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Shareholders as Directors and Aspects of Fairness for Stakeholders

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ABSTRACT: A company is an organization that is set to maximize profit with the smallest expenses, this purpose still embedded in the mindset of every entrepreneur. The Board of Directors, who are also majority and minority shareholders, are concurrent positions that often occur in the practice of a company, by regulation this is not regulated in existing positive laws in various countries. This article is expected to contribute to the development of regulations that specifically regulate the position of the Board of Directors and Shareholders. Because it affects fairness for other stakeholders, the author intends to discuss in this article to find a link between the Board of Directors who are also Shareholders in running the company and aspects of fairness for other stakeholders. The purpose of writing this article is to examine the position of the Board of Directors who is also as Shareholders in fairness theory, while the orientation of this analysis is in the form of theoretical and comparative approaches. The need for intervention from regulators, legislators to make adjustments to the provisions in order to ensure fairness for all stakeholders is realized and distributed.

KEYWORDS: Corporate; Justice; Directors; Shareholders, Stakeholders

I. INTRODUCTION

The company in this case is a limited liability company, is a legal entity that is formed by capital partnership, established under agreement, carries out business activities with authorized capital that is entirely divided into shares, and meets the requirements established by laws and implementing regulations, is owned by 2 (two) or more people, and in its development traditionally the shareholders enjoy the profit of the company, The company is regulated, directed as an organization with the aim of providing profits to shareholders.Since the 1970s, there has been a broader discourse on how companies benefit social prosperity through the value of profit-making goals that have been replaced by Anglo American legal theory and economic theories that understand the main purpose of companies is to provide the greatest benefit to shareholders. There is a social norm about the primacy of shareholders that dominates the theory and practice of modern capitalism. Concentrating on optimizing the return on profits for shareholders is stated as rational, efficient, and a way to achieve social good more broadly.[1]

In the 1980s financial institutions became investors who maximized profits as their main goal. It increases the attention of investors who are well informed of the company to investors who pressure the board of directors to get a high return on the company's tangible assets, makes the company's orientation on the search for maximum profit in the short term, by cutting production costs, outsourcing, efficiency, all done to meet the expectations of revenue from the market. In today's era that financializes intensely the return on capital that exceeds economic growth in business activities in a country, business owners and employers, senior executives, make up the richest population of 1% accumulating their total wealth, while the percentage of the population with a lower class, as well as a middle class that stagnates or even falls into a lower class, becomes an economic inequality, The "giant companies" that dominate the market by winning the business competition have grown and reaped profits for their victories, can be attributed to a greater decline in the share of the workforce.

In the United States, The United Kingdom, and France, in order to carry out obligations on social and environmental matters are left to the director. In particular, the 2006 Companies Act in the UK section 172 provides that administrators are obliged to the success of the company and the benefit of its members to take into account the impact of its decisions on the interests of workers and other parties. This provision follows a wave of constituent laws in different American states that allow or require, depending on the case, the directors of companies to consider the interests of different stakeholders. The lack of social responsibility and the lack of democracy of a company in implementing good corporate governance can dramatically hinder potential functions that are open to some people (who are usually employees of the company) who generate unfair profits to others (usually owners of capital). It is the idea of equal participation in employment agreements that provide rules for productive activities and then makes society work together for mutual benefit, and especially with the idea of democratic equality in the economic sphere.

It is fair for workers to participate in accessing the company's assets and participate in the decision-making process within the company and use it to achieve some of its functions and rights, this is to ensure that no one, even if it has a special relationship (i.e. ownership) in the context of corporate stewardship, believes the freedom to choose substantially is for the success of the corporate entity itself.[2]

In addition to the theory of justice according to Rawls developed a thought about 'Institutional perfectionism' which argues that the primacy of civil and political liberties will enter the workplace, consisting of the freedom to adhere to one's political beliefs and religious beliefs with the only restrictions not to make the exercise of the freedom of others impossible. Therefore, this thinking strongly maintains that company regulations should protect employees from any requirement to support the political opinions of employers or to serve them. Democratic equality, as a sufficient criterion for the equitable distribution of abilities (Anderson 1999), is in stark contrast to the arbitrary transfer of administrative authority to political subordination and control of employees by their employers. Regarding the ability to creatively innovate one's work, we understand it as employee entrepreneurship. The ability of individuals to innovate in the work process creatively can be imagined as working together with the complementary abilities of others. That is, they help to achieve interdependent functions in the domain of professional realization, and even more so they may serve to carry out the production of goods and services that are prerequisites for obtaining consumers.

If there are shareholders who are in the composition of the board of directors of a company then this could have bad implications for the circumstances of making important decisions that will be oriented towards the full desire to fully protect the intangible assets i.e. the value of the shares owned by themselves, in the presence of other stakeholders who are sacrificed or get unfair treatment for the social contract carried out, Justice will not be felt by other stakeholders, especially if there is a change in the political conditions governing the institution, the decisions of the board of directors lead to be pro-social or con-social. The implication is that in the future, the company is likely to maximize revenue and will intersect with the law, if a uniform board of directors directs to good corporate governance, and there is an intervention from government policy on regulations governing the prohibition of the position of the board of directors which is also as a shareholder so as not to become a conflict of interest in the ability of the board of directors to drive the direction of the company to maximum profit or increase the values of the company's shareholders who are objective towards the fairness of other stakeholders.

II. METHODS

The method used in this study is a normative method with a conceptual approach related to Directors who are also shareholders and aspects of justice for stakeholders. and will be analyzed by content analysis.

III. RESULTS AND DISCUSSION

a. Rationality Towards Priorities for Shareholders

"Few trends could so thoroughly undermine the foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible". Based on Friedman's statement above a society that is free to accept officers from socially responsible companies rather than giving as much money as possible to shareholders, if discussed more deeply Friedman explained that the duty of the management is to serve the different interests of the shareholders with different purposes, this increases the mistakes of the management or even clashes with the wealth of the shareholders. To that end, the task of the board of directors is to organize, grow and protect assets rather than owners/shareholders. Shareholders are owners who are also external parties of the company.

Shareholders are one of the stakeholders in the company, having influence over the board of directors, employees and managers are supposed to work to maximize the wealth of shareholders. The maximum wealth is obtained if long-term sustainability is achieved.Shareholders invest by providing funds / capital to the company, therefore every asset purchased by the shareholder is property for the shareholder, then the law regulates the contractual rights owned by workers and suppliers are ranked higher than shareholders, therefore shareholders have residual claims, which means that shareholders are only entitled to residual values if the company Being in a state of injury once all contractual claims with other parties are met, then the administrators are responsible for focusing on maximizing shareholders' assets, this will ensure the company to survive in the long term.

Duration owned by management to maximize shareholder wealth will provide benefits for other stakeholders, for example in the process an increase in sales in a company will correctly provide profits. Then in labor efficiency such as flexible working time and increasing the competence of its key employees will improve the performance of company management and provide improved performance of staff who are happy in doing work. In several different jurisdictions politicians equate capital market performance with interest in suffrage.[3]

b. Conflict of Interest for Shareholders

In order to get the greatest benefit for shareholders has its technical consequences such as the absence of responsibility, personal interests embedded in priorities for shareholders, scandals within the company, excessive carelessness can also have a negative

impact on society. Identification of directors who have a conflict of interest for shareholder purposes can have negative repercussions on the company in the long run, appointed directors and alignment in the provision of incentives, may result in decision-making to maximize shareholder value. It is not only economic interests that direct the interaction of the human being, but also from politics, ideology, legal systems, social conventions, modes in thought and others. Therefore, the focus on shareholders' wealth is seen with simplicity but fails if it is incorporated into the complex world of corporations.

The control function of the board of directors / board of directors is as a differentiator from social entities, the duty of the board of directors is to distinguish the corporate entity, not for totality to shareholders, as a control function, which is regulated in law consisting of different entities between shareholders as owners and instead of the right of shareholders to regulate the running of the company, directors who exercise control over long-term sustainability.

Other stakeholders such as taxpayers, employees also invest in the company without collateral for being returned in the form of profits, just like shareholders, it can be argued that not only shareholders have risks in the company, taxpayers and employees should also be considered as having risks in the company.

c. John Rawls' Theory of Justice

The principle of justice is determined through the agreement process, paying attention to cooperation between individuals, minimal morality, a sense of justice, rational choice, and the main thing that everyone wants (primary goods).

The definition of Corporate Governance and the strategy used during the Kantian period suggests that because all stakeholders do not pursue the company's goals but also lead to themselves, their rights and interests also need to be pursued together with the company's goals, and should participate in decisions that affect their interests.

The implications of policies made in companies have a direct impact, if a balance in governance is needed then fairness must trump efficiency, disputing the idea that companies should put efficiency first. Can use the concept of fiduciary obligations as a model that balances a variety of different interests, remapping the distributive consequences of the placement of authority from a company.

In the case of a constitutional agreement in the field of economics made by a country, then this can be equated with a social contract at the macro level, and for those operating in the level of interaction in the business practices carried out can be said to be a social contract at the micro level. The balance between the macro and micro social contracts, must be fulfilled simultaneously, is regulated by each of its rule-makers, in order to achieve justice.

Rawls stated that the main subject of justice is the basic structure of society, or rather, the way in which large social institutions channel fundamental rights and tasks to determine the distribution of the benefits of social cooperation, related institutions to the basic structure of society in distributing certain primary social goods. The proposal from Rawls is the original position as a model choice of principles that govern how basic institutions distribute the main goods needed. This model is able to solve some of the same problems, so this institution must be seen equally as an institution determined at the beginning to cooperate in producing social surplus. This is formulated so that it can be equally seen as usual who prefers the primary goods, depicted with an illustration of a person who is behind the veil of ignorance, where that person's perspective is the same as that of others.

These institutions are limited within the scope of justice and law of the society which so far institutions provide the main goods needed as a tool in cooperative activities in society, at the same time have the authority to impose compliance with the law with their principles into the political community governed by them.[4]

The rules and practices in the association of private enterprises are outside the scope of the application of the principles of justice. Even associations guarantee people's freedom of exit which is done voluntarily and not by coercion. Rawls considers that corporations are equal to insignificance in the process of distributing the main social goods as long as they are seen as a free association, from which people are free to go out if they are not satisfied in terms of pursuing their ideals/ happiness in life, as subjects of the general state of the economy. This makes the sense that the principle in the use of corporate governance is part of the social contract of society. But for the social contract in macro in practice it is contrary to the microsocial contract that we have already discussed.

d. Clash of Norms in Priorities/ Primacy for Shareholders

A reference to regulatory ecology, to show the fact that the law applies in a broader system of regulatory coercion. Rules involve measures to force or form habits that are implemented in law, which is understood as the rule of law. The law can make regulations with power with sources from various non-legal sources, such as from social, economic, incentive, customary, cultural sanctions. The polycentric approach to rules states that markets and social norms have an impact in regulations unlike the law, where it forces its actors in various ways. Non-compliance with laws, social norms and markets not only forces actors separately, but interacts with each other, which forms an ecology of regulation.

Complex power relations are the result of acts of respect for the rules. Seeing regulation as an ecology or system allowing consideration of the complexity of factors, both illegal and legal, that increase respect for a rule, a country is a rule-maker, although one of the most important, in a system where other rules, such as markets and societies, also wield influence.

Lessig proposed a system with 4 (four) forms of regulation: law, norms, market and architecture. Lessig defines law as a positive law, rules announced and enforced by a state. He defined social norms as normative coercion imposed not through the organized and centralized actions of a country, but through sanctions imposed by members of the community who wore them to each other. Like legal sanctions, sanctions from social norms are imposed after the incident, but unlike laws, social norms are imposed by a community not a state. A market that forces through prices, for example price, cost and risk, cannot be separated from basic factors such as norms, labor, and natural resource commodities. The market is forcing through regulated activity. Although payments on profits and resources can be distinguished, or where the risk is potential future financial losses, the obligation to force it involves market activity taken and stays as long as the actor is still in the market.[5]

The coercive architecture imposed by the physical world. It is a form of rule relating to materiality, such as the place where natural resources are located, or the coercion of buildings made by humans, including the creation of technology and communication that can lead to cross-border movement of capital.

Companies as agents that are obedient to coercion or forms of avoidance are always evolving, markets and architectures tend to force as soon as possible, while laws and social norms after the fact that occur. Still, companies can immediately feel the coercion of social or legal norms quickly, but are free from sanctions that may follow after the facts. Making coercive regulations subjective. For example, a changing labor market can cause stock prices to change faster/ fluctuate. When the law tries to coerce through self-deterrence, and ignores the combined forces of the market, social norms and the material nature of services or goods, it is unlikely to be effective. Regulation that works with the powers of other forms of regulation is legal, law is the most effective when created to power regulation from other forms of regulation, market, social norms and architecture. But if the law-shaper makes it wrong, it will make the law ineffective or work in the opposite way from the intended productivity.

A company with shareholders is a legal form that is called the the most brilliant legal invention by human beings. It provides an intent for entrepreneurs to finance business projects that no bank will fund, and for investors to channel their capital into projects without having to be involved in running their business. With limited liability investors will incur losses if the project does not perform well to the extent that the capital provided, they do not have access to creditors, which means they can re-raise and profit from their investments only through the possibilities provided by the company law offered to them, namely through dividends or by selling their shares. The incorporation of a corporate form on the basis of limited liability is obvious, but historically separate from the form of an organization that changed to serve the purposes of society.

Corporate law has provided a legal infrastructure for decision-making within the company, with decision-making level rules within the company through general meetings, board of directors meetings and senior management meetings. Through its rules in making decisions, the law has played an important role in supporting and voting for shareholders. Varying in different jurisdictions, shareholders have the competence to make or influence critical corporate decisions and provide boards with incentives to focus on the profits they can make through dividend distributions and through the sale of their shares at higher prices. Thus as a result of the interaction between corporate law and priority norms for shareholders, the general sense of corporate objectives has undergone even more narrow.[6]

e. Doctrine of Self-Dealing Transactions

A self-dealing transaction carried out directly or indirectly by the board of directors with his company is a manifestation of the interests attached to the transaction itself, this transaction is contrary to the principles of fiduciary duty and duty of care and loyalty of the board of directors, if in this case the shareholders both the majority and the minority are the directors themselves if they are associated with the discussion of priorities for shareholders, then most likely the clash of norms and deviations from the wishes of shareholders can be fulfilled easily, this is a motive for the board of directors if we use this theory of transactions for ourselves, this self-dealing transaction enters into a conflicting transaction of interest, namely in this transaction there is an interest on the part of the board of directors to maximize the value of the wealth of the shares owned, This transaction is permitted, but it must be proven that the transaction was carried out fairly and bussinesslike.

The modern criterion for a *self-dealing* transaction to be justified by sorting out case by case. Then the following criteria can be used:

1. The transactions carried out are fair to the company and can be proven;
2. Disclosure of transactions that have the interests of the board of directors;
3. Does not cause:

a. Deceit, fraud, scam;
b. Unworthy results;
c. Waste of the company's assets.

4. If it has been ratified by shareholders (in good faith and independent) after being given informed consent;
5. Approved by members of the board of directors who are free of interest, in reality the board of directors is the agent of the shareholders to provide benefits for shareholders;
6. It is explicitly mentioned in the company's articles of association and is possible.

If it is attributed to the theme of this article some criteria cannot be met because the owner and the person who governs the company are the same person, meaning that this action cannot be justified according to company law, it is clearly seen that transactions carried out by the directors can immediately provide great benefits if carried out in the short or long term, this inequality can provide injustice to other stakeholders due to the great power that owned by the board of directors who are also shareholders.[7]

IV. CONCLUSIONS

Rawls's theory of justice which defines justice under the social contract to achieve justice must be implemented simultaneously both macro and micro, institutionally a company is obliged to apply corporate law based on jurisdiction, although there is no prohibition on both the positions of directors and shareholders being held by the same person, but ethically it is not appropriate to do so. Changes that occur in corporate law, the science and logic behind group decision-making, and the implications that may arise in the future from changes in the definition of directors and the value of shareholders should be a concern for corporate law and must determine the composition, regulations, clear boundaries of the management and shareholders of a company. The need for a state to macro-regulate the social contract for the implementation of the composition of the board of directors which contains a prohibition for shareholders to become directors, demands a legal update in governing laws, given the existence of other interests owned by other stakeholders in a corporate institution.

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