent theories of legal evolution. For previous comparative works on this subject, see, e.g., THE WORLD BANK, DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES (2020) (for comprehensive cross-country analysis); Janis Sarra, *Widening the Insolvency Lens: The Treatment of Employee Claims*, in INTERNATIONAL INSOLVENCY LAW: THEMES AND PERSPECTIVES (Paul Omar ed., 2008); JANIS SARRA, EMPLOYEE AND PENSION CLAIMS DURING

legal families. The strict and broad priority of secured claims over those of workers—as defended by the World Bank and UNCITRAL, and adopted in the United States, Germany, Japan and, more recently, China—is not the rule in other jurisdictions in the North. In France, workers’ first priority over all other types of creditors—including secured creditors—dates back to 1935, although initially very limited in scope. Meanwhile, in modern UK law, only certain types of secured claims, fixed rather than floating charges, enjoy priority over workers’ claims. Australian and Canadian insolvency laws are similar to UK law in this respect so it makes some sense to identify a distinct Commonwealth model, but as we shall see, that model is not strictly followed in the Global South, as exemplified by India.

Our second broad finding is that although the law in China has developed in line with the conventional view of legal transplants and neoliberal influence, several other large jurisdictions in the South have pioneered distinct approaches to the priority of workers’ claims, consistent with the legal heterodoxy view. Most notably, Mexico preceded France in ranking workers first among all creditors and went beyond France by enshrining labor priority in its 1917 Constitution. Several Latin American countries followed the Mexican model by granting constitutional status to workers’ priority.¹⁵ Brazil is not one of those countries, but it has its own history of legislation designed to give workers’ claims superpriority, with the first statute—for agricultural workers—dating back to 1906. More recently, in 1985, India deviated from the Commonwealth model by ranking certain workers’ claims on par with those of secured creditors holding fixed charges.

There is also evidence of recent backlash against neoliberal prescriptions in the Global South. After initially giving effect to an IMF-supported bankruptcy law that favored secured claims, in 2015, the Supreme Court of Indonesia reversed itself and ruled that giving workers’ claims priority over secured claims was required by the constitution.

In sum, four of the five largest countries in the Global South did not simply transplant laws from an origin system in the Global North. Nor did they succumb to pressure from the U.S. and international organizations to adopt the creditor-friendly model. Instead, some innovated upon approaches found in the North and, at least in the case of Mexico, inspired

COMPANY INSOLVENCY: A COMPARATIVE STUDY OF 62 JURISDICTIONS (2008); Paul M. Secunda, *An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States*, 41 *FORDHAM URB. L.J.* 867 (2014); THE PROTECTION OF WORKERS’ CLAIMS IN THE EVENT OF THE EMPLOYER’S INSOLVENCY 42 (Edward Yemin & Arturo S. Bronstein eds., 1991); International Labour Organisation, *The Preferential Treatment of Workers’ Wage Claims in Case of Employer’s Bankruptcy*, in INTERNATIONAL LABOUR CONFERENCE, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS (ARTICLES 19, 22 AND 35 OF THE CONSTITUTION) 298 (2003); JAY LAWRENCE WESTBROOK, A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 183 (2010); M. P. Olivier & O. Potgieter, *The Legal Regulation of Employment Claims in Insolvency and Rescue Proceedings: A Comparative Inquiry*, 16 *INDUS. L.J. (JUTA)* 1295 (1995). For works engaging with the social science literature on legal evolution, see Federico M. Mucciarelli, *Employee Insolvency Priorities and Employment Protection in France, Germany, and the United Kingdom*, 44 *J. L. & SOC’Y* 255 (2017) (studying of workers’ insolvency priority over time in France, Germany, and the United Kingdom in view of theories of legal origins and varieties of capitalism); see Jérôme Sgard, *On Legal Origins and Bankruptcy Laws: The European Experience (1808-1914)* (CEPII, Working Paper No 2006-26, 2006) (examining the evolution of early bankruptcy laws across jurisdictions to test the legal origins thesis).

¹⁵ See Part III.A *infra*.

South-South legal transplants. Moreover, the fifth country, China, cannot be characterized as a pure case of transplantation or neoliberal hegemony. Chinese lawmakers adopted the orthodox approach after considerable internal debate, and when they did, they ensured that important segments of its economy remained subject to a more heterodox and worker-friendly regime.

The preceding summary of our findings should be read with caution because it understates the amount of legal complexity and contestation we found. In the course of our survey, we found commentators disagreeing about the meaning of seemingly clear texts. Statutory provisions in this area were subject to constitutional challenges. The actual order of payment to creditors does not necessarily follow the order specified by law because lenders and borrowers have used workarounds, such as title retention. Most notably, for at least the past two decades, jurisdictions that recognize wage priority (including France, Brazil and Mexico) have witnessed the emergence of bankruptcy-remote security devices known as “fiduciary guarantees” which circumvent workers’ rights to preferential payment.

These sorts of complications appeared in both the North and the South. In short, the functioning legal systems we examined refused to fit into grand narratives about global diffusion and convergence toward a laser-focus on protecting financiers. This is consistent with our claims about the importance of considering legal heterodoxy. Interestingly, even the World Bank has partially changed its stance in ways that recognize the tradeoffs of competing institutional arrangements. While the World Bank’s influential Doing Business ranking rewarded countries for giving secured creditors’ priority, the Business Ready (B-READY) report that replaced Doing Business is more equivocal. One of the new B-READY indicators—whose impact is yet to be determined—gives credit for granting priority to labor and environmental claims even as another B-READY indicator continues to award points for giving priority to secured creditors.

Our findings also raise the question of why these examples of legal heterodoxy appeared in the Global South. Previous works have argued that factors such as state capacity, institutional complements and background economic environments, including higher levels of inequality, are potentially important explanatory variables. Here we argue that at least one of these factors, state capacity, appears to play an important role in explaining why the Global South countries in our sample adopted heterodox priority rules. Giving workers’ claims priority over secured claims is not the only way of compensating unpaid workers of insolvent companies. An alternative is to establish a wage guarantee fund. These funds are much more prevalent in the Global North than in the Global South. We argue that this is consistent with the notion that states in the Global South adopted or maintained heterodox priority rules because establishing effective wage guarantee funds has been, at least historically, more difficult for them.

In addition to shedding light on specific theories of cross-country legal variation, this study offers a pair of methodological lessons. First, it highlights the pitfalls in deducing global trends from the discourse of international organizations and the experiences of a handful of jurisdictions such as the United States, Japan, Germany and China. Second, it

emphasizes the value of combining cross-country analysis with consideration of the evolution of laws in each jurisdiction over time. We acknowledge, however, that the benefits of our multi-country analysis come at the expense of detailed analysis of the history or political economy of developments in individual jurisdictions.

The article is structured as follows. Part I sets out the theoretical impetus for our study by discussing competing accounts of legal variation and change. We begin with three conventional accounts: mainstream accounts that emphasize legal transplants or diffusion from a handful of European countries; Duncan Kennedy's account of globalization of law, which focuses on diffusion from Europe and the United States; and the account of diffusion of neoliberal prescriptions led by international organizations and the United States. We then turn to the legal heterodoxy theory, which allows for and focuses upon adaptation and innovation in the Global South.

Part II begins our survey by describing how the legal systems of the five largest economies in the Global North determine the priority of workers' claims for unpaid wages relative to secured creditors in insolvency. We begin with the United States and other jurisdictions that grant full priority to secured creditors over workers. These jurisdictions serve as our benchmark for the capital-oriented approach. Next, we turn to France and trace the evolution of legal provisions that grant priority to workers. Finally, we turn to the UK, which adopted the intermediate "Commonwealth model" of granting priority only to types of secured claims that do not typically cover relatively liquid assets.

Part III examines the five largest economies in the Global South. We begin with Mexico, whose lawmakers were supposedly inspired by the French model but elaborated on it considerably by elevating workers' claims to the very top of the hierarchy of claims (in particular, above tax claims) and entrenching their handiwork in the constitution. We then proceed more or less chronologically to discuss the approaches adopted in Brazil, India and Indonesia, all of which deviate from foreign models. We conclude by discussing the counterexample of China, which is the only one of the Global South jurisdictions we examined that currently lacks workers' priority over secured creditors.

Part IV aims to make sense of legal heterodoxy in the Global South. We explore the hypothesis that legal heterodoxy may be a response to local economic and institutional challenges by mapping the presence of wage guarantee funds as a potential substitute for priority in insolvency. We show that effective wage guarantee funds are the norm in the Global North but largely unavailable in the Global South jurisdictions examined. This is consistent with the view that legal heterodoxy in private law may offset limited state capacity, allowing countries in the Global South to pursue similar distributive and public policy objectives to those of countries in the North but through different means.

We conclude by discussing directions for future research, and the lessons and limits of our analysis.

I. Explaining Legal Change: Globalization and Heterodoxy

Our study aims to shed light on the relative explanatory force of three broad theories of how and why private law rules tend to vary, both across countries and over time, in their approaches to social and distributional issues. The first theory focuses on the influence of a handful of European powers. The second emphasizes the more recent influence of international organizations and the United States. The third highlights the role of local innovation and adaptation in the Global South. The following sections discuss each of these theories in turn.

A. Transplants or Diffusion from European Countries

A prominent claim in the literature on comparative private law is that substantial portions of legal systems in the Global South have been transplanted or have diffused from either former European colonizers or other European countries in the same legal family.¹⁶ Holger Spamann argues that these patterns of diffusion reflect both the imposition of European norms during periods of colonization and economic, social and linguistic ties that facilitated diffusion in the post-colonial era.¹⁷ These claims may not deny, but they do downplay, the role of political forces and agency in the Global South as determinants of the content of domestic law.¹⁸ They also offer no theory of the ways in which indigenous domestic law in the Global South might differ from that of colonizers. However, they are consistent with a large literature on ‘legal origins’ which has found correlations of legal rules within legal families in a wide variety of contexts, ranging from corporate law rules and government ownership of banks to the regulation of labor markets and military conscription.¹⁹

The legal origins literature also suggests—controversially—that there are systematic differences across legal families in their approaches to social and distributional issues. The leading proponents of the legal origins theory, La Porta, Lopez-de-Silanes and Shleifer, argue that “common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations.”²⁰ More recently, Barriola, Deffains and Musy have found that civil law jurisdictions have lower

¹⁶ Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 172-175 (arguing that most countries, including all of the Global South countries in their sample of 49 countries, “derived their current formal legal order from Europe during the nineteenth century and the early twentieth century”); Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 B.Y.U. L. REV. 1813, 1818 (2009) (finding that “formal legal materials from the core countries continue to permeate the periphery even after decolonization, and that there is a clear differentiation by legal families”). For a survey on legal transplants, see Michele Graziadei, *Comparative Law, Transplants, and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2019). For a defense of the alternative metaphor of “legal translations,” see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Civil Procedure*, 45 AM. J. COMP. L. 1 (2004).

¹⁷ *Id.*

¹⁸ For critiques of this tendency in the literature see Pargendler, *supra* note 7; Daniels et al, *supra* note 7.

¹⁹ Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

²⁰ *Id.* at 286.

levels of inequality, which they attribute to the civil law's greater openness to concerns about social justice in private law.²¹ However, Holger Spamann has pointed out that the evidence in support of systematic differences between common law and civil law jurisdictions is not particularly robust.²²

In an essay titled *Three Globalizations of Legal Thought*—a canonical work in the law and development literature—Duncan Kennedy offers a distinctive version of the claim that ideas about how law should deal with distributional issues diffuse exclusively from North to South. Unlike scholars of legal transplants, Kennedy is concerned with diffusion of modes of thought rather than particular bodies of legal rules, or even political ideologies.²³ He suggests that the periods from 1850 and 1914, 1900 to approximately 1968, and from 1945 to 2000, were marked by diffusion of ideas from Germany, Germany and France, and the United States, respectively.²⁴ He argues that the first globalization disseminated a mode of thought that treated private law primarily as a means of protecting the abstract rights of individual legal persons to exercise their free will.²⁵ The second globalization spread the idea of using legislation instrumentally to achieve social purposes, including regulation of the relationship between capital and labor.²⁶ The third globalization saw the spread of policy analysis, human rights, identity politics and juristocracy.

What is significant for our purposes is that Kennedy's narrative characterizes legal ideas as flowing exclusively from North to South, much like the narratives that focus on legal transplants and diffusion within the bounds of colonial empires and legal families. We take no position on the origins of legal ideas as such. However, Kennedy's focus on the broad origins of legal ideas tends to obscure—and even downplay—the pioneering implementation of distinctive socially oriented legal rules in the Global South that go beyond the existing models in France and Germany, which he identifies as the originators of “the social.” Interestingly, while Kennedy briefly acknowledges that social rights were first constitutionalized in Mexico in 1917, he makes nothing of this move, arguing that these rights were not justiciable outside of the administrative law regime.²⁷ Yet this conclusion rests on a conventional understanding of social rights as rights held against the state, rather than as norms embedded in and realized through private law. This latter conception arguably has

²¹ Illan Barriola, Bruno Deffains & Olivier Musy, *Law and inequality: A comparative approach to the distributive implications of legal systems*, 75 INT'L REV. L. & ECON. 1, 11 (2023).

²² Holger Spamann, *Civil v. Common Law: The Emperor Has No Clothes* (Harvard Public Law Working Paper No. 24-11, August 26, 2024), <http://dx.doi.org/10.2139/ssrn.4937647>. For the evolution of legal family classifications, see Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043, 1046, 1049 (2012) (arguing that “legal traditions were to a surprising degree invented well into the twentieth century,” as “early Latin American comparativists classified the countries in the region not as the offspring of European traditions, as they are commonly understood today, but rather as belonging to a *sui generis* category of original legal systems”).

²³ Kennedy, *supra* note 5, at 22.

²⁴ *Id.* at 23.

²⁵ *Id.* at 25-28, 36.

²⁶ *Id.* at 42-43.

²⁷ *Id.* at 54.

deeper roots and finds stronger expression in Global South laws and constitutions, as exemplified by Mexico's pioneering provision on workers' priority in insolvency.

B. Influence of the United States and International Organizations

In the post-colonial era, the United States and a handful of international organizations, such as the World Bank, have come to rival European former colonial powers as sources of influence on legal systems in the Global South. According to some scholars, that influence has manifested itself in legal reforms that limit the role of the state in addressing distributional concerns, including through private law.

Mattei and Nader offer a particularly elaborate version of this claim.²⁸ They argue that Third World countries have been the victims of a project in which the IMF and the World Bank use the conditions attached to sovereign loans to impose legal reforms that promote the economic interests of transnational corporate actors.²⁹ Those reforms are, broadly speaking, designed to open the economies to foreign investment and competition and to reduce the role of the state in regulating market conduct and redistributing resources.³⁰ In the resulting "neo-liberal paradise," the rule of law becomes an instrument for oppressing the poor and the weak.³¹ Mattei and Nader paint a grim picture of societies in which "impoverished courts and state institutions (...) can only function as enforcement agencies protecting uneven distribution of property against workers and peasants."³²

Conditional lending is not the only instrument the World Bank may have used to promote legal reforms tilted in favor of the interests of capital. Another key instrument was the Bank's Doing Business reports. The Doing Business project, which was inspired by the scholarship on legal origins, was launched in 2004 and discontinued in 2021. Its purpose was to compile information about the legal systems of countries around the world in order to produce quantitative measures of the ease of performing selected business activities as well as an overall "ease of doing business" index. The data were published in annual reports together with discussion of the types of reforms that would help countries to improve their performance, as well as profiles of countries that had improved their performance over time. Importantly, the reports also included rankings of countries based on their ease of doing business. Over time, it became clear that the Doing Business project influenced many governments' legal reforms through channels that ranged from "direct influence on government leaders to indirect influence through donors, investors, civil society and the press."³³

²⁸ For a similar account of externally driven legal change in Latin America since the 1980's, see JORGE L. ESQUIROL, *RULING THE LAW: LEGITIMACY AND FAILURE IN LATIN AMERICAN LEGAL SYSTEM* 64-68 (2019).

²⁹ MATTEI & NADER, *supra* note 6, at 58-63.

³⁰ *Id.* at 62.

³¹ *Id.* at 60, 62.

³² *Id.* at 63.

³³ WORLD BANK INDEPENDENT EVALUATION GROUP, *THE DEVELOPMENT EFFECTIVENESS OF THE USE OF DOING BUSINESS INDICATORS, FISCAL YEARS 2010–20* (2022), 5, 17. See also LAURA ALFARO ET AL., *DOING BUSINESS: EXTERNAL PANEL REVIEW: FINAL REPORT* (2021), 9 and Kevin E. Davis, *The Role of International Organizations in the Production of Legal Metrics*, in *COMPARATIVE LEGAL METRICS: QUANTIFICATION OF*

The Doing Business project was widely criticized for bias against regulation aimed at social or distributive goals (as well as, at least by French scholars, for having an Anglo-Saxon bias).³⁴ Specifically, the rankings—especially early versions—rewarded countries that reduced costs for businesses through more flexible labor standards but did not reward countries for generating benefits for workers or producing public goods.³⁵ Mattei and Nader view the notion that “issues of distribution are better tackled by taxation than by adjudication” as the most pernicious of U.S. ideas that were exported to developing countries through international financial institutions.³⁶

The World Bank appears to have shifted its stance on legal rules aimed at social or distributional goals. In 2024, the Bank launched the first iteration of the B-READY project, a repackaged and remodeled successor to the defunct Doing Business project. Unlike Doing Business, B-READY seeks to account for the social benefits of regulation.³⁷ For example, in the area of business insolvency, while Doing Business focused exclusively on the priority of secured creditors and efficient recovery, B-READY adopts a hybrid approach: its financial services indicator rewards economies that grant secured claims absolute priority over other creditors’ claims, but its business insolvency indicator grants points for giving labor and environmental claims priority over secured (or unsecured) creditors.³⁸ It remains to be seen whether B-READY will be as influential as Doing Business.

C. Institutional Persistence and Local Innovation

No one would deny that internal as well as external factors have influenced the development of private law in the Global South. For instance, it is widely acknowledged that both path dependence and institutional complementarities hamper institutional change in response to the influence of international organizations.³⁹ Terence Halliday and Bruce Carruthers developed their model of the “recursivity” of global lawmaking based on the bankruptcy law reforms promoted by the World Bank and the IMF in China, Indonesia and Korea. Halliday and Carruthers identified cycles of lawmaking and implementation, by which global norms constrain local lawmaking, but found that national experiences also influenced global norm making.⁴⁰ Other scholars have identified efforts at “creative

PERFORMANCES AS REGULATORY TECHNIQUE 305, 317-319 (Mauro Bussani, Sabino Cassese & Marta Infantino eds., 2023).

³⁴ For a critique of this literature and of the World Bank’s efforts, see Benedicte Fauvarque-Cosson & Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, 57 AM. J. COMP. L. 811 (2009).

³⁵ Alfaro et al., *supra* note 28; Timothy Besley, *Law, Regulation, and the Business Climate: The Nature and Influence of the World Bank Doing Business Project*, 29 J. ECON. PERSP. 99, 115-116 (2015).

³⁶ MATTEI & NADER, *supra* note 6, at 96.

³⁷ THE WORLD BANK GROUP, BUSINESS READY REPORT (2024), xxii.

³⁸ THE WORLD BANK GROUP, BUSINESS READY METHODOLOGY HANDBOOK, FIRST EDITION 323-324, 677, 679 (2024).

³⁹ See, e.g., Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999) (on the role political and economic channels for path dependence in corporate governance); VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).

⁴⁰ Halliday & Carruthers, *supra* note 8, at 1138.

compliance” or “mock compliance” with prescriptions by international organizations and standard setters in the Global South, by which formal reforms mask the significant persistence of local arrangements.⁴¹

An emerging literature has examined internally driven developments in private law that are motivated by distributional concerns and their significance for general accounts of the development of law in the Global South. Jorge Esquirol’s discussion of the Latin American “*acquis légaux*” provides a case in point.⁴² Esquirol and other scholars have documented several innovative distributively-oriented features of Latin American legal systems, including their relatively forceful embrace of the idea that property serves a social function.⁴³ More recently, works on “legal heterodoxy” have analyzed legal doctrines in the Global South that deviate from approaches prevalent in the Global North by incorporating broad distributional and public policy objectives in private law.⁴⁴ Contract laws in Brazil, Colombia and South Africa are formally more sensitive to concerns about inequality than their counterparts in the Global North.⁴⁵ Global South jurisdictions have also pioneered a wide array of legal innovations aimed at the protection of stakeholders in corporate law, ranging from the erosion of shareholders’ limited liability for environmental harm to mandatory spending on corporate social responsibility and the promotion of racial diversity in corporate ownership and governance.⁴⁶ While there is by now a large literature documenting distinct approaches to constitutional law by courts in the Global South,⁴⁷ the corresponding scholarly effort in areas of private and commercial law is only now beginning to gain traction.

II. Workers versus Secured Creditors in the Global North

In order to examine the alternative theories of legal variation and change set out in Part I, we analyze how the priority of secured claims relative to workers’ claims for unpaid wages in insolvency has varied across countries in recent times. We define the concept of a secured claim functionally to mean any claim secured by a consensually created interest in the debtor’s property. This definition excludes claims secured by interests that are created non-consensually, i.e. by operation of law. We also do not treat set-off or netting rights as

⁴¹ See, e.g., Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 129 (2002); ANDREW WALTER, GOVERNING FINANCE: EAST ASIA’S ADOPTION OF INTERNATIONAL STANDARDS 5 (2008) (on mock compliance).

⁴² Esquirol, *supra* note 9. Other works have also examined internally driven and distributively oriented developments in other countries or regions, including but not limited to works framed as explorations of legal transplants or the diffusion of the idea of the social. See, e.g., Shalakany, *supra* note 9 (analyzing the origins of the Egyptian Civil Code).

⁴³ Ankersen & Ruppert, *supra* note 9; Daniel Bonilla, *Liberalism and Property in Colombia: Property as a Right and Property as a Social Function*, 80 FORDHAM L. REV. 1135 (2011); Jorge L. Esquirol, *Formalizing Property in Latin America*, in COMPARATIVE PROPERTY LAW 333 (Michele Graziadei & Lionel Smith eds., 2017).

⁴⁴ Davis & Pargendler, LEGAL HETERODOXY, *supra* note 10.

⁴⁵ Davis & Pargendler, *Contract Law and Inequality*, *supra* note 10.

⁴⁶ Pargendler, *Heterodox Stakeholderism*, *supra* note 10.

⁴⁷ See *supra* note **Error! Bookmark not defined.** and accompanying text.

secured claims, although we recognize that it is debatable whether such rights involve the creation of an interest in the property of the debtor.⁴⁸

We begin, as is common in the literature, by limiting the scope of our analysis to countries in the Global North. For these purposes we define the Global North in terms of economic prowess, focusing on the five high-income countries with the largest GDP in the world according to the World Bank based on 2023 data.⁴⁹ Our analysis reveals three distinct approaches to priority of workers' claims versus secured claims in these countries. First, in the United States, Germany and Japan, secured claims generally have priority, although there are exceptions. Second, in France, some workers' claims enjoy priority over secured claims. Third, in the United Kingdom, portions of workers' claims enjoy priority over some secured claims but not others. In the following sections we discuss each of these approaches in turn. The final section of this part describes international organizations' embrace of the U.S. model.

It is worth noting that there is no consensus among scholars in the Global North about the optimal approach to priority of workers' claims in insolvency, including from a traditional law-and-economics perspective. Much of the debate revolves around the extent to which workers will adjust the terms upon which they deal with firms to reflect the risk of being subordinated to secured claims. If workers fail to adjust at all, then a rule that gives secured claims priority encourages firms to transfer wealth from workers without compensation by issuing high priority debt.⁵⁰ Even if workers can adjust their wage demands to obtain compensation for the risk of subordination, they are unlikely to adjust the terms upon which they deal with an employer to reflect the risk of being subordinated to any specific secured claim.⁵¹ In a seminal article, Lucian Bebchuk and Jesse Fried argue that the presence of such "non-adjusting" creditors combined with a rule of full priority gives firms overly strong incentives to incur the costs of creating security interests.⁵² Another factor weighing in favor of giving workers priority is that they are likely to be more risk averse than secured creditors and far less capable of mitigating the risk of their employer's insolvency through diversification—a risk bearing rationale. This implies that the costs to workers of being subordinated are likely to be high. It also implies that even if workers could adjust to the risk

⁴⁸ See, e.g., *Caisse populaire Desjardins de l'Est de Drummond v. Canada* [2009] S.C.C. 29 (Can.) (concluding that an agreement providing for a right to compensation or a right to set-off created a security interest).

⁴⁹ World Bank, World Bank Open Data, <https://data.worldbank.org/>. For historical country classifications, see https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups?_gl=1*ce43qc*_gcl_au*NjU2NjI4MDIyLjE3MjM1NTc1NTA.

⁵⁰ Alan Schwartz, *A Theory of Loan Priorities*, 28 J. LEGAL STUD. 209, 255-257 (1989) (“[i]f workers respond to imperfect information with optimism, perceiving bankruptcy to be less likely than it is in fact, or if firms do not solve the workers’ collective action problem in devising contracts bankruptcy will impose nontrivial losses on the employees”).

⁵¹ Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 885 (1995). See also Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1300 (1997); Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1232 (2005).

⁵² Bebchuk & Fried (1995), *supra*.

of subordination, they would charge such a high premium for bearing the risk of being subordinated that it would be efficient to give them priority, as a form of insurance.⁵³

The debate is not entirely one-sided though.⁵⁴ As an empirical matter, it is unclear whether firms respond to the incentive to transfer value away from non-adjusting unsecured creditors by issuing secured debt.⁵⁵ In addition, even some skeptics of secured creditor priority acknowledge that giving workers' claims priority would increase the cost of credit for firms, which might in turn harm workers along with investors by reducing firms' size and financial stability.⁵⁶

A. The U.S. Model

U.S. law has long given secured claims priority over the claims of unpaid workers. Subject to exceptions discussed below, the law of most states grants secured claims priority over the claims of unpaid workers, and federal bankruptcy law leaves priorities determined by state law intact. Federal bankruptcy law does, however, give wage earners' claims limited priority over the claims of other unsecured creditors—currently a portion of wage earners' claims rank fourth among the classes of claims granted priority over the general group of unsecured creditors.⁵⁷ Both these features of federal bankruptcy law, namely, preservation of state law priority of secured claims and preferential treatment of wage earners' claims relative to unsecured creditors, have been in place since the Bankruptcy Act of 1841.⁵⁸ Curiously, the only earlier federal bankruptcy statute, the Bankruptcy Act of 1800, provided that secured creditors were to be paid pro rata with other creditors, but that statute was repealed in 1803.⁵⁹

There are several exceptions in U.S. law to the general rule that secured creditors have priority over wage earners. First, as in many countries, U.S. admiralty law grants seamen a lien against their vessel for unpaid wages, and this “sacred lien” enjoys priority

⁵³ Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 167-169 (1989) (justifying risk sharing by secured creditors in bankruptcy).

⁵⁴ For an overview of the debate see Kenneth N. Klee, *Barbarians at the Trough: Riposte in Defense of the Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466 (1997); John Armour, *The Law and Economics Debate About Secured Lending: Lessons For European Lawmaking?*, 5 EUR. COMPANY & FIN. L. REV. 3, 13 (2008) (special volume on “The Future of Secured Credit in Europe”) (arguing that the benefits of secured credit are “empirically more significant” than occasional harms to non-adjusting creditors).

⁵⁵ Compare Yair Listokin, *Is Secured Debt Used to Redistribute Value from Tort Claimants in Bankruptcy? An Empirical Analysis*, 57 DUKE L.J. 1037 (2008) (finding that firms that are relatively susceptible to tort liability do not issue relatively high amounts of secured debt as bankruptcy approaches) with Barry Adler and Verdran Capkun, *Debt-Equity Conflict and the Incidence of Secured Credit*, 62 J. L. & ECON. 551 (2019) (contradicting Listokin's findings on whether firms issue secured debt as bankruptcy approaches based on a larger dataset and an improved measure of the amount of secured debt).

⁵⁶ Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1389 (1996) (arguing that in a full-priority secured credit system “employees may win or lose”).

⁵⁷ 11 U.S. Code § 507(a)(4).

⁵⁸ C. Scott Pryor, *The Missing Piece of the Puzzle: Perspectives on the Wage Priority in Bankruptcy*, 16 AM. BANKR. INST. L. REV. 121, 123-141 (2008).

⁵⁹ Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, § 5, repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248, § 31.

over other secured claims.⁶⁰ Second, workers on building projects or whose services otherwise improve real property often can obtain a mechanic's lien against the property under state law, but those liens typically do not have priority over pre-existing mortgages.⁶¹ Third, in several states, either workers or an administrative agency acting on their behalf can obtain a lien against an employer's property for unpaid wages, and in a handful of those states—Texas, Wisconsin and Tennessee—wage liens enjoy priority over pre-existing security interests.⁶²

Several leading U.S. commentators have questioned the rules that subordinate workers' claims to secured claims.⁶³ In 1996, Elizabeth Warren proposed to amend state law governing secured transactions to set aside up to 20 per cent of the value of a secured creditor's collateral to satisfy the claims of unsecured creditors.⁶⁴ The proposal was ultimately rejected, but the scholarly and policy debate continued.⁶⁵ A bipartisan bill introduced in 2025, the "Protecting Employees and Retirees in Business Bankruptcies Act," would increase the scope of workers' priority in insolvency proceedings without impinging on secured creditors' rights.⁶⁶

The U.S. approach is currently followed in two other countries among the top ten economies of the Global North, Germany and Japan, but the German model has varied over time. In each country, secured claims now have priority over workers' claims and specified portions of workers' claims have priority over other unsecured claims.⁶⁷ In Germany, however, claims for wages due within the past six months enjoyed priority over secured claims between 1974 and 1994. This priority rule was abolished—along with other kinds of statutory priorities—in the same year that Germany instituted the PSVaG, a wage guarantee fund for employees.⁶⁸ In Japan, secured creditors have absolute priority safeguarded by a

⁶⁰ *United States v. Smith*, 828 F. Supp. 2d 863, 866 (E.D. Tex. 2011); *Payne v. S.S. Tropic Breeze*, 423 F.2d 236, 242 (1st Cir.), cert. denied, 400 U.S. 964 (1970).

⁶¹ *See, e.g.*, NY Lien L § 13 (2023).

⁶² TN Code § 66-13-101; V.T.C.A., Labor Code § 61-0825; W.S.A. § 109.09. *See, generally*, Nabila N. Khan, *Combatting Wage Theft in Global Supply Chains: A Proposal for Transnational Wage Lien Laws* (2022). LL.M. Essays & Theses. 10, available online at: https://scholarship.law.columbia.edu/llm_essays_theses/10.

⁶³ Schwartz, *supra* note 50, at 255-257; Bebchuk & Fried (1995), *supra* note 50, at 857; Warren, *supra* note 50, at 1373.

⁶⁴ Klee, *supra* note 54, at 1467 (citing the Memorandum from Elizabeth Warren to the Council of the American Law Institute (Apr. 25, 1996)).

⁶⁵ *Id.*

⁶⁶ Protecting Employees and Retirees in Business Bankruptcies Act, S. 1381 119th Cong. (1st Sess. 2025). *See also* Press Release, Durbin, Hawley Introduce Bipartisan Bill to Protect Employees When Businesses File for Bankruptcy, Apr. 9, 2025 (describing how the bill doubles the amount of employee wage claims entitled to priority, grants additional priority claims for benefit plans and workers' severance pay, and eliminates the restriction that priority wage and benefit claims must be earned within 180 days of the bankruptcy filing).

⁶⁷ Insolvenzordnung [InsO] [Insolvency Code], §§ 49 and 50 (Germany); Hasan-hō [Bankruptcy Act], Act No. 75 of 2004, Arts. 2(9), 149(1) (Japan).

⁶⁸ Mucciarelli, *supra* note 14, at 282 (noting that "former insolvency rules of West Germany (*Konkursordnung*) were amended in 1974 to introduce employee super-priority, similarly to the French regime.").

well-established right of separation (*betsujo ken*),⁶⁹ which has been effective since at least the 1922 Bankruptcy Act.⁷⁰

B. The French Model

French law takes a very different approach from U.S. law to the priority of workers' claims relative to secured claims: workers' claims for up to 60 days of wages, subject to a prescribed maximum, have first priority.⁷¹ The administrator must pay these sums within the first ten days of the bankruptcy, provided funds are available.⁷²

The French system of workers' superpriority in insolvency was initially introduced by a 1935 presidential decree and had a very limited scope: 15 days' wages for manual workers (*ouvriers*) and one month's wages for other employees (*employés*).⁷³ This regime was modified by subsequent legislation, including a significant expansion in 1961.⁷⁴ The report from the *Conseil des ministres* introducing the 1935 decree indicates that the decree was motivated by complaints from workers about procedural delays and the existence of privileges that took precedence over the preferred claims for wages guaranteed by existing law.⁷⁵ The government also noted that the issue had become more salient as the number of bankruptcies had increased and workers who had lost their jobs could find new employment only with great difficulty.⁷⁶

The background to the 1935 decree was a proposal to create superpriority which was debated and approved by the *Conseil supérieur du travail* in 1934.⁷⁷ During the debates, one member of the council described superpriority as "a very limited protection of the vital wage," and said that "the legal perspective must reconcile itself with humanity."⁷⁸ Other members—including the representative of the Ministry of Finance—expressed concerns, particularly regarding the potential encroachment on tax claims.

⁶⁹ Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 62 (2005); Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 706-7 (2000).

⁷⁰ Hasan hō [Bankruptcy Act], Law No. 71, 1922, Art. 92 (Japan).

⁷¹ Code du travail [C. trav.] [Labor Code] art. L3253-2 (Fr.).

⁷² Code de commerce [C. com.] [Commercial Code] art. L625-8 (Fr.).

⁷³ Décret tendant à assurer le paiement des salaires en cas de faillite ou de liquidation de l'employeur [Decree aimed at ensuring the payment of wages in the event of the employer's bankruptcy or liquidation], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 9, 1935, at 8697-8698.

⁷⁴ The 1961 revisions significantly expanded the scope of wage protection to cover 60 workdays for both manual workers and employees. See Sénat, 1^{re} Session ordinaire de 1961-1962, Proposition de Loi tendant à la modification de l'article 47 a du Livre Ier du Code du travail, en vue d'assurer le paiement par privilège des salaires en cas de faillite ou de règlement judiciaire (Nov. 30, 1961), at 3.

⁷⁵ Décret tendant à assurer le paiement des salaires en cas de faillite ou de liquidation de l'employeur, *supra* note 73, at 8697.

⁷⁶ *Id.*

⁷⁷ Ministère du travail et de la prévoyance sociale, Bulletin de l'office du travail, Tome XLI, 1934, at 304.

⁷⁸ *Id.* at 309. The original text reads: « Ce dont il s'agit c'est d'une protection très limitée du salaire vital. L'humanité doit pouvoir se concilier avec le point de vue juridique. »

Prior to the 1935 decree, both the Civil Code and the Commercial Code granted certain workers' claims priority over certain secured claims,⁷⁹ though neither workers nor secured creditors received first priority.⁸⁰ Versions of this privilege date back to the Napoleonic Civil Code of 1804 and before that to the Loi du 11 Brumaire of 1798 and jurisprudence of the Châtelet of Paris.⁸¹ Initially limited to servants (*gens de service*) under the Civil Code,⁸² the privilege over secured claims was expanded over time to cover other categories of workers. An 1838 amendment to the Commercial Code extended this privilege to industrial workers in case of bankruptcy.⁸³ Despite assertions to the contrary,⁸⁴ it is clear

⁷⁹ Code civil [C. civ.] [Civil Code] arts. 2095, 2101, 2104, 2105 (1804) (Fr.); Code de commerce [C. com.] [Commercial Code] art. 549 (1838) (Fr.). The Civil Code granted servants (*gens de service*) privileged claims over movables (art. 2101) and immovables (art. 2104)—however, the priority over immovables only applied if movable assets were insufficient (art. 2105). See LOUIS MARTIN, DROIT CIVIL 407 (1896); RAYMOND THEODORE TROPLONG, DES PRIVILEGES ET HYPOTHEQUES, OU COMMENTAIRE DU TITRE XVIII DU LIVRE III DU CODE NAPOLEON 17-19 (1854).

⁸⁰ Other general privileges, namely judicial, funerary and “last illness” costs, ranked above the claims of servants, industrial workers and creditors secured by immovable assets. See Code civil [C. civ.] [Civil Code] art. 2101(1)-(3). The priority of general privileges over special privileges on movables (art. 2102) was contentious, although the precedence of judicial costs was more widely accepted. For doctrinal works, see *infra* note 86 and accompanying text. See also Cour d’appel de Paris, Nov. 27, 1814, Recueil général des lois et des arrêts en matière civile criminelle administrative et de droit public 168 (1816) (ruling that a landlord secured by movable goods outranks funerary costs); Cour impériale de Bordeaux, Apr. 12, 1853, Recueil général des lois et des arrêts 444 (1853) (finding that judicial costs rank above a special privilege over movables). A statute determined that Treasury claims (art. 2098) were paid first, but courts and scholars debated whether certain general and special privileges over movables could outrank them. See TROPLONG, *supra* note 79, at 32-34; ALEXANDRE DURANTON, COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL XIX 336-341 (1844).

⁸¹ Loi du 11 Brumaire an VII de la République sur le régime hypothécaire, COLLECTION COMPLETE, DECRETS, ORDONNANCES, REGLEMENTS ET AVIS DU CONSEIL D’ETAT 16, 18 (Duvergier & Bocquet, 1798) (establishing a privilege in favor of domestic workers (*domestiques*)). See also MARCEL PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL CONFORME AU PROGRAMME OFFICIEL DES FACULTES DE DROIT II 775 (2nd ed., 1902); DURANTON, *supra* note 80, at 59-61 (noting that, before 1798, the Châtelet of Paris had recognized a privilege for “city domestic workers” (*domestiques de ville*) at least since 1692).

⁸² Because the previous regime protected only domestic workers (*domestiques*), there was controversy among scholars and courts who disagreed on whether the privilege afforded to servants (*gens de services*) merely reproduced the existing priority or expanded it to encompass a broader array of workers. Compare GABRIEL BAUDRY-LACANTINERIE & PAUL DE LOYNES, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL. XXIV-XXVI, DU NANTISSEMENT, DES PRIVILEGES ET HYPOTHEQUES, ET DE L’EXPROPRIATION FORCEE 333 (1906) (arguing that the Civil Code maintained the previous regime); MARTIN, *supra* note 79, at 409 with TROPLONG, *supra* note 79, at 202-3; DURANTON, *supra* note 80, at 61-2 (interpreting the Civil Code as expanding the scope of workers covered by the privilege).

⁸³ Code de commerce [C. com.] [Commercial Code] art. 549 (1838) (Fr.). For subsequent amendments, see Loi du 4 mars 1889 portant modification de la législation des faillites, J.O., Feb. 20, 1889 (Fr.) (extending the priority conferred by the commercial code to wages owed for a period of six months and to additional classes of workers); GASTON GRIOLET, CHARLES VERGE & HENRY BOURDEAUX, CODE DE COMMERCE SUIVI DES LOIS COMMERCIALES ET INDUSTRIELLES : AVEC ANNOTATIONS D’APRES LA DOCTRINE ET LA JURISPRUDENCE ET RENVOIS AUX OUVRAGES DE MM. DALLOZ (2nd ed., 1913) (tracking the statutory reforms to art. 549). For a commentary, see JASSUDA BEDARRIDE, TRAITE DES FAILLITES ET BANQUEROUTES OU COMMENTAIRE DE LA LOI DU 28 MAI 1838 30-31 (5th ed., 1874). Scholars have noted that this amendment responded to the then existing controversy about the scope of the Civil Code’s privilege for servants (see *supra* note 82). JEAN-PAUL-VINCENT GADRAT, TRAITE DES FAILLITES ET BANQUEROUTES D’APRES LA LOI DU 28 MAI 1838 : ETUDES DE DROIT COMMERCIAL 364 (1864).

⁸⁴ Arturo S. Bronstein, *The protection of workers’ claims in the event of insolvency of the employer: from civil law to social security*, 126 INT’L LAB. REV. 715, 720 (1987) (“[n]either the Napoleonic Code nor the other civil

that nineteenth-century French law provided some level of priority for workers' claims over secured claims, though the precise contours and effectiveness of this priority were unclear. While workers' privileged claims clearly ranked above creditors secured by immovable assets under the Code's wording,⁸⁵ there was significant controversy over whether workers enjoyed priority over secured claims on movable assets. The priority of workers' claims relative to secured creditors holding interests in movable property remained unsettled among French courts and legal scholars in the nineteenth century.⁸⁶

Wage protection in bankruptcy remained on the legislative agenda through the nineteenth and early twentieth centuries. In 1849, legislators unsuccessfully attempted to pass a bill establishing superpriority of wages.⁸⁷ In 1907, a study discussed in the *Conseil supérieur du travail* reported that contests between workers and lessors (*bailleurs*), whose claims had priority over those of workers, "resulted in 443,000 francs being paid to 192 *bailleurs* and 48,000 francs in wages being lost by workers."⁸⁸

In the twenty-first century, a series of reforms have expanded the availability of security devices tied to property rights, which exempt creditors from bankruptcy proceedings and thus circumvent workers' priority.⁸⁹ For instance, French scholars claim that *fiducie*-

codes went so far as to accord to workers a preference over creditors having a special preferential right enforceable against some particular property of the debtor's.").

⁸⁵ Code civil [C. civ.] [Civil Code] arts. 2095. A privilege, by definition, takes precedence over mortgage. See ANDRE VINCENT, THESE POUR LA LICENSE: REGLES GENERALES SUR LES PRIVILEGES. DES PRIVILEGES SUR LES MEUBLES 33 (Faculté de droit de Paris, 1877); RAYMOND-THEODORE TROPLONG, DU NANTISSEMENT, DU GAGE ET DE L'ANTICHRESE : COMMENTAIRE DU TITRE XVII, LIVRE III DU CODE CIVIL 524-529 (1847); MARTIN, *supra* note 79, at 406-7; ÉMILE ACOLLAS, MANUEL DE DROIT CIVIL, COMMENTAIRE PHILOSOPHIQUE ET CRITIQUE DU CODE NAPOLEON, CONTENANT L'EXPOSE COMPLET DES SYSTEMES JURIDIQUES 562 (1874).

⁸⁶ See, ruling that the privilege of a landlord secured with movable assets outranks the privilege of domestic workers, Cour royale de Rouen, June 17, 1826, Recueil Sirey 5-6 (1827) (Fr.); Cour royale de Paris, Feb. 25, 1832, Recueil Sirey 299 (1832) (Fr.); Cour de cassation, Jan. 19, 1864, Bulletin des arrêts de la Cour de cassation rendus en matière civile 15-16 (1864) (Fr.); Cour de Dijon, May 19, 1893, Recueil Sirey 134-136 (1895) (Fr.). But see, for a different position, Cour d'appel de Rouen, Jan. 30, 1851, Recueil Sirey 281-282 (1851) (Fr.). Compare also PLANIOL, *supra* note 81, at 828-9; BAUDRY-LACANTINERIE & LOYNES, *supra* note 82, at 679-86 (1906) (in favor of granting priority to creditors secured by special privileges over movables) with TROPLONG, *supra* note 85, at 60-1; FRANÇOIS PETIT, DU PRIVILÈGE DU BAILLEUR D'UN FONDS RURAL 166 (1907); DURANTON, *supra* note 80, at 277-9; GEORGES-BONAVENTURE BATTUR, TRAITÉ DES PRIVILÈGES ET HYPOTHÈQUES I 52 (1823) (in favor of prioritizing general privileges, including servants' claims). A third view holds that there should not be a fixed ranking between special and general claims, instead the underlying cause of each privilege should be assessed on a case-by-case basis. In practice, judicial costs often received priority, followed by secured creditors' special privileges and then general privileges. See CHARLES AUBRY & FREDERIC CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS : D'APRES LA METHODE DE ZACHARIAE. III 481-2 (Marchal et Billard, 1869-72).

⁸⁷ JEAN GUINOT, LA PROTECTION LEGALE DES SALAIRES ET DES APPOINTEMENTS DANS LA FAILLITE DE L'EMPLOYEUR 8 (1929).

⁸⁸ Ministère du travail et de la prévoyance sociale, Bulletin de l'office du travail, Tome XIV, 1907, at 1070. According to the report, if workers had been paid in full, all "*bailleurs* would still have gotten 394,776 francs." *Id.* Before that, an old law protecting workers employed in public works, the so-called *privilege de pluviôse*, was amended in 1891 to enhance their protection vis-à-vis other creditors. See Cour de cassation com., Sept. 20, 2017, 15-28.812 (Fr.).

⁸⁹ Charlie Lledo, *Essai d'une théorie générale des sûretés réelles: plaidoyer pour la réhabilitation du droit de préférence* 56, 219 (PhD Thesis, Université Paris II Panthéon-Assas, 2020); Francine Macorig-Venier, *L'exclusivité*, 30 PETITES AFFICHES 59 (Feb. 11, 2011). *Fiducie-sûreté*, e.g., was introduced in 2007 by Loi n°

sûreté has dethroned the *hypothèque*—once nicknamed “queen of securities”—to become the “new queen of securities.”⁹⁰ As we shall see, similar developments have occurred in other countries. While this trend might suggest that statutory priorities would become moot,⁹¹ practitioners have debated the appeal and use of the *fiducie* in France.⁹² Data on wage recovery rates under the French superpriority regime do not show significant declines, which suggests the ongoing relevance of the statutory priority system.⁹³

C. The UK Model

UK law diverges significantly from both U.S. law and French law in that it gives wage earners’ claims for a portion of their unpaid wages priority over some secured claims but not others. The critical distinction is between fixed charges and floating charges. Workers’ claims for unpaid remuneration for the period up to four months before the initiation of insolvency proceedings and below a prescribed limit are defined as “preferential debts,” which rank behind fixed charges but ahead of floating charges when a company is being wound up.⁹⁴ Floating charges are charges which apply to assets that the debtor is entitled to transfer free of encumbrance until a specified “crystallising” event occurs.⁹⁵ They typically cover an entire class of present and future assets that the debtor expects to transfer

2007-211 du 19 février 2007 instituant la *fiducie*, J.O., Feb. 21, 2007 (Fr.). For subsequent reforms, *see* Loi n° 2008-776 du 4 août 2008 portant diverses mesures de modernisation de l’économie, J.O., Oct. 5, 2008 (Fr.); Ordonnance n° 2008-1345 du 18 décembre 2008 portant réforme du droit des entreprises en difficulté, J.O., Dec. 19, 2008 (Fr.); Ordonnance n° 2009-112 du 30 janvier 2009 portant réforme de la *fiducie*, J.O., Jan. 31, 2009 (Fr.); Loi n° 2009-526 du 12 mai 2009 de simplification et de clarification du droit et d’allègement des procédures, J.O., May 13, 2009 (Fr.); Ordonnance n° 2021-1193 du 15 septembre 2021 portant modification du livre VI du code de commerce, J.O., Sept. 16, 2021 (Fr.).

⁹⁰ Alain Cerles, *La fiducie, nouvelle reine des sûretés ?*, LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES 19 (Sept. 6, 2007).

⁹¹ *See supra* note 89. *See also* Matthieu Dubertret, *Introduction*, in LA FIDUCIE EN ACTION : ACTES DU COLLOQUE 13-14 (Comité de Droit Financier – Paris EUROPLACE, 2012).

⁹² Anker Sorensen & Brice Mathieu, *The fiducie-sûreté: the most effective French security interest?*, 30 J. INT’L BANKING L. & REG. 621 (2015) (“Although the *fiducie* appears to be a very effective type of security interest for creditors, it has not met the expected success since its introduction into French law.”); Benjamin Raillard, *Fiducie, How to strengthen secured financing*, PRIVATE DEBT INVESTOR, Apr. 2, 2010 (describing how “[t]he *fiducie* is becoming widespread”); Arnaud Lefebvre, *La fiducie se développe, lentement mais sûrement*, OPTION FINANCE, Jan. 18, 2024 (citing estimates that approximately ten to a few dozen *fiducie* structures are established in France per year).

⁹³ *See, e.g.*, Association pour la gestion du régime de Garantie des créances des Salariés [AGS], *Rapport d’activité 2023*, at 40; AGS, *Rapport annuel 2022*, at 54; AGS, *Rapport Annuel 2021*, at 66; AGS, *Rapport annuel 2019/2020*, at 89; AGS, *Rapport annuel 2018/2019*, at 19; AGS, *Rapport d’activité 2017*, at 27; AGS, *Rapport d’activité 2016*, at 27; AGS, *Rapport d’activité 2015*, at 27; AGS, *Rapport d’activité 2014*, at 27; AGS, *Rapport d’activité 2013*, at 24; AGS, *Rapport d’activité 2011*, at 16; AGS, *Rapport d’activité 2010*, at 17-18; AGS, *Rapport d’activité 2009*, at 17; AGS, *Rapport d’activité 2008*, at 13; AGS, *Rapport d’activité 2007*, at 12; AGS, *Rapport d’activité 2006*, at 12; AGS, *Rapport d’activité 2005*, at 11; AGS, *Rapport d’activité 2004*, at 10; AGS, *Rapport d’activité 2003*, at 10; AGS, *Rapport d’activité 2002*, at 7; AGS, *Rapport d’activité 2001*, at 10; AGS, *Rapport annuel d’activité 2000*, at 9.

⁹⁴ Companies Act 2006 c. 46, § 754; Insolvency Act 1986 c. 45, § 175 and sch. 6, category 5.

⁹⁵ *National Westminster Bank v. Spectrum Plus* [2005] UKHL 41, ¶ 111 (appeal taken from Eng.).

in the ordinary course of business, such as raw materials, work in progress, inventory and accounts receivable.⁹⁶

Provisions granting claims for unpaid wages priority over floating charges have been part of English law since 1897.⁹⁷ For a long time, these provisions did not apply to floating charges that crystallized into fixed charges prior to the date of the insolvency proceedings, but this limitation was removed by a 1986 legislative amendment.⁹⁸ Even before 1897, miners working in the tin and copper mining districts known as the “stannaries” in the English counties of Cornwall and Devon were granted a charge for unpaid wages against the assets of their mine, which took priority over secured claims.⁹⁹

D. International Organizations

The main international organizations concerned with reform of labor law and insolvency law respectively either have not taken a position on the priority of workers’ claims relative to secured claims or have actively opposed giving priority to workers. The International Labour Organization (ILO) has essentially remained silent on the conflict between workers’ and secured creditors’ claims. In 1949, ILO Convention No. 95 provided that workers’ wages should be granted priority over ordinary creditors for the period or amount provided by national regulations—limitations which were “wholeheartedly” supported by the U.S. government during the preceding debates.¹⁰⁰ The Convention left it to national laws and regulations to determine the relative priority of wages vis-à-vis other privileged creditors.¹⁰¹

⁹⁶ *Id.* ¶¶95-100. Current Australian and Canadian rules on priority of wage earners’ claims are functionally very similar to UK rules, but the Canadian legislation is of relatively recent vintage. Corporations Act 20.01, s. 433 (Aust.); Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, §§ 81.3, 81.4 (Can.). Canadian law diverged from English law when the common law provinces adopted personal property security acts (PPSAs) modeled on Article 9 of the U.S. Uniform Commercial Code. The PPSAs eliminated the distinction between fixed and floating charges for the purposes of determining priority vis-à-vis unsecured claims such as those of employees, and both provincial law and federal bankruptcy law gave priority to secured claims. Jacob S. Ziegel, *The New Provincial Chattel Security Law Regimes*, 70 CAN. BAR REV. 681 (1991) (tracing the history of the PPSAs). Political support emerged almost immediately to provide additional protection for employees, in the form of either priority in bankruptcy or some sort of guarantee fund. Jacob S. Ziegel, *The New Personal Property Security Regimes – Have We Gone Too Far?*, 28 ALTA. L. REV. 739, 753-754 (1990). However, it was not until 2008 that the federal government adopted the current provisions of the Bankruptcy and Insolvency Act which grant employees a super-priority security interest over the bankrupt’s “current assets” in respect of claims for unpaid wages up to Canadian \$2000. Current assets are defined as cash, cash equivalents, inventory, accounts receivable, and proceeds of those assets. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, §§ 2, 81.3, 81.4.

⁹⁷ Preferential Payments in Bankruptcy Amendment Act 1897, 60 & 61 Vict. c. 19 (UK).

⁹⁸ Insolvency Act 1986 c. 45, § 251 (specifying that “[f]loating charge” means a charge which, as created, was a floating charge”).

⁹⁹ This charge appears to have been of ancient origin but was codified in the Stannaries Act 1887, 50 & 51 Vict. c. 43, § 4. It was repealed in 1998 on the grounds of obsolescence.

¹⁰⁰ INTERNATIONAL LABOUR CONFERENCE, PROTECTION OF WAGES: SEVENTH ITEM ON THE AGENDA 11 (1949).

¹⁰¹ “Article 11. 1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations. 2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share

ILO Convention No. 173 of 1992 modifies the previous treatment in giving the signatories the option of protecting workers by means of either a privilege over ordinary creditors *or* a guarantee institution.¹⁰² It provides that jurisdictions without guarantee institutions must offer a privilege in an amount “not below a socially acceptable level” and ranking higher than most privileged claims, including those of the state and the social security system.¹⁰³ The preamble of ILO Recommendation No. 180 adopted in connection with the 1992 Convention highlights the new understanding that “guarantee institutions, if properly designed, afford greater protection of workers claims.”¹⁰⁴ At the same time, the Recommendation states that the privilege should cover claims such as severance pay and accident compensation in addition to wages.¹⁰⁵

By contrast, the World Bank and UNCITRAL—two of the most influential organizations on insolvency law reform—have strongly disavowed workers’ priority in insolvency, especially over secured creditors. The World Bank’s 2001 Principles and Guidelines for Effective Insolvency and Creditor Rights Systems recommend that all priorities above secured creditors should be “eliminated, reduced,” and “addressed by other legal reforms.”¹⁰⁶ The 2005 Principles, which were reproduced in the 2021 edition, not only continued to assert that secured claims’ should be given first priority but also maintained that the number of priorities, even below secured claims, “should be kept to a minimum,” and that “[p]ublic interests generally should not be given precedence over private rights.”¹⁰⁷ For instance, the World Bank’s Doing Business Report downgraded Botswana’s ranking in 2008 because of an “amendment to its Employment Act increasing the priority ranking of employee benefits to preferred status,” even though such priority did not apply against

of the assets. 3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.”

¹⁰² Protection of Workers’ Claims (Employer’s Insolvency) Convention (No. 173), art. 3, June 23, 1992, 33 U.N.T.S. 290.

¹⁰³ *Id.* art. 7.

¹⁰⁴ *Id.* preamble.

¹⁰⁵ *Id.* item II(3)(1).

¹⁰⁶ THE WORLD BANK PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS (2001) (“[a] security system should set rules of priority on competing claims or interests in the same assets and minimize the number of priorities that come ahead of secured interests in collateral. (...) In some countries unpaid wages, taxes and many other debts come ahead of a security interest in the distribution of the sale proceeds of property subject to a security interest, with the result that the benefits of secured credit are unavailable. Any priority placed ahead of the secured party represents a substantial cost, which is generally transferred back to borrowers in the form of higher interest rates and transaction costs. Often the public policy represented by the priority (say, benefiting workers) receives a minor and occasional benefit at a substantial cost to the entire commercial system. Such priorities should be eliminated, reduced, and, where public policy concerns are compelling, addressed by other legal reforms that do not compromise the system for secured lending”). *See also id.* at 21 noting that “often the public policy represented by the priority (say, benefiting workers) receives a minor and occasional benefit at a substantial cost to the entire commercial system”). *See also* THE WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES 26 (2021).

¹⁰⁷ *Id.* THE WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS – A REVIEW OF THE ROSC EXPERIENCE AND NEXT STEPS (2005). *See* Principles C12 at 19. Principle C12.4 pays lip services to workers without giving guidance on concrete protections: “C12.4. Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors.”

secured creditors.¹⁰⁸ Similarly to the World Bank, UNCITRAL’s influential Legislative Guide on Insolvency Law has also favored secured creditors’ priority over workers and limited priorities among unsecured creditors.¹⁰⁹

III. Workers versus Secured Creditors in the Global South

In this Part, we expand the scope of our analysis to cover countries in the Global South. We include the countries with the five largest economies classified as developing countries by the United Nations Conference on Trade and Development (UNCTAD) and as low- or middle-income countries by the World Bank in 2023.¹¹⁰

All of the countries in our sample have adopted innovative approaches to priority of wage claims that diverge from the models found in the Global North. We chronicle those innovations in the following sections, beginning with Mexico’s path-breaking constitutionally entrenched provisions. We then discuss the approaches adopted in Brazil, India, Indonesia and China, respectively.

A. Mexico

Mexico appears to have been the first of the world’s largest economies to give workers’ claims broad priority over secured claims—and it did so through its constitution. Under Article 123, XXIII, of the Mexican Constitution of 1917, “[c]redits in favor of workers for wages earned within the last year, and for compensations, shall have priority over all other obligations in the event of receivership or bankruptcy.”¹¹¹ Before that, the 1870 Civil Code of Mexico established a privilege for wage claims arising from domestic and family service, although these claims ranked below those of secured creditors.¹¹² The constitutional

¹⁰⁸ WORLD BANK GROUP, DOING BUSINESS 2020: ECONOMY PROFILE – BOTSWANA 62, <https://archive.doingbusiness.org/content/dam/doingBusiness/country/b/botswana/BWA.pdf>.

¹⁰⁹ UNCITRAL, Legislative Guide on Insolvency Law (2004) § 64 (“The adoption of these types of exception to the rule of first priority of secured creditors has the potential to create uncertainty with respect to the recovery of secured credit, thus discouraging the provision of secured credit and raising the associated costs. It is highly desirable that the use of such exceptions in an insolvency law be limited”). *See also id.* § 68 (“Some priorities are based on social concerns that may be addressed more readily by law other than the insolvency law, such as social welfare legislation, than by designing an insolvency law to achieve social objectives that are only indirectly related to questions of debt and insolvency”).

¹¹⁰ World Bank, *supra* note 49; United Nations Conference on Trade and Development, Country Classifications, <https://unctadstat.unctad.org/EN/Classifications.html>.

¹¹¹ Constitución Política de los Estados Unidos Mexicanos [CP], art. 123 XXIII, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

¹¹² Código Civil del Distrito Federal y Territorio de la Baja California, art. 2090(4), Diario Oficial del Gobierno Supremo de la República 28-02-1871 (Mex.). The privilege was considerably more limited than that of the French Civil Code: in Mexico, workers’ claims only had priority over immovables not subject to mortgage and movables not covered by other privileges. However, the scope of wages protected was higher, as the Mexican Code extended the French one-year limit to two years. *See* MANUEL MATEOS ALARCÓN, ESTUDIOS SOBRE EL CÓDIGO CIVIL DEL DISTRITO FEDERAL, PROMULGADO EN 1870, CON ANOTACIONES RELATIVAS A LAS REFORMAS INTRODUCIDAS POR EL CÓDIGO DE 1884 IV 166 (1885); ESTÉBAN CALVA & FRANCISCO DE P. SEGURA, INSTITUCIONES DE DERECHO CIVIL II 450 (1875).

provision of 1917 was later codified in the Civil Code of 1928 and the Federal Labor Act of 1931.¹¹³

The avant-garde labor rights enshrined in the constitution were deeply influenced by the pro-labor philosophy that motivated the Mexican Revolution.¹¹⁴ The Supreme Court's bulletin of 1936 explained that "labor law (...) cannot disregard the existence of other relationships that develop in social life, including civil and commercial ones."¹¹⁵ Similarly, Mario de la Cueva, a prominent Mexican commentator, later explained the priority given to worker's claims as a reflection of the idea that "in the labor-capital pair, the relationships, contradictions, and even tragedies within capital (...) must not affect labor rights."¹¹⁶

The Mexican provisions on priority of workers' claims were likely influenced by French law, even if they went beyond the French approach at the time. In 1936, the Supreme Court of Mexico held in landmark decision *Núñez Pérez* that the solution of granting priority to workers' claims in bankruptcy was "not new as it has already been enshrined in ancient legislations," such as the French Civil Code, "though not in absolute terms" as Mexico did.¹¹⁷ This suggests Mexico was willing to deliberately deviate from French solutions by adopting a stronger social orientation. Writing in 1954, however, de la Cueva identified the French Civil and Commercial Code priority rules as a source of inspiration for constitutional legislators, noting that French law granted certain workers' claims priority over secured claims even prior to 1917.¹¹⁸

In the face of numerous challenges, Mexican courts have consistently upheld priority of workers' claims over secured claims. In the first few decades after the provisions were adopted, and in spite of their relatively straightforward language, a group of private law scholars argued that the provision had failed to establish priority over secured claims because secured claims were akin to property rights.¹¹⁹ However, since the 1930s, the Mexican Supreme Court has continuously affirmed the priority of worker claims over those of any other creditor—including secured creditors—subject to the one year limit set out in the constitution.¹²⁰ In 1934, the Supreme Court ruled specifically that workers' claims are

¹¹³ Código Civil [CC], art. 2.989, Diario Oficial de la Federación [DOF] 14-05-1928, últimas reformas DOF 24-12-2013 (Mex.); Ley Federal del Trabajo, art. 97, DOF 1-4-1970, últimas reformas DOF 12-6-2015 (Mex.).

¹¹⁴ NÉSTOR DE BUEN, DERECHO DEL TRABAJO 323-324 (1974) (noting that "[i]t is difficult to separate the analysis of art. 123 from what we could call the philosophy of the Revolution, which gave it life.") (free translation); Fernando Yllanes Ramos, *The Social Rights Enshrined in the Mexican Constitution of 1917*, 96 INT'L LAB. REV. 590 (1967) (discussing the pro-worker philosophy that underpinned the 1917 constitution).

¹¹⁵ Suprema Corte de Justicia, Informe de la Presidencia, Informe Rendido a la Suprema Corte de Justicia de la Nación por su Presidente el Sr. Lic. D. Daniel V. Valencia al Terminar el Año de 1936 (1936), at 48 (free translation).

¹¹⁶ De la Cueva, *supra* note **Error! Bookmark not defined.**, at 357 (free translation).

¹¹⁷ Suprema Corte de Justicia, Informe de la Presidencia, *supra* note 115, at 46 (free translation).

¹¹⁸ MARIO DE LA CUEVA, DERECHO MEXICANO DEL TRABAJO MEXICANO 730 (1954) (free translation) ("[s]ince the appearance of the Napoleonic Code, a general privilege, ranked higher than the mortgage, has been established in favor of servants.").

¹¹⁹ MARIO DE LA CUEVA, EL NUEVO DERECHO DEL TRABAJO 356 (1972).

¹²⁰ Initial rulings of the Supreme Court recognized wage priority with no time limitation. *See, e.g.*, Salarios, Preferencia de Los, Suprema Corte de Justicia, Ponente: Salomón González Blanco, Cuarta Sala, Semanario Judicial de la Federación, Quinta Época, Tomo XLVI, p. 1126 (Mex.). But in 1936, the landmark decision

preferred over secured claims, as the constitution must prevail over civil law provisions.¹²¹ Similarly, the Court has held that employees may seize assets pledged by a debtor to a third party as a guarantee to satisfy wage credits.¹²² Workers' claims are given priority not only in the context of bankruptcy, but also in *prosecuciones individuales*.¹²³ Finally, the Supreme Court has consistently ruled that the constitution provides a minimum standard that may be expanded by statute,¹²⁴ with the exception of the one-year time limitation for priority claims.¹²⁵ It has stated that this interpretation is compatible with the *spirit* of the constitutional provision, which sought to establish an "extensive protection of payments" arising out of employment relationships "over any other credits that could diminish or nullify [them]."¹²⁶

Mexico's constitutionalized approach to priority of workers' claims was eventually replicated in five other Latin American countries over the next several decades (but in no other jurisdiction in the Global North or South): Ecuador (1945), El Salvador (1950), Honduras (1957), Peru (1979) and Bolivia (2009).¹²⁷ The Mexican Constitution appears to

Núñez Pérez limited priority to wages gained over the past year. See De la Cueva, *supra* note 119, at 356-367. Following decisions upheld the one year time limit. See, e.g., Trabajadores, Preferencia De Los Creditos De Los, Suprema Corte de Justicia, Ponente: Vicente Santos Guajardo, Cuarta Sala, Semanario Judicial de la Federación, Quinta Época, Tomo LIII, p. 1612 (Mex.).

¹²¹ Hipotecas, Preferencia de los Creditos de los Trabajadores Sobre las, Suprema Corte de Justicia, Ponente: Luis M. Calderón, Segunda Sala, Semanario Judicial de la Federación, Quinta Época, Tomo XLI, Tesis Aislada, p. 489 (Mex.). For a similar decision, see Quiebras, Preferencia de los Creditos de Trabajo en Las, Suprema Corte de Justicia, Ponente: Alfredo Iñárritu, Cuarta Sala, Semanario Judicial de la Federación, Quinta Época, Tomo LIV, p. 2364 (Mex.).

¹²² Trabajadores, Prelación de los Creditos de los, Suprema Corte de Justicia, Ponente: Salomón González Blanco, Cuarta Sala, Semanario Judicial de la Federación, Tomo XLVII, p. 4305 (Mex.).

¹²³ Obreros, Preferencia de Créditos de Los, Suprema Corte de Justicia, Ponente: Jesús Guzmán Vaca, Quinta Época, Segunda Sala, Apéndice 2000, Tomo V, Trabajo, P.R. SCJN, p. 199 (Mex.); Creditos De Los Trabajadores, Preferencia De Los, Suprema Corte de Justicia, Cuarta Sala, Semanario Judicial de la Federación, Tomo LXXXIX, p. 198 (Mex.).

¹²⁴ Suprema Corte de Justicia, Amparo Directo en Revisión 2159/2011, Ponente: Ministro Luis María Aguilar Morales, Segunda Sala (Oct. 26, 2011) (Mex.); Suprema Corte de Justicia, Amparo Directo en Revisión 180/2016, Ponente: Ministra Margarita Beatriz Luna Ramos, Segunda Sala (May 10, 2017) (Mex.); Suprema Corte de Justicia, Amparo Directo en Revisión 7201/2016, Ponente: Ministra Margarita Beatriz Luna Ramos, Segunda Sala (May 3, 2017) (Mex.); Suprema Corte de Justicia, Amparo Directo en Revisión 2686/2016, Ponente: Ministro Alberto Pérez Dayan, Segunda Sala (Jan. 31, 2018) (Mex.).

¹²⁵ Suprema Corte de Justicia, Amparo Directo en Revisión 2378/2010, Ponente: Olga Sánchez Cordero de García Villegas, Primera Sala (July 13, 2011) (Mex.).

¹²⁶ Suprema Corte de Justicia, Amparo Directo en Revisión 2159/2011, *supra* note 124, at 28; Suprema Corte de Justicia, Amparo Directo en Revisión 180/2016, *supra* note 124, at 21, 25; Suprema Corte de Justicia, Amparo Directo en Revisión 7201/2016, *supra* note 124, at 18, 23; Suprema Corte de Justicia, Amparo Directo en Revisión 2686/2016, *supra* note 124, at 17, 19.

¹²⁷ We have individually reviewed all constitutions available in the Constitute Project database to identify provisions relevant to worker claims in insolvency using targeted keywords. Zachary Elkins, Tom Ginsburg & James Melton, *Constitute: The World's Constitutions to Read, Search, and Compare*, CONSTITUTE PROJECT, <https://www.constituteproject.org/>. We found constitutional wage priority in the constitutions of the following jurisdictions: Constitución de la República de Ecuador, del 6 de marzo de 1945, art. 148(v) (Ecuador); Constitución de la República de El Salvador, del 8 de septiembre de 1950, art. 183(4) (El Salvador); Constitución de la República de Honduras, del 19 de diciembre de 1957, art. 112(4) (Honduras); Constitución para la República del Perú, del 12 de julio de 1979, art. 49 (Peru); Constitución Política del Estado Plurinacional de Bolivia, del 7 de febrero de 2009, art. 48, IV (Bolivia).

have influenced these provisions.¹²⁸ Scholars in some of those countries have suggested that the direct inspiration for their constitutional provisions was the Inter-American Charter of Social Guarantees, approved in Rio in 1947 and adopted in Bogotá in 1948 (which the United States refused to adopt).¹²⁹ However, unlike the Mexican Constitution, the Inter-American Charter did not specifically award priority over secured claims. It merely stated that “[t]he amount of wages and the social benefits shall constitute privileged credits in case of bankruptcy or civil insolvency proceedings.”¹³⁰

We consider Mexico’s pioneering constitutional provision on priority of wage earners’ claims to be a paradigmatic early example of legal heterodoxy in the Global South. It set a new standard for protection of workers through insolvency law that was inspired by but went further than anything to be found in the Global North, in terms of both form and substance, and appears to have sparked a wave of South-South transplants in Latin America.¹³¹

Much like in France (and other countries discussed below), however, the priority of wage earners’ claims is threatened by the recent emergence of insolvency-immune security devices.¹³² In 2000, legislators introduced *fideicomiso de garantía*, a bankruptcy-remote device derived from *fideicomiso*, a long-established Mexican legal instrument similar to a

¹²⁸ Ramón Reynaldo Artiga Pérez, *El Salario como Crédito Privilegiado* 24 (1976) (Ph.D. Thesis, Universidad de El Salvador); Ayala Santiago Guerrón Ayala, *Principios constitucionales del derecho del trabajo y flexibilidad laboral en el Ecuador* 20 (2001) (Master’s Thesis, Universidad Andina Simón Bolívar) (“[i]ndeed, inspired by the Mexican Constitution of 1917, the Ecuadorian Constitution of 1929 marks the beginning of what is known as social constitutionalism in Ecuador. This Constitution is the first in Ecuador to systematically and effectively address labor issues by incorporating provisions that cover multiple aspects.”) (free translation).

¹²⁹ Fidel Angel Gonzalez, *Proyecciones de la Carta Internacional Americana de Garantías Sociales en las Legislaciones Laborales de Centroamérica y Panamá* 8-9 (1970) (Ph.D. Thesis, Universidad de El Salvador) (“[l]abor law is represented as an inverted pyramid, whose vertex, after Bogotá, is the Inter-American International Charter of Social Guarantees.”) (free translation); Artiga, *supra* note 128, at 29 (“the Salvadoran constitutional legislators had as immediate material source the Charter”) (free translation). The U.S. voted against adoption of the Charter because it dealt with matters reserved to states under the U.S. Constitution, but also expressed doubts about whether the matters it dealt with were suitable for a charter of fundamental principles. See Charles G. Fenwick, *The Ninth International Conference of American States*, 42 AM. J. INT’L L. 553, 563-564 (1948).

¹³⁰ See 1 ANNALS ORG. AM. ST. 111, 127 (1949) (art. 10 of the Inter-American Charter of Social Guarantees provides that “[t]he value of wages and social benefits constitutes a privileged claim in the case of the bankruptcy of the employer”).

¹³¹ This observation is consistent with the fact that Latin American countries generally tend to have relatively stringent labor regulation. See Ben Ross Schneider, *Hierarchical Market Economies and Varieties of Capitalism in Latin America*, 41 J. LATIN AM. STUD. 553, 562 (2009) (finding that labor regulation in Latin America is stronger than in both coordinated and liberal market economies, though it has limited application given high levels of informality). Schneider’s work, like the original studies on varieties of capitalism focusing on Global North jurisdictions, does not cover worker protection in insolvency. Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE Peter A. Hall & David Soskice eds., 2001).

¹³² Ley de Bancos de Fideicomiso, DOF 17-7-1926 (Mex.); Ley General de Títulos y Operaciones de Crédito, DOF 27-8-1932, últimas reformas DOF 26-03-2024 (Mex.) (regulating fideicomiso).

trust.¹³³ In 2018, a Mexican federal court ruled that *fideicomiso de garantía* creates an “autonomous legal entity” with “complete independence and separation” from the bankruptcy estate.¹³⁴ However, other rulings by federal courts have either mitigated this separation in light of other creditors’ interests¹³⁵ or entirely disregarded it due to irregularities in the *fideicomiso*’s constitution.¹³⁶ The Supreme Court found no contradiction in the apparently conflicting decisions due to the different factual backgrounds of each case.¹³⁷

B. Brazil

Brazilian bankruptcy law appears to give workers strong priority over secured creditors, but this regime is circumvented in practice by the growing availability and use of the mechanism of a “fiduciary sale” (*alienação fiduciária*)—a security device that involves transfer of title to the creditor—which is not subject to bankruptcy proceedings.¹³⁸ Brazil’s current Bankruptcy Law of 2005 gives workers’ claims for unpaid wages (up to 150 times the minimum wage) and compensation for work-related accidents, priority over secured claims other than those secured by fiduciary sale.¹³⁹ It also gives even higher priority to wage claims accruing in the three months prior to bankruptcy subject to a cap of five times the minimum wage per worker. Those claims enjoy priority over bankruptcy expenses and must be paid as soon as there is sufficient cash available.¹⁴⁰

The legislative provision that directly preceded the current regime was adopted in 1960 and granted unlimited priority to workers’ claims for unpaid wages and compensation for work-related accidents.¹⁴¹ Well before that, in 1906, Brazil adopted an innovative scheme that gave agricultural workers’ claims in relation to the harvest to which they contributed priority over secured claims. This was a significant move in an agrarian society, and was reproduced in the bankruptcy statute of 1908 and the Civil Code of 1916.¹⁴² In other respects, however, through the nineteenth century and much of the twentieth century, Brazilian law

¹³³ Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito, DOF 23-5-2020 (Mex.).

¹³⁴ Fideicomiso de garantía. Sus efectos en caso de quiebra del deudor, Ponente: Abraham S. Marcos Valdés, Octavo Tribunal Colegiado en Materia Civil del Primer Circuito, Gaceta del Semanario Judicial de la Federación, Décima Época, Tesis I.8o.C.57 C (10a.) (Mex.) (free translation).

¹³⁵ Fideicomiso o cesión de derechos. En caso de concurso mercantil, las remuneraciones futuras derivadas de un contrato privado de tracto sucesivo, a fin de garantizar o pagar una obligación, no podrán continuar vigentes, dado que la administración y aplicación de los activos futuros estarán reguladas por normas de orden público que rigen para el cedente o fideicomitente, Ponente: Neófito López Ramos, Tercer Tribunal Colegiado en Materia Civil del Primer Circuito, Gaceta del Semanario Judicial de la Federación, Libro 34, Septiembre de 2016, Tomo IV, Tesis I.3o.C.230 C (10a.), p. 2736 (Mex.).

¹³⁶ Suprema Corte de Justicia de la Nación, Primera Sala, Contradicción de Tesis 280/2021, Ponente: Ministro Juan Luis González Alcántara Carrancá (Feb. 2, 2022) (Mex.), at 6.

¹³⁷ *Id.* at 14-16.

¹³⁸ See, e.g., Cássio Cavalli, *A Prioridade do Crédito Garantido na Lei 11.101/2005 e os Limites da Mens Legislatoris*, 1 AGENDA RECUPERACIONAL 1, 6 (2023).

¹³⁹ Lei No. 11.101, de 9 de fevereiro de 2005, art. 3, D.O.U. de 9.2.2005 (Braz.).

¹⁴⁰ *Id.* arts. 84 I-A and 151.

¹⁴¹ Lei No. 3.726, de 11 de fevereiro de 1960, D.O.U. de 12.2.1960, p. 2393 (Braz.).

¹⁴² Lei No. 2.024, de 17 de dezembro de 1908 (Bankruptcy statute), art. 92, D.O.U. de 19.12.1908 (Braz.); Lei No. 3.017, de 1º de janeiro de 1916 (Civil Code) [C.C.] arts. 759 and 1.560, D.O.U. de 5.1.1916 (Braz.).

was similar to the French Civil Code of 1804, in which domestic workers claims were privileged in relation to certain other unsecured claims but were subordinated to secured claims.¹⁴³

These reforms appear to have been developed indigenously. Superpriority for agricultural workers' claims was introduced with the goal of protecting foreign labor to induce greater immigration (especially from Italy) and economic development.¹⁴⁴ Broader priority for workers' claims was introduced in 1960 through an amendment to the Bankruptcy Law of 1945 during the centrist government of Juscelino Kubitschek. The reform was proposed by federal House representative Adauto Cardoso in 1958, who sought to "ensure (...) full and privileged payment of those who, through their work, contributed decisively to the creation of the assets and values" of the company.¹⁴⁵ The Bankruptcy Law as amended would become "an effective defender of prerogatives of the human person" by placing Labor Law as the "supreme criterion for the classification of credits."¹⁴⁶ Workers' priority was described as an "innovation" that considered labor as a "sacred part of the commercial or industrial enterprise," which is "indispensable to the very subsistence of the worker and of their family."¹⁴⁷ The proposal leading to the reform did not cite any foreign precedents, only the 1906 Brazilian legislation in favor of agricultural workers.¹⁴⁸

The extent of priority granted to wage claims has fluctuated over the years. During Brazil's military dictatorship, the priority assigned to workers' damage claims was limited to one-third of damages in 1967, but then reinstated to allow full claims in 1977.¹⁴⁹ The Bankruptcy Law enacted in 2005 kept the priority of workers' claims over secured claims but introduced the current proviso limiting the wage claims enjoying priority to 150 times the minimum wage—a limitation that does not, however, apply to workers' accident compensation.¹⁵⁰ Although the original bill approved by the House of Representatives

¹⁴³ Lei No. 556, de 25 de junho de 1850 (Commercial Code) [C. COM] art. 876, III (Braz.) (granting priority to domestic workers and assistants to merchants). *See also* art. 269 (granting priority to mortgagees over mortgaged assets). Decreto nº 917, de 24 de outubro de 1890, art. 70, I, a (Braz.) (granting priority to claims by domestic workers and assistants to merchants). *See* SALUSTIANO ORLANDO DE ARAUJO COSTA, *CODIGO COMMERCIAL DO IMPERIO DO BRASIL* 466, 447, 449 (1886) (suggesting that secured creditors have priority over privileged creditors with respect to the mortgaged assets); ALDO MUSACCHIO, *EXPERIMENTS IN FINANCIAL DEMOCRACY: CORPORATE GOVERNANCE AND FINANCIAL DEVELOPMENT IN BRAZIL, 1882-1950* 163 (2009) (stating that secured creditors enjoyed first priority since 1850).

¹⁴⁴ Decreto No. 1.607, de 29 de dezembro de 1906 (Braz.). For the legislative debates, *see* Congresso Nacional, *Anais da Câmara dos Deputados*, v. 5 (1907), p. 572-573 (Braz.).

This followed the first innovation of giving agricultural workers a privileged claim that ranked below secured claims. Decreto No. 1.150, de 5 de janeiro de 1904, D.O.U. de 9.1.1904 (Braz.). *See also*, regulating the priority of agricultural wages, Decreto No. 6.437, de 27 de março de 1907, D.O.U. de 17.4.1907 (Braz.).

¹⁴⁵ *Diário do Congresso Nacional* (Seção I) (Abril de 1958), p. 1219 (Braz.).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Decreto-Lei nº 192, de 24 de fevereiro de 1967, D.O.U. de 27.2.1967 (Braz.); Lei No. 6.449, de 14 de outubro de 1977, D.O.U. de 18.10.1977 (Braz.).

¹⁵⁰ Lei No. 11.101, *supra* note 139, art. 83. *See* Supremo Tribunal Federal, *Ação Direta de Inconstitucionalidade* 3.934-2-DF, Tribunal Pleno, Relator: Min. Ricardo Lewandowski (May 27, 2009) (Braz.), at 21 (ruling that the limitation does not apply to work-related accidents). Similarly, State Courts of Appeals have consistently ruled

established unlimited priority for wage claims, the Senate added a limit—with the support of two major trade unions¹⁵¹ seeking to protect average workers by limiting the ability of managers to use the priority rule to satisfy substantial and sometimes fraudulent claims.

The Brazilian courts have generally supported the legislature's efforts to regulate wage earners' priority over secured claims. In 1964, a decision of the Brazilian Supreme Court rejected a secured creditor's attempt to satisfy their claims outside of bankruptcy. The Court reaffirmed the "absolute preference of the claims of employees over wages and workers' damage claims in bankruptcy, overriding those of secured creditors."¹⁵² The constitutionality of the 2005 limitation was ultimately upheld by the Brazilian Supreme Court, which justified the limitation in view of social justice concerns such as preserving jobs and protecting "the patrimony of workers, especially the most vulnerable from an economic perspective."¹⁵³ A majority decision by the Brazilian Supreme Court also denied a challenge to the priority of restitution claims for amounts advanced by financial institutions to exporters on currency exchange contracts¹⁵⁴ over workers' claims, arguing that the promotion of exports also enjoys constitutional protection.¹⁵⁵

At the same time, the Brazilian legal system as a whole has increasingly permitted the evasion of workers' bankruptcy priority through the widespread use of fiduciary sales with the establishment of a separation right in 1969,¹⁵⁶ and subsequent legal reforms strengthening the rights of fiduciary sale holders.¹⁵⁷ While the initial legislation governing

that the limitation does not affect the payment of compensation for work accidents. *See, e.g.*, Tribunal de Justiça de São Paulo, Agravo de Instrumento No. 2259355-88.2021.8.26.0000, 1ª Câmara Reservada de Direito Empresarial, Relator: Des. Azuma Nishi (Apr. 23, 2022) (Braz.) (summary of opinion); Tribunal de Justiça do Rio Grande do Sul, Agravo de Instrumento No. 70082230095, Quinta Câmara Cível, Relatora: Isabel Dias Almeida (Aug. 28, 2019) (Braz.) (summary of opinion).

¹⁵¹ Congresso Nacional, Anais do Senado, v. 28, n. 6 (2004) (Braz.), p. 245 (noting that two major trade union organizations, *Central Única dos Trabalhadores* (CUT) and *Força Sindical*, supported the establishment of a limitation on preferential credits of workers. The sum of 150 minimum wages was suggested by CUT).

¹⁵² Supremo Tribunal Federal, Recurso Extraordinário No. 53,526-RJ, Primeira Turma, Relator: Min. Evandro Lins (June 11, 1964) (Braz.), at 4.

¹⁵³ Supremo Tribunal Federal, Ação Direta de Inconstitucionalidade 3.934-2-DF, *supra* note 150, at 17. For a discussion, *see* Pargendler, *Heterodox Stakeholderism*, *supra* note 10, at 572.

¹⁵⁴ Under this type of contract, the financial institution advances to the exporter the amounts in Brazilian reais under a foreign currency exchange contract prior to the shipment of goods or delivery of services abroad.

¹⁵⁵ Supremo Tribunal Federal, Ação Direta de Inconstitucionalidade 3424-DF, Tribunal Pleno, Relator: Min. Edson Fachin, Redator do Acórdão: Min. Gilmar Mendes (Apr. 19, 2021) (Braz.); Supremo Tribunal Federal, Ação de Descumprimento de Preceito Fundamental 312-DF, Tribunal Pleno, Relator: Min. Edson Fachin, Redator do Acórdão: Min. Gilmar Mendes (Apr. 19, 2021), at 19 of Justice Fachin's vote (noting that "the provision in question is part of the export promotion system and is integrated into a macroeconomic policy aimed at stimulating the country's productive, commercial, and export activities," and further "intended to provide greater security to the financial institution").

¹⁵⁶ Decreto-Lei No. 911, de 1º de outubro de 1969, D.O.U. de 3.10.1969 (Braz.). Fiduciary sale was introduced in 1965. Lei No. 4.728, de 12 de julho de 1965, D.O.U. de 16.7.1965 (Braz.).

¹⁵⁷ *See, e.g.*, Lei No. 13.476, de 28 de agosto de 2017, D.O.U. de 29.8.2017 (Braz.); Lei No. 14.112, de 24 de dezembro de 2020, D.O.U. de 24.12.2020 (Braz.); Lei No. 14.711, de 30 de outubro de 2023, D.O.U. de 31.10.2023 (Braz.).

fiduciary sales applied exclusively to movable property, Brazil instituted a regime for fiduciary sale of immovables in 1997.¹⁵⁸

C. India

India initially followed the Commonwealth model for protection of workers' claims vis-à-vis secured claims in insolvency, but since 1985, Indian law has provided that workers' claims rank *pari passu* with amounts owed to secured creditors.¹⁵⁹ Under the previous regime, which dated back to 1956, workers' credits ranked ahead of floating charges but were subordinated to other types of secured claims.¹⁶⁰

In 1985, an amendment to the Companies Act established that workmen's dues rank *pari passu* with secured creditors.¹⁶¹ The term "workman" was first defined in the 1947 Industrial Disputes Act as "any person employed (including an apprentice) in any industry to do any skilled or unskilled, manual or clerical work for hire or reward."¹⁶² Over the years, the Act was amended to expand the definition to employees performing technical, operational and supervisory work with express or implied terms of employment.¹⁶³ The Supreme Court has construed the term "workman" broadly to cover any workers performing the functions listed in the Act.¹⁶⁴ A minority strain of cases has adopted an even wider definition, arguing that "[q]uite obviously, the broad intention is to take in the entire 'labour force' and exclude the 'managerial force.'"¹⁶⁵

The amendment bill was initially presented by the Minister of Industry and Company Affairs who claimed to be keeping the "interest of the workers in a welfare State uppermost."¹⁶⁶ While the proposal was praised for elevating the priority of workmen's dues, others criticized it as "anti-labour" for placing workers, who "should have been given the first priority" merely "on par with the secured creditors."¹⁶⁷

Interestingly, legislators described the preference granted to workmen's dues as "a progressive measure to depart from the English Company Law and move towards the company laws of the United States and of Canada,"¹⁶⁸ in an instance of disguised legal

¹⁵⁸ Lei No. 9.514, de 20 de novembro de 1997, D.O.U. de 21.11.1997 (Braz.).

¹⁵⁹ The Companies (Amendment) Act of 1985, 1985, § 529A; Insolvency and Bankruptcy Code, 2016, § 53.

¹⁶⁰ The Companies Act, 1956, § 530.

¹⁶¹ The Companies (Amendment) Act of 1985, 1985, § 529A.

¹⁶² Industrial Disputes Act, 1947, § 2(s).

¹⁶³ See, e.g., Industrial Disputes (Amendment) Act No. 46, 1982; Industrial Disputes (Amendment) Act No. 36, 1956. The provision excludes persons in the military, police service, prison employees and workers in managerial or administrative capacity. The text also provides an additional limitation for employees in supervisory capacity with wages earning more than 10,000 rupees.

¹⁶⁴ Bushan Tilak Kaul, 'Industry,' 'Industrial Dispute,' and 'Workman': *Conceptual Framework and Judicial Activism*, 50 J. INDIAN L. INST. 3, 42 (2008).

¹⁶⁵ S. K. Verma v. Mahesh Chandra and Another, (1983) 3 SCR 799 (India). The literature has warned against "[s]implifying the definition of 'workman' on the lines suggested in S.K. Verma (...). This is not to undermine the important role that the court has played in building up a strong base for determining the contours of the contract of employment in the context of Indian industry." Kaul, *supra* note 164, at 43.

¹⁶⁶ The Companies (Amendment) Bill, 1985 (May 14, 1985), at 256.

¹⁶⁷ *Id.* at 278.

¹⁶⁸ *Id.* at 294.

heterodoxy. As we have shown, by the time this debate took place in 1985 even more progressive measures had been adopted in Mexico, Brazil and other Latin American countries. However, we have not found any reference to those measures in the Indian debates.

The equal priority ranking of secured claims and workmen's claims has been deemed to restrict secured creditors' right to pursue separate satisfaction in their claims against bankrupt companies. In *International Coach Builders Ltd v. Karnataka State Financial Corp.*, the Supreme Court ruled that "[p]rior to 1985 it might have been possible for a secured creditor (...) to opt to stand outside the winding up and realise the security by bringing it to sale," because they had "unrestricted right of standing outside the winding up and proceeding against the property mortgaged."¹⁶⁹ However, after 1985, the secured creditor must "seek leave of the Company Court for the limited purpose of ensuring that the *pari passu* charge in favour of the workmen is safeguarded."¹⁷⁰

The protection of workers—both in and outside of bankruptcy—has remained a primary concern for Indian legislators and judges.¹⁷¹ The Companies Act, 2013 modified the scheme adopted in 1985 to give workmen's dues payable for a period of two years preceding the winding up order full priority over all other debts, including secured debts.¹⁷² However, the Insolvency and Bankruptcy Code (IBC) enacted in 2016 continued to rank workmen's dues *pari passu* with secured creditors.¹⁷³ In a ruling that confirmed the inapplicability of the Companies Act to liquidations governed by the IBC, the Supreme Court of India decided that "[t]he unpaid dues of the workmen are adequately and significantly protected in line with the

¹⁶⁹ *International Coach Builders Ltd v. Karnataka State Financial Corp.*, (2003) 2 SCR 631 (India). This is in contrast with pre-1985 rulings of the Supreme Court of India. See, e.g., *M. K. Ranganathan and Another v. Government of Madras and Others*, (1955) 2 SCR 374 (holding that "[t]he secured creditor is thus outside the winding up and can realise his security without the leave of the winding up Court").

¹⁷⁰ *Id.*

¹⁷¹ Nimrit Kang & Nitin Nayar, *The Evolution of Corporate Bankruptcy Law in India*, ICRA BULLETIN MONEY & FINANCE (2003), at 56 ("[i]n a socialist economy such as India, where the protection of the worker is paramount, the government may simply not trust creditors and managers to formulate an outcome in 'public interest'").

¹⁷² The Companies Act, 2013, § 326. In 2015, a committee struck to consider reform of India's bankruptcy law noted that "[t]here was some debate" about "whether the priority given to workmen in the Companies Act, 2013 should be retained in the proposed Code as well." The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (Nov. 2015) (India). Earlier expert report committees had recommended the extension of protection to all employees of the company. In 2000, the Eradi Committee expressed that Section 529A of the Companies Act "should include dues of all employees of the company." Report of the High Level Committee on Law Relating to Insolvency and Winding Up of Companies (2000), at 29. In 2005, the Irani Committee once again recommended that "[t]he status of secured creditors should be *pari passu* with employees in respect of their claims." Ministry of Company Affairs, Report of the Expert Committee on Company Law (2005), at 153.

¹⁷³ Insolvency and Bankruptcy Code, 2016, § 53. The relevant provisions of The Companies Act, 2013 and the IBC both came into force on December 15, 2016. Ministry of Corporate Affairs, S.O. 3677(E) (Notified on December 7, 2016)) (coming into force of sections 326 to 365 of the Companies Act, 2013) and Ministry of Corporate Affairs, S.O. 3687(E) (Notified on December 9, 2016)) (coming into force of sections 33 to 54 of the IBC). See, for a commentary about workmen priority in the IBC, Surbhi Kapur, *The Social Dynamics of Corporate Insolvency Law and Workers/Employees of Distressed Companies: Comparing Select Asian Jurisdictions*, 13 CHINESE J. COMP. L. 1, 18-19 (2025).

objectives sought to be achieved by the Code.”¹⁷⁴ The Court further noted that “secured creditors are taking significant hair-cut [*sic*] and workmen are being compensated on an equitable basis in a just and proper manner” under the provisions of the IBC.¹⁷⁵ More recently, the 2018 Report of the Insolvency Law Committee stressed that “given that workmen of a corporate debtor are the nerve centre thereof, and lose jobs and their livelihood as a result of the liquidation, it was deemed fit to retain *pari passu* priority for workmen.”¹⁷⁶

D. Indonesia

Until the early 2010s, despite conflicting provisions in the labor and bankruptcy statutes, Indonesian insolvency law effectively favored secured creditors over workers. Under former Article 95, paragraph (4), of the Manpower Law of 2003, wages and other workers’ rights must have “priority in payment” in bankruptcy.¹⁷⁷ However, the Bankruptcy Act of 2004 provides that secured creditors “may execute their rights as if no bankruptcy had occurred.”¹⁷⁸ This system of separate out-of-bankruptcy enforcement by secured creditors may be traced back to the first bankruptcy rules of Indonesia introduced under Dutch rule in 1906.¹⁷⁹ Practically speaking, giving effect to the provisions of the Bankruptcy Act meant that secured creditors could circumvent workers’ bankruptcy priority, leaving employees with limited or no recovery from the bankruptcy estate.

Workers challenged the constitutionality of this regime under Article 28D of the Constitution.¹⁸⁰ Article 28D provides that every person shall have “the right to fair legal recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law” and “the right to work and to receive fair and proper remuneration and treatment in employment.”¹⁸¹ In 2008, the Federation of Indonesian Labor Unions filed a petition before the Constitutional Court claiming that the separate satisfaction right of secured creditors violated their constitutional rights to fair and equitable treatment.¹⁸² Rizal Ramli, one of the expert witnesses in the case, noted that the Bankruptcy Law was drafted

¹⁷⁴ Moser Baer Karamchari Union Through President Mahesh Chand Sharma v. Union of India, 2023 SCC OnLine SC 547 (India), § 17.

¹⁷⁵ *Id.*

¹⁷⁶ Ministry of Corporate Affairs, Report of the Insolvency Law Committee (Mar. 2018) (India), at 78.

¹⁷⁷ Law No. 13/2003 of 2003 on Manpower as lastly amended by Law No. 6 of 2023 on the Enactment of Government Regulation in Lieu of Law No. 2/2022 of 2022 Concerning Job Creation (Indonesia), art. 95(1).

¹⁷⁸ Law No. 27/2004 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations as lastly amended by Law No. 4/2023 of 2023 on Financial Sector Development and Reinforcement (Indonesia), art. 57.

¹⁷⁹ Faillissements-verordening [Bankruptcy Regulation], Staatsblad [State Gazette] 1905 No. 217 jo. Staatsblad 1906 No. 348, art. 56, paragraph (1). See Wijantini, *Indonesian Bankruptcy Law: Revisited*, 1 INTEGRITAS – JURNAL MANAJEMEN BISNIS 177, 178 (2008). A similar provision was reproduced in the 1998 and 2004 amendments.

¹⁸⁰ See, e.g., Constitutional Court, Decision No. 2/PUU-VI/2008, Chief Justice: Jimly Asshiddiqie (May 6, 2018); Constitutional Court, Decision No. 18/PUU-VI/2008, Chief Justice: Moh. Mahfud MD (Oct. 15, 2008) (unsuccessful challenges to the constitutionality of provisions of the Bankruptcy Law due to failure to ensure priority payment of wages over all other creditors). But see Constitutional Court, Decision No. 67/PUU-XI/2013, Chief Justice: Hamdan Zoelva (Jan. 30, 2014) (successful challenge to the constitutionality of secured creditors priority over wages).

¹⁸¹ 1945 Constitution of the Republic of Indonesia, art. 28D, paragraphs (1) and (2).

¹⁸² Constitutional Court, Decision Number 18/PUU-VI/2008, *supra* note 180, at 62 and 73.

by “foreign consultants paid for and appointed by the IMF to give primary priority to secured creditors and place workers’ rights afterwards,” while “in their own countries workers’ rights (...) are far more important than those of secured creditors.”¹⁸³ The decision recognized the importance of providing adequate protection of workers’ rights in bankruptcy, but concluded that such policies “must not interfere with the interests of secured creditors.”¹⁸⁴ The Court reasoned that the “lack of sufficient stimulus or motivation for investors to invest because of no guarantees on the return on investment, could in turn hinder job creation,”¹⁸⁵ adding that “[j]ustice demands that such [*security*] agreements are legally and morally binding and must be adhered to.”¹⁸⁶ The ruling concluded that the priority afforded to secured creditors was consistent with the Constitution as it provided legal certainty and ensured fair treatment to all creditors, including workers.¹⁸⁷

In 2013, however, the Constitutional Court reversed its earlier stance in a landmark decision that found secured creditors’ priority over workers unconstitutional. The dispute concerned a case brought by employees of PT Pertamina (Persero), a state-owned oil company. The workers argued that, because they and their families depended on their wages, they had much more valuable interests and weaker positions vis-à-vis other creditors in bankruptcy, and so the priority prescribed in Article 95, paragraph (4), should be interpreted as a priority over any other credits.¹⁸⁸ They also noted that the Indonesian “industrial relations system is based on Pancasila,” an arrangement in which “the government, through all efforts, encourages and participates in promoting, protecting and fulfilling workers’ rights.”¹⁸⁹ Pancasila (literally, “five (*panca*)” “principles (*sila*)”), Indonesia’s ideology, has five principles: belief in God, just and civilized humanity, unity of Indonesia, democracy that is based on consensus and social justice for all Indonesians.¹⁹⁰

The Court sided with the workers, appealing to concerns about social inequality. It noted that the parties to security agreements are usually “socially and economically equal,” while employment contracts are characterized by inequality between the parties since “workers are clearly socially and economically weaker and lower than investors.”¹⁹¹ The decision also considered it “unjust” to impose the risks associated with the business activity on workers who did not participate in the profits and whose wages were the only means of survival, and that the rights to live and secure livelihood are inalienable in any situation.¹⁹² It concluded that Article 95, paragraph (4), of the Manpower Law must be interpreted as granting priority to workers over all other creditors, including secured creditors. However, it restricted this priority to wages, placing other workers’ claims below those of secured

¹⁸³ *Id.* at 62-64.

¹⁸⁴ *Id.* at 77.

¹⁸⁵ *Id.* at 74.

¹⁸⁶ *Id.* at 78.

¹⁸⁷ *Id.* at 81.

¹⁸⁸ Constitutional Court, Decision No. 67/PUU-XI/2013, *supra* note 180, at 11-12.

¹⁸⁹ *Id.* at 14-15.

¹⁹⁰ 1945 Constitution of the Republic of Indonesia, Preamble.

¹⁹¹ Constitutional Court, Decision No. 67/PUU-XI/2013, *supra* note 180, at 42.

¹⁹² *Id.* at 43-44.

creditors.¹⁹³ A few years after the decision, the Manpower Law was amended to provide that wages take priority over all types of creditors, while other workers' claims have priority over those of all creditors "except for secured creditors."¹⁹⁴

Following the amendment, the Labor Party and several trade unions filed a judicial review petition seeking to declare the unconstitutionality of the differential treatment accorded to workers' non-wage claims in bankruptcy.¹⁹⁵ The complainants argued that this differentiation "reduced the rights of workers" and "effectively excluded priority payment" in bankruptcy liquidation.¹⁹⁶ However, in a unanimous judgment, the Court held that the different priorities set by the Constitutional Court and subsequently enacted into law struck a balance between labor protection and secured creditors' interests, "provid[ing] fair legal certainty not only for workers but also for secured creditors."¹⁹⁷

As a practical matter, the extent of workers' priority for wages is limited by the fact that, under Indonesian Bankruptcy Law, secured creditors can exercise their rights to sell the collateral as if no bankruptcy had occurred within two months after the commencement of the state of insolvency. Only if the secured creditors fail to exercise their rights within the two-month period does the collateral become part of the bankruptcy estate (or bankruptcy *boedel*) managed by the Receiver and subject to the workers' priority claim.¹⁹⁸

E. China

China's Enterprise Bankruptcy law (EBL) gives secured claims priority over workers' claims, but certain state-owned enterprises (SOEs) that existed prior to the enactment of the EBL are excluded from its scope and remain subject to an administrative insolvency process that gives priority to workers' claims.¹⁹⁹ As in the U.S. model, to the extent that workers' claims are subordinated to those of secured creditors, they still enjoy priority over other unsecured claims.²⁰⁰

Workers' claims benefited from greater protection under the complicated scheme of legislation, judicial rulings, administrative instruments, local laws and policies that governed resolution of corporate insolvencies in China prior to the enactment of the EBL in 2006.²⁰¹

¹⁹³ *Id.* § 3.19.

¹⁹⁴ Law No. 11 of 2020 on Job Creation (Indonesia); Law No. 6 of 2023 concerning the Stipulation of Government Regulations intended to become Law, in Lieu of Law No. 2 of 2022 concerning Job Creation (Indonesia), art. 81. The Elucidation states that "priority in payment" means that "workers' wages take priority over all types of creditors, including secured creditors or creditors holding collateral rights, claims of country's rights, auction offices, and public agencies established by the government."

¹⁹⁵ Constitutional Court, Decision No. 168/PUU-XXI/2023, Chief Justice: Suhartoyo (Oct. 31, 2024).

¹⁹⁶ *Id.* at 184-185.

¹⁹⁷ *Id.* at 624.

¹⁹⁸ Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (Indonesia), art. 55, paragraph (1).

¹⁹⁹ Enterprise Bankruptcy Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2006, effective June 1, 2007) (hereinafter "Enterprise Bankruptcy Law"), Art. 109 P.R.C. ORDER NO. 54 (China).

²⁰⁰ Enterprise Bankruptcy Law, Art. 113.

²⁰¹ Charles D. Booth, *The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over*, 20 SING. ACAD. L. J. 275, 277-278 (2008).

Both the 1991 Civil Procedure Law, which provided for bankruptcy of legal persons other than SOEs, and the 1986 Enterprise Bankruptcy Law for Trial Implementation, which applied exclusively to SOEs, established that secured creditors “enjoy the right to receive repayment with priority with respect to such security.”²⁰² However, at least one commentator has suggested that in practice, courts often gave priority to workers’ claims over secured claims.²⁰³ Meanwhile, SOEs could only be petitioned into bankruptcy under the 1986 legislation with the consent of the relevant government authority, and such consent was only given if the authority was confident that workers claims could be satisfied.²⁰⁴ Moreover, many SOE insolvencies were resolved through “policy-based insolvency,” an administrative process that involved coordination between courts and local governments. Those policies included a series of notices that granted workers entitlements to be resettled and required claims based on resettlement rights to be satisfied out of the SOEs land rights in priority to any secured claims.²⁰⁵ These mechanisms allowed local governments to shut down failing firms while avoiding worker unrest.²⁰⁶

The issue of priority of workers’ claims divided opinions during the drafting of the EBL. Those in favor of giving priority to workers’ claims relied on the “people oriented” nature of worker priority, which “conforms to the spirit of the Constitution.”²⁰⁷ Opponents stressed the potential impact on the availability of credit and the stability of financial institutions.²⁰⁸ The final version adopted a compromise: secured claims were only given priority over workers’ claims arising after the day the law was promulgated and over 2,000 designated SOEs were excluded from the scope of the new legislation.²⁰⁹

Chinese lawmakers were well aware of the varying approaches to priority of worker claims favored in other countries and by international organizations. The Asian Development Bank and the World Bank submitted reports to Chinese lawmakers on bankruptcy reform, the German government provided expert assistance, and Chinese scholars published articles canvassing approaches in other countries.²¹⁰ The World Bank’s report was particularly pro-

²⁰² Enterprise Bankruptcy Law (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 2, 1986), art. 32 1988 P.C.R. ORDER 45 (China); Civil Procedure Law of the People’s Republic of China, arts. 203 and 206, promulgated by Order No. 44 of the President of the PRC on 9 April 1991 and effective as of that date.

²⁰³ Li Guoqiang, *The Establishment of Limited Priority of Workers’ Claims in the Enterprise Bankruptcy Law of China* in OECD, ASIAN INSOLVENCY SYSTEMS CLOSING THE IMPLEMENTATION GAP 171 (2007).

²⁰⁴ Booth, *supra* note 201, at 307.

²⁰⁵ *Id.* WORLD BANK REPORT ON THE BANKRUPTCY OF STATE ENTERPRISES IN CHINA: A CASE AND AGENDA FOR REFORMING THE INSOLVENCY SYSTEM vii (2000).

²⁰⁶ Halliday & Carruthers, *supra* note 8, at 1168.

²⁰⁷ Guoqiang, *supra* note 203, at 170-171.

²⁰⁸ Guoqiang, *supra* note 203, at 171-172.

²⁰⁹ EBL, Arts. 132-133; Booth, *supra* note 201, at 309-310; Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOCIO. 1135, 1170 (2007).

²¹⁰ Halliday & Carruthers, *supra* note 8, 1168-1171; Wang Weiguo, *The Order of Payment of Workers’ Claims and Security Interests under China’s New Bankruptcy Law*, in OECD, ASIAN INSOLVENCY SYSTEMS: CLOSING THE IMPLEMENTATION GAP 181-183 (2007) (describing international instruments and laws in Chinese Taipei, France, Japan, Korea and the US); Guoqiang, *supra* note 203, at 174 (referring to comparative study of laws in 27 countries); Wang Huaiyu, *The bankruptcy Criteria and Priority of Claims: An International Comparison of*

creditor and stressed that “[t]he protection of secured interests is critical for the stability of the financial system and the scope of bank lending.”²¹¹

Of the five Global South countries we have examined, China is the only one which follows the conventional narrative. It replaced an extremely heterodox regime with the dominant international model after obtaining advice from an array of foreign experts in a conscious effort to move toward a market economy. However, it is worth noting that China’s decision was mainly the product of internal debate rather than external compulsion; the EBL was neither a colonial transplant nor the product of foreign coercion.²¹² There is also at least one report of a Chinese judge disregarding the EBL’s priority scheme to favor workers in certain cases.²¹³

IV. Explaining Legal Heterodoxy in the Global South

In Part III, we found that four out of five of the jurisdictions we examined in the Global South granted some form of priority to worker claims over secured claims in insolvency in ways that are distinct from Global North standards. We now turn to the reasons why that is the case. In the first section below, we suggest that our findings are consistent with the hypothesis that absence of complementary state capacity, and specifically capacity to implement an effective wage guarantee fund, is an important factor. In the second section, we identify a range of other aspects of the local environment that might reasonably induce lawmakers to choose heterodox approaches. In the third section, we discuss the limits of our analysis.

A. Absence of Complementary State Capacity

In previous work on legal heterodoxy, two of us have canvassed a variety of economic, political and cultural factors that bear on whether a country’s lawmakers in the Global South might embrace legal heterodoxy.²¹⁴ On one side are the benefits of adopting legal rules that are tailored to local economic, cultural, political or institutional conditions. On the other side, the risks include scaring away foreign investors—particularly from the Global North—who are only willing to operate in familiar legal environments, and alienating foreign-trained legal elites.

Here we focus on how the local institutional environment influences the appeal of legal heterodoxy in the Global South. In particular, it may not be possible to capture the

Insolvency Laws, in OECD, *ASIAN INSOLVENCY SYSTEMS: CLOSING THE IMPLEMENTATION GAP* 259 (2007) (describing laws in 42 countries).

²¹¹ World Bank, *supra* note 205, at vii.

²¹² Halliday & Carruthers, *supra* note 8, 1170-1171 (“[w]hile both sets of China’s reform cycles were informed by and aware of the global context and occur within the purview of the IFIs and German aid program, it is clear that China’s internal agenda and domestic political imperatives drove the speed of reform and, most important, the enactment of law that would meld both tracks into one.”).

²¹³ (2010) Yáng zhí zì dì 0043 ((2010)扬执字第 0043) [(2010) Yang Execution Document No. 0043], 人民司法 [People’s Justice], Cases 24/2012 (Yangzhou Interm. People’s Ct. Mar. 22, 2012) (China).

²¹⁴ Davis & Pargendler, *LEGAL HETERODOXY*, *supra* note 10.

benefits of legal rules prevalent in the Global North in the absence of complementary institutions with sufficient capacity to enforce or administer those rules. To the extent states in the Global South have had relatively little capacity to enforce and administer legal rules—a common historical generalization—legal heterodoxy might be attractive.

More specifically, we focus here on states' capacity to implement wage guarantee funds. These funds offer an alternative to elevated priority in insolvency as a means of compensating unpaid workers. A fund allows workers to receive compensation without going through the insolvency process. A properly administered and financed fund avoids the risks both of delays in realizing upon the employer's assets through the insolvency process and that the employer's assets will be insufficient to satisfy the workers' claims. However, creating and operating an effective wage guarantee fund involves the burdens of securing financing and ensuring that the fund is administered competently. The financial burden can be mitigated by ensuring that the fund is subrogated to the claims it satisfies. This means that granting workers' claims priority will tend to reduce the burden of operating a wage guarantee fund.²¹⁵ In other words, priority for workers' claims and wage guarantee funds are, to some extent, substitutes from the perspective of workers but complements from the perspective of the state—assuming the state possesses adequate capacity.

Among the countries in our study, those in the Global South were more likely to protect workers through the private law mechanism of bankruptcy priority than through wage guarantee funds. Four of the five countries we examined in the Global North have wage guarantee funds—the lone exception being the U.S.—despite the fact that they employ three different approaches to priority of workers' claims relative to secured claims.²¹⁶ In fact, the European Union has required member states to institute wage guarantee funds since 1980.²¹⁷ Meanwhile, in the Global South, wage guarantee funds were established in some parts of China soon after the priority of secured claims over workers' claims was enhanced.²¹⁸ However, none of the four countries that opted for heterodox approaches have functioning

²¹⁵ Arturo S. Bronstein, *The Preference of Workers' Claims*, in *THE PROTECTION OF WORKERS' CLAIMS IN THE EVENT OF THE EMPLOYER'S INSOLVENCY* 42 (Edward Yemin & Arturo S. Bronstein eds., 1991).

²¹⁶ *Fair Entitlements Guarantee Act* 2012 (Austl.); Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1 (Can.); Loi n° 73-1194 du 27 décembre 1973 tendant à assurer, en cas de règlement, judiciaire ou de liquidation de biens, le paiement des créances résultant du contrat de travail, J.O., Dec. 30, 1973, p. 14145 (Fr.); Betriebsrentengesetz [BetrAVG] [Occupational Pensions Act], Dec. 19, 1974, BGBl. I at 3610–BGBl. III 800-22 (Ger.); Chingin'noshiharainokakuhotōnikansurūhōritsu [Act on Ensuring Wage Payment], Act No. 34 of 1976 (Japan); Legge 29 maggio 1982, n. 297, G.U. May 31, 1982, n. 147 (It.); Werkloosheidswet, 6 november 1986, Stb. 1986, 566 (Neth.), arts. 61 and 62; Real Decreto 505/1985 (B.O.E. Apr. 17, 1985, 92) (1985) (Spain); National Assistance Act 1948 c. 49 (U.K.).

²¹⁷ Directive 80/987/EC, 1980 O.J. (L 283) 23 (EU) which was subsequently replaced by Directive 2008/94/EC, art. 3, 2008 O.J. (L 283) 36 (EU) (containing a similar requirement).

²¹⁸ Stacey Steele et al., *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law*, 66 AM. J. COMP. L. 669, 681 (2018). For a description of regional Chinese guarantee funds, see Sarah Biddulph, *Structuring China's Engagement with International Human Rights: The Case of Wage Protection Law and Practice*, in *LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS* 72 (Ljiljana Biukovic & Pitman B. Potter eds., 2017) (“[w]age protection funds have been established in a range of localities including Shenzhen, Shanghai, Fujian and Guizhou, where municipal governments are placing a levy on all enterprises.”).

wage guarantee funds. Various Indian insolvency statutes, including the Companies Act, 1956 and the current Insolvency and Bankruptcy Code, 2016, have provided for the creation of wage guarantee funds, but none of those funds appear to have become operational and the current legislation is unclear on crucial matters such as how the fund is to be financed.²¹⁹

These findings are consistent with the hypothesis that heterodox approaches to priority of wage earners' claims in insolvency emerged and have persisted in the Global South at least in part as a consequence of states' relatively limited capacity to implement wage guarantee funds. There is a general perception that in India, Indonesia, and Mexico, as well as, to a lesser extent, Brazil, the state has, at least until quite recently, possessed limited capacity relative to states in the Global North and the modern Chinese state.²²⁰ It is also the case that these and other countries in the Global South have relatively large informal sectors, whose workers may be difficult to cover under wage guarantee funds.²²¹ We are inclined to treat broad generalizations about relative state capacity with caution, and we acknowledge that conditions can change rapidly.²²² Nonetheless, our findings are consistent with the idea that state capacity plays a role in explaining the emergence of at least one form of legal heterodoxy in the Global South.

B. Other Factors that Might Influence the Appeal of Legal Heterodoxy

Our findings point to other potentially relevant local conditions. Ideological factors clearly played a role in producing the pathbreaking provisions of the 1917 Mexican Constitution, and the indigenous ideology of *Pancasila* was explicitly cited in the Indonesian Supreme Court's decision that the Manpower Act trumped the Bankruptcy Act. Moving in the other direction, the shift in ideology on the part of China's party-state may explain the country's move toward orthodoxy.

Further research is required to determine whether there is any correlation between the emergence of heterodoxy in this area and other institutional or economic variables. For

²¹⁹ See Deepanshi Gupta, *Conceptualising Implementation of the Insolvency and Bankruptcy Fund in INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, EMERGING IDEAS ON IBC* 159-160 (2023); Manvendra Singh & Amit Nagar, *An Analysis of the Effectiveness and Challenges of the Insolvency and Bankruptcy Fund under Indian Laws*, 65 CINEFORUM 79, 81 (2024); Insolvency and Bankruptcy Board of India, *Subject: Operationalisation of the Insolvency and Bankruptcy Fund (IBF)* (undated).

²²⁰ Kevin E. Davis and Mariana Pargendler, *Legal Heterodoxy in the Global South: Adapting Private Laws to Local Contexts*, in *LEGAL HETERODOXY IN THE GLOBAL SOUTH* 1, 8-9, 11 (2025).

²²¹ According to the International Labour Office, the share of informal employment in total employment for the Global South countries we studied was: Brazil, 46%; China 54.4%; Mexico, 53.4%; India, 88.2% and Indonesia 85.6%. In the Global North the figures were: Germany, 10.2%; Japan, 18.7%; United States of America, 18.6%; United Kingdom, 13.6%. International Labour Office, *WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE*, THIRD EDITION 85-131 (2018). In each case, the data appear to be from the most recent year available as of 2016. *Id.* at 82. Insolvency priority rules may also do little to protect the informal sector, but at the same time they demand less in the way of administrative capacity than wage guarantee funds.

²²² For instance, the OECD has cited Brazil's "high institutional capacity" and "high administrative capacity" as determinants of its success in extending contributory social protection schemes to informal workers. OECD, *BREAKING THE VICIOUS CIRCLES OF INFORMAL EMPLOYMENT AND LOW-PAYING WORK* (2024), <https://doi.org/10.1787/f95c5a74-en.148>. However, that report also shows that only a small proportion of informal workers in Brazil and other developing and emerging countries benefit from contributory social protection schemes. *Id.* at 127-130.

instance, institutional variables might affect the likelihood of employers entering insolvency proceedings while leaving workers' claims unsatisfied. In principle, legislation that holds a firm's officers, directors or shareholders individually liable for unpaid wages might encourage them to avoid this outcome. In New York, the ten largest shareholders of private companies can be held personally liable for the company's unpaid wages—a rule whose scope was extended to cover companies incorporated elsewhere and to limited liability companies in 2015.²²³ In Brazil, shareholders' limited liability does not apply vis-à-vis worker claims,²²⁴ which suggests that Brazilian lawmakers view shareholder liability as a complement, rather than substitute, to workers' priority in bankruptcy.

It also would be interesting to explore whether the emergence of laws granting workers' claims priority over secured claims is correlated with measures of workers' vulnerability in the event that an employer fails to pay wages. The level of vulnerability should in part be a function of workers' ability to find other employment in the event that an employer fails to pay their wages, perhaps as measured by the average duration of unemployment.

C. The Potential Irrelevance of Legal Heterodoxy

We close this section by stressing the limits of our analysis. Our study covers variations in formal legal rules concerning priority of workers' claims in insolvency as reflected in legislation and decisions of apex courts. We have not systematically examined whether claims against insolvent firms are actually paid in the order specified in the formal legal rules.

There are at least three reasons why actual practices may deviate from formal legal rules. First, lower courts or officials may apply rules that deviate from those specified by the legislature or higher courts. Second, corporate insolvencies might be resolved without resorting to formal insolvency proceedings. Third, insolvencies might be resolved under rules specified by the laws of another country. The first two possibilities are well-documented reasons why 'law in action' might deviate from 'law on the books.'²²⁵ The third possibility figures prominently in Katharina Pistor's book, *The Code of Capital*, which argues that actors in the Global South are frequently subject to private law rules biased in favor of capital because local courts allow New York or English law to be applied extraterritorially.²²⁶

The first two factors certainly affect whether workers' claims are paid in accordance with legally specified priority rules in insolvency. For instance, there is evidence that Chinese courts often deviate from the provisions of the Civil Code in tort and contract law in order to pursue policy objectives, and, as noted above, some evidence that this has occurred in relation

²²³ N.Y. Bus. Corp. Law § 630.

²²⁴ Pargendler, *Heterodox Stakeholderism*, *supra* note 10, at 545-48.

²²⁵ Halliday and Carruthers, *supra* note 8, at 1141 ("the sociology of law, with notable exceptions, has significantly narrowed its focus to one fraction of legal change—that of the move from formal law on the books to law in practice").

²²⁶ PISTOR, *supra* note 2.

to the EBL's rules on priority of workers' claims.²²⁷ As for the second point, both before and after the adoption of the 2006 EBL, relatively few companies initiated bankruptcy in China.²²⁸ Nevertheless, while regulatory arbitrage is certainly an important force within domestic legal systems, as exemplified by the use of title retention to (among other things) avoid workers' priority in Brazil, France and Mexico, choice of foreign law is more limited in bankruptcy than in other areas of law, such as corporate and contract law. Foreign law is not an important determinant of the order in which workers' claims against insolvent companies are paid, at least in relation to an employer's local assets. In most jurisdictions, bankruptcy courts determine the priority in which the proceeds of local assets are paid in accordance with local law rather than allowing foreign bankruptcy laws to be applied extraterritorially (although assets can be placed in foreign jurisdictions deliberately in an attempt to avoid workers' priority).²²⁹

Conclusion

Variation in the rules that govern conflicts between workers and secured creditors in bankruptcy offers a window into the forces driving the incorporation of distributive objectives in private law. Developments in this area of the law are not explained by theories that focus on external influences on legal development in the Global South. Our findings demonstrate the limits of these theories in two ways.

First, we have shown that, in this area, legal institutions in the Global South are not mere transplants from Global North jurisdictions. Nor do their legal idiosyncrasies appear to be random or arbitrary. Instead, each of the five largest Global South jurisdictions examined have diverged from their Global North counterparts by offering workers stronger, or distinct, forms of priority in insolvency, at least at some point in time. Mexico pioneered the concept of giving workers' claims priority over all creditors in insolvency in its 1917 Constitution. While the literature on legal origins has characterized workers' superpriority as emblematic of the French civil law tradition, Mexico preceded, rather than followed, France in making this move. Brazil's legislation granting agricultural workers priority over the product of the harvest was adopted even earlier, in 1906, almost thirty years before the 1935 decree that timidly introduced the French superpriority regime. Moreover, although the literature on legal transplants in private law has focused on transplants from North to South, we highlight instances of South-South cross-fertilization, with Mexico's constitutionalization of workers' superpriority spreading to various other Latin American jurisdictions in the subsequent decades. Interestingly, we also found evidence of "legal heterodoxy in disguise," as when

²²⁷ For discussions of Chinese tort and contract law see, e.g., Benjamin L. Liebman, Rachel E. Stern, Wenwa Gao & Xiaohan Wu, *Tort Law Heterodoxy in China*, in LEGAL HETERODOXY, *supra* note 10; Weitseng Chen, *Contracts, Inequality and the State: Contract Law Ultra-heterodoxy in China*, in LEGAL HETERODOXY, *supra* note 10. On the EBL, see *supra* note 213.

²²⁸ Steele et al, *supra* note 218, at 674-679.

²²⁹ Even strong advocates of choice of forum in bankruptcy law allow for the application of local law with respect to employees and involuntary creditors. See Anthony J. Casey, Aurelio Gurrea-Martínez & Robert K. Rasmussen, *A Commitment Rule for Insolvency Forum*, 4 U. CHI. BUS. L. REV. 51, 73 (2025).

commentators and lawmakers in Mexico and India downplayed the innovations in their regimes by misleadingly citing or exaggerating purported Global North precedents.

Second, the evolution of workers' priority in bankruptcy challenges narratives that policymaking by international organizations has carried the day in helping transform legal systems around the world for the benefit of capital. Workers' priority over secured creditors has proved remarkably resilient, and has even expanded to additional jurisdictions, despite historical opposition by the World Bank and UNCITRAL. Perhaps surprisingly, among the five largest Global South economies, only China has eliminated workers' priority over secured creditors in insolvency following World Bank consultations—a change whose practical significance is questionable given other avenues for a heterodox stakeholderism in Chinese insolvency proceedings.

While our findings show the limits of theories that emphasize legal transplants and neoliberal hegemony, they support the theory of legal heterodoxy in the Global South. The Global South jurisdictions examined have diverged from their Global North counterparts in adopting priority rules that were innovative in terms of both substance and form. To begin, four out of the five jurisdictions have adopted rules that are more protective of workers. Moreover, in those jurisdictions the treatment of workers' claims in insolvency was intertwined with the constitutional regime; in each of the four countries there were challenges to the treatment of workers' priority before the constitutional court. Such a challenge was successful in Indonesia, with the Constitutional Court reversing its prior ruling and appealing to the constitution's protection of workers and the Indonesian ideology of Pancasila to recognize workers' priority over secured creditors in a landmark 2015 decision.

Complicating matters though, we have also identified a trend of sub rosa legal reforms that effectively reduce the scope of workers' priority without amending the relevant provisions of the bankruptcy statute. Over the past few decades, France, Mexico and Brazil have all introduced or strengthened statutory security devices that effectively shield secured creditors from the bankruptcy estate and its creditors. This workaround takes the form of “insolvency-proof” securities rooted in *sui generis* property rights in jurisdictions that place workers, among other preferential creditors, above secured creditors in insolvency. As a result, statutory priorities are progressively eroded by legal mechanisms that authorize secured creditors to evade the standard order of priority—which includes workers' priority payment. At the same time, these security interests produce greater deviations from U.S.-style restructuring proceedings as they are effectively excluded from bankruptcy altogether.

Our study also sheds light on how the economic and institutional environment might explain the embrace of legal heterodoxy in the Global South. We find that effective wage guarantee funds, which are used in the four largest Global North economies besides the United States, are absent in the countries in the Global South which adopted heterodox forms of worker priority. This is consistent with the hypothesis that limited state capacity is a factor driving legal heterodoxy in private law in the Global South. This also implies that transplants of private law rules to the Global South may lead to divergent social outcomes vis-à-vis the Global North in the absence of complementary institutional changes. We leave it to future

work to explore the role of other economic and institutional factors, such as levels of unemployment, labor market flexibility, wage theft regulations, and the imposition of shareholder liability for labor debts.

In sum, we find longstanding, significant and continued contestation of private law's role in protecting workers, as well as significant agency and innovation on the part of lawmakers in the Global South. Our multi-country analysis has identified factors that may explain these patterns, but we believe that there is much to be learned from more in-depth studies of the history and political economy of the laws of specific jurisdictions.

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