

The Rights of The Shareholders Minority in a Company: A Critical Analysis

Ahmad Aswar Rowa¹ Anwar Borahima² A. Badriyah Rifai³ Abdullang Marlang³

1.PhD student, Postgraduate Hasanuddin University

2.Professor on Legal Science, Faculty of Law Hasanuddin University, as a Promotor

3.Professor on Legal Science, Faculty of Law Hasanuddin University, as a Co-Promotor

Abstract

In an economic area, the national economy is operated to create prosperity of the society equally. To reach the purpose, it is needed supporting facilities such as “legal order” to encourage, to drive, and to control all development activities in the economic area. Basically, the first law of PT was the Law No. 1 of 1995 Concerning Limited Liability Companies. It has been changed to the Law No. 40 of 2007 Concerning Limited Liability Companies. The protection of the rights of the shareholders minority can be found in article 61 (1) (2), article 62 (1) (2), article 138 (1), (2), (3), (4), (5), (6), and article 146 (1), (2), (6) of the Law No. 40 of 2007 on PT, as well as in various regulation. The purpose of it indeed is to protect the shareholders minority from the action of the shareholders majority or the company. The result of the research showed that some variables (indicators) of the rights of the shareholders minority showed that the indicators can be seen in the forms of the rights of the shareholders minority are the rights of the company’s operating, the rights of accessing information of the company, the rights of a fair price, and the personal rights.

Keywords: the Rights of the Shareholders Minority and the Company

1. Introduction

In an economic area, the national economy is operated to create prosperity of the society equally. To reach the purpose, it is needed supporting facilities such as “legal order” to encourage, to drive, and to control all development activities in the economic area. One of legal materials that is needed to support the economic development is creating Limited Liability Companies (hereinafter referred to PT). Basically, the first law of PT was the Law No. 1 of 1995 Concerning Limited Liability Companies. It has been changed to the Law No. 40 of 2007 Concerning Limited Liability Companies. The Law is expected to be on a basis of economic democracy with principles of community, efficiency, justice, sustainability, environmental awareness, independence and safeguards for balanced progress and national economic unity pursuant to Pancasila and the 1945 Constitution of the Republic of Indonesia (hereinafter referred to UUD 1945).¹

Enacting the Law on PT is raising a glimmer of hope to the holders that an existency of PT as a business entity has had a legal basis adequately.² As it is known before the independence, the Law on PT referred to the Trade Law Code (hereinafter referred to KUHD). In the KUHD, it was governed in article 35 and article 36 and then replaced by the Law No. 4 of 1971 on the Amandement of Article 54 KUHD. The amandement was the rights to vote for the shareholders. It was previously that there was limitation to the rights of vote. However, it has been no limited in the new Law of PT. The Law states *one share one vote*.³

The law on PT shall protect the interest of the shareholders, creditors, other parties, and/or the PT’s interest itself. This is pivotal due to in fact that there is possibility to be a conflict amongst the shareholders and PT, or conflict between the shareholders minority and the shareholders majority. The conflict of interest of the shareholders minority is given a certain authority such as the rights to ask the general meeting of shareholders (hereinafter referred to RUPS) and the rights to do controlling of the the company’s working by enacting of the Head of the District Court.

According to I.G. Rai Widjaya, in order to avoid unfair competition due to accumulation of economic power in small group economic actors and to avoid monopoly and monopsony in all forms that is harmful the society, the Law of PT governs the requirements and procedures of merger, consolidation, acquisition, and demerger of the company. In terms of protecting the creditor and third party’s interest, it is also enacting the requirements of reducing the capital, rebuying the share and dissolving of the company, and protecting the shareholders minority. It must be considered to protect also the public interest and the company’s interest itself such as the task, authority, and responsibility of the company.⁴

The rights of the shareholders particular the shareholders minority shall be protected. The shareholders are able to do their rights through an adequate procedure enacted by the company to the the shareholders majority

¹ See C.S.T. Kansil and Christine S.T. Kansil, 2001, *Hukum Perusahaan Indonesia (Aspek Hukum dalam Ekonomi)*, Pradnya Paramita, Jakarta. See also Sentosa Sembiring, 2006, *Hukum Perusahaan tentang Perseroan Terbatas*, CV. Nuansa Aulia, Bandung, p. 14.

² Ibid. p. 15.

³ Ibid.

⁴ I.G. Rai, Widjaya, 2002, *Hukum Perusahaan*, Megapoin, Jakarta, p. 189.

as stipulated in the Law on PT. In terms of it, the guarantee of legal protection can be seen RUPS's mechanism.¹ The protection of the rights of the shareholders minority can be found in article 61 (1) (2), article 62 (1) (2), article 138 (1), (2), (3), (4), (5), (6), 97 (6), and article 146 (1), (2), (6) of the Law No. 40 of 2007 on PT, as well as in various regulation. The purpose of it indeed is to protect the shareholders minority from the action of the shareholders majority or the company.²

The rights of the shareholders minority must be in line with good corporate governance (hereinafter referred to GCG) and some principle of fairness, transparency, accountability, and responsibility. Implementation of good corporate governance in the economic world nowadays must be applied by the companies in order to exist in a global competition. The implementation then must have strategic purposes. The purposes are:

1. To develop and increase the value of the company;
2. To manage resources and risks efficient and efficiency;
3. To increase discipline and responsibility of the company's organs in order to keep the interests of the shareholders and the stakeholders of the company;
4. To improve the company's contribution to the national economy;
5. To improve the national's investment; and
6. To succeed the program of privatization of the state-owned companies.³

Demanding of GCG is an interesting issue to attract foreign investor into market share. Therefore, if GCG can be implemented very well, it indicates that there is well treatment to the investors.⁴ GCG definitively is a system of regulation and control of the company to create added value of the stakeholders. The concept of GCG in Indonesia can be interpreted as a concept of a good corporate management. There are 2 (two) important factors in this concept; first, the importance of the shareholders to access a right and an accurate information. And second, the obligation of the company to disclosure accurately and transparently all information related to the company, ownership, and stakeholder.⁵ GCG generally is capability of one state to attract the foreign investor. In fact, they will avoid to invest their money if one state has no fair and accurate GCG.⁶

Corporate governance effectively must give appropriate incentive to the board of commissioners and the board of directors to reach the purpose of the company in order to find out the interest of the company itself and the shareholders. The system must also facilitate an effective control of the company to push it to use the company's resources efficiently.⁷ Basically, the basic philosophy hold by the shareholders when they invest their money is to get profit maximally. One ways to get it is controlling the management of the company efficient and effective. Therefore, the most important things to be considered is corporate sustainability. In terms of it, the principles of GCG play an important role as a tool to count the quality of the company.⁸

The legal protection of the shareholders minority as mentioned above is a new innovation in Indonesian Laws on PT (the Law No. 40 of 2007). However, the form of legal protection as stipulated in the Law has no shown the legal protection to the shareholders minority perfectly due to the protection and the principles of GCG are difficult to be applied in Indonesia. It is because the interest between the shareholders minority and majority is sometimes against one to another.⁹ In the context of the company's management when the dispute (civil cases) taking place between the shareholders minority and majority, the shareholders minority will be acted as a plaintiff and the shareholders majority will be acted as a defendant.

The focus of this article therefore is to address the rights of the shareholders minority in practice based on the cases taking place in City of Palu, Central Sulawesi.

2. Research's Method

The type's research is a normative and an empirical legal research to recite the rules in positive law.¹⁰ The research's approach will be used to elaborate and explore all possibilities data either through statute and conceptual approaches or empirical approach. The statute approach is done by examining Indonesian laws and regulations concerning to the legal issues at hand, while the conceptual approach is resulted from the views and doctrines that developed in the jurisprudence (legal science). The empirical approach itself is to see how the law

¹ Munir Fuady, 2005, *Perlindungan Pemegang Saham Minoritas*, CV. Utomo, Bandung, p. 1.

² See the Law No. 40 of 2007 on PT.

³ See Ridwan Khairandy and Camelia Malik, 2007, *Good Corporate Governance: Perkembangan Pemikiran dan Implementasinya di Indonesia dalam Perspektif Hukum*, Kreasi Total Media, Yogyakarta, p. 2.

⁴ Balfas, Hamud, M, 2006, *Hukum Pasar Modal Indonesia*, PT Tatanusa, Jakarta, p. 231.

⁵ Ridwan Khairandy and Camelia Malik, *op.cit*, p. 2.

⁶ Jeswald W. Salacuse, "Corporate Governance in the New Country", *Company Lawyer*, Volume 25 (3), 2004, p. 69.

⁷ Jeremy Charles Vanderloo, "Encouraging Corporate Governance for the Closely Held Musiness" *Mississippi College Law Review*, Volume 24, Fall 2004, p. 40.

⁸ Indra Surya and Ivan Yustiavandana, 2006, *Penerapan Good Corporate Governance*, Kencana Prenada Media Group, Jakarta, p. 70.

⁹ Jeswald W. Salacuse, *op.cit*, p. 89.

¹⁰ See J. Ibrahim, 2008, *Theory and Method of Normative Legal Research*, Bayu Media Publishing, Malang.

working to the issues theoretically.

Sources of legal materials used in this research are the primary and secondary legal materials. The primary legal materials are authoritative in the form of legislation. The secondary legal materials further are materials either published or unpublished such as some literature (books), legal journals, the law scientific papers and articles.¹ The empirical data is taken from state-owned and private-owned enterprises. Those enterprises are PT Palu Graha Sejahtera and PT Haycarb Palu Mitra.

Research's analysis is qualitative analysis. It means that content of the used materials in the research will interpret the law based on the theories, principles of law, and the how the law working in that issue. It is then presented in a descriptive form that provides an overview of the right of minority shareholders.

3. The Rights of the Shareholders Minority

The rights of the shareholders minority of share is a moving object and is given the rights of ownership to the holder in which every shareholder has the rights to sue (file) the company in front of the District Court if the company has created losses to the shareholders. Some the company's action are unfair decision and unreasonable reason of RUPS, directors, and commissioners. The file can be sent to the District Court where the company domicile.

Based on this research, some variables (indicators) of the rights of the shareholders minority showed that the indicators can be seen in the forms of the rights of the shareholders minority in the context of the rights of the company's operating. The regulation of it is found out in article 146 of the Law of PT. the article states that "District Courts may wind up Companies on (a). a petition from the public prosecutors' office on the grounds that the Company has breached the public interest or the Company has committed actions which breach legislative regulations; (b) a petition from interested parties on the grounds that there is a legal defect in the deed of establishment; (c). a petition from shareholders, the Board of Directors, or the Board of Commissioners on the grounds that it is not possible for the Company to continue. Therefore, the shareholders minority is possible to do "objection" to the company for the company's action without approval or mis-management of the company conducted by the company.

Another indicator raised in this research was the shareholders minority to access information of the company as stipulated in the article 138 of the Law on PT. The rights of it was the companies may be inspected with the purpose of obtaining data or information in the event of suspicion that the Company has committed acts which break the law and are detrimental to shareholders or third parties; or members of the Board of Directors or Board of Commissioners commit acts which break the law and are detrimental to the Company or shareholders or third parties. This rights is given by the Law to guarantee that those rights are implemented by the company.

The shareholders minority rights also can be seen in article 62 of the Law on PT. it states that "Each shareholder is entitled to request the Company that the shareholder's shares be bought at a fair price if the shareholder concerned does not approve of actions by the Company which harm that shareholder or the Company, in the form of:

- a. amendments of the articles of association;
- b. assignment or securing of assets of the Company which have a value of more than 50% (fifty per cent) of the Company's net assets; or
- c. Mergers, Consolidations, Acquisitions, or Demergers".

In the event that the shares requested to be bought as contemplated in paragraph (1) exceeds the limit on re-purchase of shares by the Company as contemplated in Article 37 paragraph (1) subparagraph b, the Company must endeavour that the remaining shares be bought by a third party.

Related to the personal rights, it has been governed in article 61 of the Law on PT. it states that Each shareholder is entitled to file suit against the Company in the district court if the shareholder has been harmed by any action of the Company considered unfair and unreasonable as a result of a resolution of the RUPS, Board of Directors and/or Board of Commissioners. The suits contemplated must be filed with the district court whose jurisdiction covers the Company's domicile.

Those rights of the shareholders minority as explained above basically is bearing in mind of the article 33 of the Indonesia Constitution as legal norm. The article then is in line with the principles of the GCG such as fairness, accountability, and transparency. As the legal norm, the implementation of the obligation of the company must fulfill its policy and control factors in management of the company.

The objects of the shareholders minority of the research can be seen in the PT Haycarb Palu Mitra and PT. Palu Graha Sejahtera.

¹ See Peter Mahmud Marzuki, 2007, *Legal Reserach*, Kencana Prenada Media Group, Jakarta.

3.1 PT Haycarb Palu Mitra

The rights of company (PT Haycarb Palu Mitra) can be seen in some variables. Those variables are put in the rights of company operating (Article 146 The Law No. 40 of 2007), the rights of access of company information (Article 138 The Law No. 40 of 2007), and the rights of fair treatment (Article 62 The Law No. 40 of 2007).

The rights of company operating as mentioned in Article 146 The Law No. 40 of 2007 basically is right given by the Law to ask the District Court to wind up Companies on liquidating. Therefore, the shareholders minority is able to state an objection to the Company regarding whether there is an approval of company's management or not. The rights of the company operating to the Deed of Company's Establishment can be seen in Table 1 (above), as followings:

Table 1
The Rights of Company's Operating to the Deed of Company's Establishment

PT Haycarb Palu Mitra	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	4	50,00	4	50,00	8
The shareholders minority	3	60,00	2	40,00	5
S u m	7	53,84	6	46,15	13

Source: Primer Data, 2016

Table 1 indicated that the company's operating rights was done by the Board of Directors and the Board of Commissioners (8 persons). 4 out of 8 stated done properly (50 %) and other stated "No" (50 %). However, it was different in the context of the shareholders minority (5 persons). 3 out of 5 stated "Done" (60 %) and other stated "No" (40 %). It can be concluded then that the company had operated its company in accordance with the deed of the establishment of the company (valid and null).

In the line with the company's operating to the company's activities, the company treated differently. Table 2 showed that:

Table 2
The Rights of Company's Operating to the Company's Business

PT Haycarb Palu Mitra	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	5	62,50	3	37,50	8
The shareholders minority	2	40,00	3	60,00	5
S u m	7	53,85	6	46,15	13

Source: Primer Data, 2016

Table 2 states that the Rights of Company's Operating to the Company's Business in the Board of Directors and the Board of Commissioners perspectives indicated that it was done (5 out of 8 respondents = 62,50 %) and other stated "No" (37,50 %). It was different in the shareholders minority perspectives. 2 out of 5 stated "Done" (40 %) and other was "No" (60 %). It can be concluded that the company operates its company based on its Vision and Mission to protect the rights of the shareholders minority as stated in article 146 of the Law.

Related to article 138 of the Law No. 40 of 2007 regarding the rights of access information of the company, the access information of the shareholders minority is addressed to facilitate their rights on information in order to protect their rights. Table 3 then stipulated the rights of access information of the company.

Table 3
The Rights of Shareholders Minority to Access Information of The Company

PT Haycarb Palu Mitra	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	3	37,50	5	62,50	8
The shareholders minority	4	80,00	1	20,00	5
S u m	7	43,75	6	46,15	13

Source: Primer Data, 2016

Table 3 indicated that the rights of shareholders minority to access information of the company in the context of the Board of Directors and the Board of Commissioners showed that 3 out of 8 persons stated "Done = 37, 50 %", and others stated "No = 62,50%". However, it was different to the shareholders minority in which 4 persons stated also "Done = 80 %" and others stated "No = 20%". It can be concluded that the rights of shareholders minority to access information of the company had worked properly.

Related to the rights of a fair treatment as stipulated in Article 62 the Law No. 40 of 2007, "Each shareholder is entitled to request the Company that the shareholder's shares be bought at a fair price if the shareholder concerned does not approve of actions by the Company which harm that shareholder or the Company,

in the form of amendments of the articles of association; assignment or securing of assets of the Company which have a value of more than 50% (fifty per cent) of the Company's net assets; or Mergers, Consolidations, Acquisitions, or Demergers". The net asset means that it must be legalized in last 6 (six) months.

The rights of the shareholders minority to ascertain a fair treatment can be seen in table 4, as followings:

Table 4
The Rights Shareholders Minority to ascertain a Fair treatment

PT Haycarb Palu Mitra	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	3	37,50	5	62,50	8
The shareholders minority	2	40,00	3	60,00	5
S u m	5	43,75	8	46,15	13

Source: Primer Data, 2016

Table 4 indicated that the rights of shareholders minority to get a fair treatment in the context of the Board of Directors and the Board of Commissioners showed that 3 out of 8 persons stated "Done = 37, 50 %", and others stated "No= 62,50%. However, it was similar to the shareholders minority in which 2 persons stated also "Done = 40 %" and others stated "No = 60%. It can be concluded that the rights of shareholders minority to get a fair treatment had not worked properly.

3.2 PT Palu Graha Sejahtera

The rights of company (PT Palu Graha Sejahtera) can be seen in some variables. Those variables are put in the rights of company operating (Article 146 The Law No. 40 of 2007), the rights of access of company information (Article 138 The Law No. 40 of 2007), and the rights of fair treatment (Article 62 The Law No. 40 of 2007).

The rights of company operating as mentioned in Article 146 The Law No. 40 of 2007 basically is right given by the Law to ask the District Court to wind up Companies on liquidating. Therefore, the shareholders minority is able to state an objection to the Company regarding whether there is an approval of company's management or not. The rights of the company operating to the Deed of Company's Establishment can be seen in Table 1 (above), as followings:

Table 5
The Rights of Company's Operating to the Deed of Company's Establishment

PT Palu Graha Sejahtera	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	3	60,00	2	40,00	5
The shareholders minority	2	66,66	1	33,33	3
S u m	5	62,50	3	37,50	8

Source: Primer Data, 2016

Table 5 indicated that the company's operating rights was done by the Board of Directors and the Board of Commissioners (8 persons). 3 out of 5 stated done properly (60 %) and other stated "No" (40 %). However, it was similar in the context of the shareholders minority (5 persons). 2 out of 3 stated "Done" (66,66 %) and other stated "No" (33,33 %). It can be concluded then that the company had operated its company in accordance with the deed of the establishment of the company (valid and null).

In the line with the company's operating to the company's activities, the company treated differently. Table 6 showed that:

Table 6
The Rights of Company's Operating to the Company's Business

PT Palu Graha Sejahtera	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	4	80,00	1	20,00	5
The shareholders minority	2	66,66	1	33,33	3
S u m	5	63,33	2	36,66	8

Source: Primer Data, 2016

Table 6 states that the Rights of Company's Operating to the Company's Business in the Board of Directors and the Board of Commissioners perspectives indicated that it was done (4 out of 5 respondents = 80 %) and other stated "No" (20 %). It was no different in the shareholders minority perspectives. 2 out of 3 stated "Done" (66.66 %) and other was "No" (33.33 %). It can be concluded that the company operates its company based on its Vision and Mission to protect the rights of the shareholders minority as stated in article 146 of the Law.

Related to article 138 of the Law No. 40 of 2007 regarding the rights of access information of the

company, the access information of the shareholders minority is aimed to facilitate their rights on information in order to protect their rights. Table 7 then stipulated the rights of access information of the company.

Table 7
The Rights of Shareholders Minority to Access Information of The Company

PT Palu Graha Sejahtera	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	2	40,00	3	60,00	5
The shareholders minority	1	33,33	2	66,66	3
S u m	3	36,66	5	63,33	8

Source: Primer Data, 2016

Table 7 indicated that the rights of shareholders minority to access information of the company in the context of the Board of Directors and the Board of Commissioners showed that 2 out of 5 persons stated “Done = 40, 00 %”, and others stated “No= 60,00%. However, it was similar to the shareholders minority in which 1 persons stated “Done = 33.33 %” and others stated “No = 66.66%. It can be concluded that the rights of shareholders minority to access information of the company had no worked properly.

Related to the rights of a fair treatment as stipulated in Article 62 the Law No. 40 of 2007, “Each shareholder is entitled to request the Company that the shareholder’s shares be bought at a fair price if the shareholder concerned does not approve of actions by the Company which harm that shareholder or the Company, in the form of amendments of the articles of association; assignment or securing of assets of the Company which have a value of more than 50% (fifty per cent) of the Company’s net assets; or Mergers, Consolidations, Acquisitions, or Demergers”. The net asset means that it must be legalized in last 6 (six) months.

The rights of the shareholders minority to ascertain a fair treatment can be seen in table 8, as followings:

Table 8
The Rights Shareholders Minority to ascertain a Fair treatment

PT Palu Graha Sejahtera	Valid		Invalid		Total
	F	%	F	%	
the Board of Directors and the Board of Commissioners	3	75,00	2	25,00	5
The shareholders minority	2	66,66	1	33,33	3
S u m	5	70,83	3	29, 16	8

Source: Primer Data, 2016

Table 8 indicated that the rights of shareholders minority to get a fair treatment in the context of the Board of Directors and the Board of Commissioners showed that 3 out of 5 persons stated “Done = 75 %”, and others stated “No= 25%. However, it was similar to the shareholders minority in which 2 persons stated also “Done = 66.66 %” and others stated “No = 33.33%. It can be concluded that the rights of shareholders minority to get a fair treatment had worked properly.

Referring to the obligation of the company, both PT Haycarb Palu Mitra and PT. Palu Graha Sejahtera implement GCG in the form of fairness, transparency, and accountability. Most of them has been implemented in the company’s operating to protect the shareholders minority.

4. Conclusion

The protection of the rights of the shareholders minority can be found in article 61 (1) (2), article 62 (1) (2), article 138 (1), (2), (3), (4), (5), (6), and article 146 (1), (2), (6) of the Law No. 40 of 2007 on PT. In the forms of the rights of the shareholders minority, they are the rights of the company’s operating, the rights of accessing information of the company, and the rights of a fair treatment. In the context of implementation those rights, both PT. Palu Graha Sejahtera and PT Haycarb Palu Mitra have been implemented them. However, both companies have not dealt with them optimally.

Bibliography

- Balfas, Hamud, M, 2006, *Hukum Pasar Modal Indonesia*, PT Tatanusa, Jakarta.
 C.S.T. Kansil and Christine S.T. Kansil, 2001, *Hukum Perusahaan Indonesia (Aspek Hukum dalam Ekonomi)*, Pradnya Paramita, Jakarta.
 I.G. Rai, Widjaya, 2002, *Hukum Perusahaan*, Megapoin, Jakarta, .
 Indra Surya and Ivan Yustiavandana, 2006, *Penerapan Good Corporate Governance*, Kencana Prenada Media Group, Jakarta.
 J. Ibrahim, 2008, *Theory and Method of Normative Legal Research*, Bayu Media Publishing, Malang.
 Jeremy Charles Vanderloo, “Encouraging Corporate Governance for the Closely Held Musiness” *Mississippi College Law Review*, Volume 24, Fall 2004 40 :.

Jeswald W. Salacuse, "Corporate Governance in the New Country", *Company Lawyer*, Volume 25 (3), 2004 : 69.
Munir Fuady, 2005, *Perlindungan Pemegang Saham Minoritas*, CV. Utomo, Bandung.
Peter Mahmud Marzuki, 2007, *Legal Reserach*, Kencana Prenada Media Group, Jakarta.
Ridwan Khairandy and Camelia Malik, 2007, *Good Corporate Governance: Perkembangan Pemikiran dan Implementasinya di Indoesia dalam Perspektif Hukum*, Kreasi Total Media, Yogyakarta.
Sentosa Sembiring, 2006, *Hukum Perusahaan tentang Perseroan Terbatas*, CV. Nuansa Aulia, Bandung.