

PROTECTION OF MINORITY SHAREHOLDERS FROM FRAUD IN LIMITED LIABILITY COMPANY DIVIDEND DISTRIBUTION

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Abstract

This research investigates the potential fraudulent actions carried out by majority shareholders and other corporate organs in the context of stock distribution. The primary focus is on the continuity of practices that may disadvantage minority shareholders and undermine the legal protections they should receive. Majority shareholders, often wielding significant influence in the General Meeting of Shareholders (RUPS), may exploit their power to manipulate decisions related to stock distribution. The presence of a quorum that can be achieved without the participation of minority shareholders increases the risk of fraud in this process. The aim of this research is to identify various fraudulent actions that may occur in stock distribution by majority shareholders and related corporate organs. Using a legal analysis approach and case studies, this research also explores ways in which minority shareholders might prevent or respond to fraudulent actions. Furthermore, the research examines the extent to which Law No. 40 of 2007 concerning Limited Liability Companies (UU PT) provides a legal basis to prevent and respond to fraudulent actions in stock distribution. Practical implications of potential fraud are analyzed to provide recommendations that can strengthen legal protections for minority shareholders. This research is expected to contribute to a deeper understanding of the dynamics of fraud in stock distribution, outline the legal challenges faced by minority shareholders, and formulate concrete steps to prevent and respond to such fraud in companies.

1. INTRODUCTION

The company as a legal entity which is an alliance of capital is never free from problems. Problems in companies often arise from within the company and cause certain parties to feel disadvantaged or cheated. Parties who often feel aggrieved are minority shareholders,¹ this is because minority shareholders are one of the weak parties in the

¹ Dwi Tatak Subagiyo, "Perlindungan Hukum Pemegang Saham Minoritas Akibat Perbuatan Melawan Hukum Direksi Menurut Undang-Undang Perseroan Terbatas," *Perspektif* 20, no. 1 (January 2015): 52, <https://doi.org/10.30742/perspektif.v20i1.122>.

company. Share ownership in a company is a proof of one's ownership in the company.² This indicates that a person's ownership in a company can be measured by the number of shares owned. The greater the shares owned by a person, the greater his influence in a company will also be.

Majority shareholders in the implementation of the company's business activities will always receive protection within the General Meeting of Shareholders (GMS).³ This is because although the resolution resolved within the GMS is not unanimous, the decision to be taken is the majority decision. Even so, the decision does not necessarily always follow the decision of the majority shareholders, but must also fulfil the quorum determined by Law No. 40 of 2007 concerning Limited Liability Company (hereinafter referred to as "UU PT"). This protection from the UU PT aims to provide balance and protection for minority shareholders. This protection in the form of a quorum within its implementation still contain flaws, this is because this quorum protection can only be implemented in the event that minority shareholders do not own shares exceeding the quorum that has been regulated in the UU PT.

Minority shareholders as the weaker party in the company also still have rights that are comparable to other shareholders. As explained in Article 52 paragraph (1) of the UU PT, shares authorize their owners to attend and vote in the GMS, receive dividend payments and the remaining assets from liquidation, and exercise other powers granted by the UU PT. It is very clear that a shareholder is authorized to receive dividends distributed by the company without exception and does not distinguish between minority shareholders and majority holders. The authority of each shareholder should be obtained with justice and without any interference from other parties, but in the implementation of dividend distribution there are limited liability company organs that are also involved. This is because within a limited liability company there are 3 main organs, namely, members of the Board of Directors, members of the Board of Commissioners, and GMS, all of which play an important role in dividend distribution.

The distribution of dividends in Article 71 of the UU PT can be carried out after the obtainment of GMS approval in relation to the annual report prepared by the Board of Directors which have been reviewed by the Board of Commissioners. Therefore, the distribution of dividends is based on the approval of the GMS, but the GMS will always be dominated by the majority shareholders. The quorum required for the annual GMS is as set out in Article 86 paragraph (1) of the UU PT where the required quorum is more than ½ of the total number of shares. The implementation of this GMS can take place in the absence of minority shareholders, which can lead to fraud in dividend distribution. The majority shareholder as the controller in the GMS can cooperate with the Board of Directors and also the Board of Commissioners in the implementation of dividends. Although the Board of Directors has the authority and responsibility to carry out the GMS preceded by the invitation of the GMS as stipulated in Article 79 of the UU PT, if the Board of Directors commits an unlawful act and does not make a real invitation, it will be difficult for minority shareholders to prove it. This is because the majority shareholder can easily state that the invitation has been delivered and state that the minority shareholder is negligent in

² Ni Luh Dwik Suryacahyani Gunadi and Jose Widyatama, "Perhitungan Sebagai Seorang Investor Saham Atas Besaran Pajak Yang Harus Dibayarkan Kepada Negara," *Jurnal Locus Delicti* 2, no. 1 (April 2021): 15, <https://doi.org/10.23887/jld.v2i1.455>.

³ Hendy Martin Butar-Butar, Budiman N.D.P Sinaga, and Tulus Siambaton, "Perlindungan Hukum Terhadap Pemegang Saham Minoritas Pada Perusahaan Terbuka," *Patik: Jurnal Hukum* 7, no. 2 (August 2018): 139, <https://ejournal.uhn.ac.id/index.php/patik/article/view/290>.

responding to the GMS invitation. This cooperative action by the majority shareholders, members of the Board of Directors and members of the Board of Commissioners has covered all organs of a limited liability company which makes minority shareholders need to be given special protection to obtain their rights.

The possibility of fraud committed by limited liability company organs in collaboration with majority shareholders inspires the author to conduct deeper research. This research aims to find out about what actions and options are owned by minority shareholders to provide a balance in the differences of power and authority that exist in a company. The author intends to examine whether the existing law in the form of the UU PT is sufficient to provide legal protection for minority shareholders or the protection provided actually backfires and cannot be used by minority shareholders and also to examine how minority shareholders should act to avoid actions that harm them in terms of dividend distribution.

2. METHOD

The type of research used is normative legal research or doctrinal legal research. It is called doctrinal legal research because this research is only aimed at written regulations, therefore, this research is closely related to the literature because it will require secondary data obtained from the library. The primary legal material which will be used within this research is Law No. 40 year 2007 regarding Limited Liability Companies. The secondary legal material which will be used within this research is extracted from books, national and international journals, thesis, dissertation and bachelor thesis. The tertiary legal material which will be used is from sites.

3. RESULTS AND DISCUSSION

3.1 Protection of Minority Shareholders based on UU PT

The distribution of dividends is based on the preparation of the Annual Report by the Board of Directors of the company to be submitted to the GMS, the preparation of the Annual Report is necessary to fulfil the requirements for the distribution of Dividends⁴ among others: has net profit; has a positive profit balance; has a mandatory reserve; and decided by the GMS. To ensure that the company has a net profit and a positive profit balance, the company through the GMS shall approve and ratify the Annual Report. In providing approval and ratification, shareholders can find out about the contents of the Annual Report, including the Financial Statements. That way in the context of distribution of dividends, all organs of a limited liability company have their respective roles, starting with the preparation of the annual report by the Board of Directors, review by the Board of Commissioners, and approval and ratification by the GMS. However, the GMS as a limited liability company organ tasked with providing approval and ratification will be the most important organ in the distribution of dividends, in other words, the majority shareholder in the company as the controller of the company has greater power and dominates the running of the GMS and the decisions that will be taken.

Within the annual GMS which is clearly regulated in Article 86 of UU PT, it is clear that the attendance quorum required is only more than $\frac{1}{2}$ and based on Article 87 of the UU

⁴ Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2009), 291.

PT it is explained that decisions can be taken if approved by more than ½ of the shares issued by the company. Minority shareholders in this case do not need to be present or vote, if the majority shareholder already owns more than 50% of the shares in the company. Minority shareholders in this case are often the ones who are cheated on and also have no power to take part in decisions made by the company. This can surely result in fraudulent actions that may be carried out by the organs of a limited liability company whereas the Board of Directors, Board of Commissioners, and majority shareholders can work together to make it appear as if no dividend distribution has ever occurred.

Minority shareholders who are vulnerable to such fraudulent actions must understand what authority they have in the event of fraud committed by the organs of the limited liability company simultaneously. Minority shareholders in this case have several rights, one of which is the right to file a lawsuit against the company to the district court if they are disadvantaged due to the actions of the company which are considered unfair and without reasonable grounds as a result of the decisions of the GMS, Board of Directors, and/or Board of Commissioners as explained in Article 61 of the UU PT. This can be one of the solutions owned by minority shareholders, where minority shareholders can file a lawsuit for criminal acts of forgery of letters or embezzlement that have been committed by the organs of a limited liability company.⁵ Surely this lawsuit requires proof that can ensnare all individuals committing fraud. The Board of Directors as the drafter of the annual report can certainly be charged if it is proven that he did not do what was his duty and did not carry out his official duties in accordance with the UU PT. The distribution made is not possible if there is no annual report made by the Board of Directors, so the Board of Directors must be responsible for the drafting of the annual report. The Board of Commissioners who participate in reviewing and ensuring the correctness in the preparation of the Annual Report must also be responsible for the preparation of the annual report to be reported within the GMS, so that in making the Annual Report the Board of Directors and the Board of Commissioners have full responsibility.

The lawsuit that can be carried out by minority shareholders can be one of the options that can be carried out by minority shareholders, but in practice it is less efficient. Minority shareholders, in addition to being able to sue, have other powers, namely, the right to request that the company purchase their shares at a fair price if they do not approve of the company's actions that are detrimental to shareholders or the company, as explained in Article 62 of the UU PT. The provision of the request for repurchase of shares at a fair price can be done if the shareholders do not approve the Company's actions concerning, amendments to the articles of association; transfer or pledge of the Company's assets which have a value of more than 50% of the company's net assets; and merger, consolidation, acquisition, or spin off. In the event that the distribution of dividends is carried out by fraud accompanied by an amendment to the Articles of Association in advance, minority shareholders have the right to request the repurchase of their shares.

The buyback of minority shareholders' shares is not necessarily just an entire buyback by the company, instead, there are provisions which have been regulated within the UU PT. This provision has been explained in Article 37 of the UU PT which states that the repurchase of shares does not cause the Company's net assets to become smaller than the amount of issued capital plus mandatory reserves that have been set aside; and the total nominal value of all shares repurchased by the Company and pledge of shares or fiduciary guarantee of shares held by the Company itself and/or other companies whose shares are

⁵ Munir Fuady, *Hukum Tentang Akuisisi: Take Over dan LBO* (Bandung: PT Citra Aditya Bakti, 2014), 127-128.

directly or indirectly owned by the Company, does not exceed 10% (ten percent) of the total issued capital of the Company. These certain conditions shall still be considered when conducting repurchase, in addition, we shall also pay attention regarding the decrease of capital which will occur in the company.

Minority shareholders to request repurchase may not exceed 10% of the total issued capital in the Company. If the minority shareholder owns more than 10%, then the shares owned cannot be entirely repurchased by the Company, but an offer can be made to a third party to replace the minority shareholder's position. This can also only be done if the actions taken by the Board of Directors, Board of Commissioners, and majority shareholders are to conceal the truth that dividend distribution has occurred and to commit fraud by increasing the company's operating capital, so that it seems that dividend distribution has not occurred and there is only an increase in authorized and paid-up capital by the company. The implementation of the buyback by the company must also be approved in advance within the GMS, which is very burdensome for minority shareholders.

Minority shareholders, who are the disadvantaged party in all aspects, in the exercise of authority to defend their rights also still require a GMS decision, making it difficult for all possibilities that can be done. Another protection that minority shareholders have is in Article 97 paragraph (6) of the UU PT which states that "On behalf of the Company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may file a lawsuit through the district court against members of the Board of Directors who, through their fault or negligence, have caused losses to the Company." Minority shareholders have this authority, but there is still a minimum share ownership limit that must be met, this is not much different from Article 61 of the UU PT where shareholders have the authority to file a lawsuit in court in the event of fraud, only in Article 97 paragraph (6) of the UU PT focuses more on violations committed by the Board of Directors of the company. Article 97 paragraph (6) of the UU PT is a complement to Article 61 of the Company Law where there is negligence or error committed by the Board of Directors of the company, then shareholders with a minimum share ownership limit of 1/10 can file a lawsuit for examination and demand responsibility for losses caused by the Board of Directors.

Article 97 paragraph (6) of the UU PT has provided legal certainty and protection from negligence or error conducted, while Article 114 paragraph (6) of the UU PT which states "On behalf of the Company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may sue members of the Board of Commissioners whose errors or negligence have caused losses to the Company to the district court"⁶ aims to provide legal certainty to shareholders for acts of negligence or misconduct of members of the Board of Commissioners. Article 114 paragraph (6) is similar to Article 97 paragraph (6) of the UU PT which purpose is to complete the entirety of legal protection held by the shareholders. It is unfortunate that all of these articles still have a minimum limit for implementation, namely a 1/10 shareholding, which is less meaningful protection for minority shareholders who have less than that shareholding. Minority shareholders will still be disadvantaged, in the event that the majority shareholder deliberately adds to the authorized capital of the company, the shareholding of minority shareholders will be diluted easily so that the implementation of the articles provided by the UU PT can be considered less protective of minority shareholders.

⁶ Gunawan Widjaja, *Hak Individu dan Kolektif Para Pemegang Saham* (Jakarta: Praninta Offset, 2008), 78.

Not only Article 114 paragraph (6) of the UU PT, there are two more articles which provide legal protection to shareholders, among others Article 138 paragraph (3) of the UU PT. This article explains regarding the examination conducted towards the company which allegedly conducts tort. In contrast to Article 97 paragraph (6) dan Article 114 paragraph (6) of the UU PT, Article 138 paragraph (3) UU PT within its implementation requires the requestor to first collect data or statement to the Company within the GMS and the Company does not provide such data or statement. In addition to being questioned within the GMS, to conduct an examination request towards the company, the following qualifications apply, among others,

- a. 1 (one) shareholder or more represents at least 1/10 (one tenth) of the entire shares with voting rights;
- b. other parties which based on laws, the Company's articles of association or agreement with the Company is granted authority to submit an examination request; or
- c. prosecutor for public interest

the same thing that happened within previous articles is repeated where this protection is provided with burdensome requirements for minority shareholders. It is unfortunate that even for the examination of actions that are indicated to be unlawful, minority shareholders cannot do much.

The last legal protection which can be offered to shareholders is to propose dissolution of the company as explained within Article 144 paragraph (1) of the UU PT. The article states that "The Board of Directors, the Board of Commissioners or 1 (one) shareholder or more representing at least 1/10 (one tenth) of the total number of shares with voting rights, may propose the dissolution of the Company to the GMS." Shareholders here have the right to propose the dissolution of the company, but by doing so, the purpose of the desired protection of minority shareholders will not be fulfilled and in the implementation of this dissolution, surely, there are provisions to obtain GMS approval and must fulfil the quorum determined by UU PT. Therefore, this last legal protection is also ineffective to provide protection to minority shareholders because everything must be based on the GMS resolution which cannot be achieved by minority shareholders alone.

The problems that arise in this company are indeed difficult to be handled by shareholders alone because the strength of the company lies in the 3 main organs of the company, namely, the Board of Directors, the Board of Commissioners, and the GMS. The three organs of the company are unlikely to be controlled by minority shareholders, therefore, promoting the interests of minority shareholders will be difficult. GMS which is one of the organs of the company with authority that is not given to the Board of Directors or the Board of Commissioners, is an organ of a limited liability company formed to fulfil the needs of shareholders, which also cannot be used by minority shareholders because the authority of minority shareholders is less than that of majority shareholders. The protections discussed above are neither effective nor flexible enough to provide protection for minority shareholders with less than 10% of shares. It has been discussed above that the legal protection provided by the UU PT is often constrained by the 10% share ownership requirement, where there are many cases where minority shareholders do not own that much shares and also several articles that require GMS approval which surely will also be difficult to fulfill.

3.2 Legal Measures to Prevent Fraud by Minority Shareholders

Legal protection can be done in 2 ways, including preventive and repressive, legal protection that has been discussed previously is a legal protection measure taken after the occurrence of fraud/negligence/errors committed by unscrupulous organs of the company. In other words, the protection provided by the UU PT is more directed towards repressive legal protection. We can see in the articles discussed above that there are a lot of minority shareholder authorities that direct shareholders to file a lawsuit in court.⁷ To file a lawsuit in court, of course, we must first have sufficient evidence or at least meet the minimum threshold of evidence to report it to the authorities. This is what makes the protection of the UU PT to minority shareholders still classified as repressive legal protection. This kind of legal protection has not been able to accommodate all the needs of minority shareholders as discussed earlier that this protection is difficult to implement for one reason or another, especially related to the minimum reporting limit of 10% share ownership or having to request approval from the GMS. Where both of these things will be difficult to achieve by minority shareholders. Then this leaves the question as to what preventive legal protection can be done by minority shareholders in order to maintain honesty and justice in the company?

If we go back to the basics, we can actually see that basically all shareholders already have the authority to carry out preventive legal protection for themselves. As a shareholder, it is clear that the person controls the shares and the shares give the holder various powers. One of them is explained in Article 52 paragraph (1) which authorizes shareholders to, among others,

- a. attend and vote in the GMS;
- b. receive dividend payments and the remaining assets of the liquidation proceeds;
- c. exercise other rights based on this law.

All three of these are important to minority shareholders, but the most important is to carry out other matters under the law. Exercising other rights is important because shares, which are securities and have an economic value surely have a sale value and can be transferred. This transfer of right over shares can be a solution for minority shareholders to minimize fraud, in the event that majority shareholders are often in conflict with majority shareholders and other company organs, one option that can be done is to sell their share ownership in order to avoid fraud committed by unscrupulous parties.

Transfer of right over shares cannot be a permanent solution for minority shareholders, in the event where a company can still generate profit surely minority shareholders will not opt to sell the said shares. Within Article 57 of UU PT, a company's articles of association can regulate regarding the requirements of transfer of rights over shares:

- a. the requirement to offer in advance to shareholders with a certain classifications or other shareholders;
- b. must obtain prior approval from the company's organs; and/or
- c. must obtain prior approval from the authorized agency authorities in accordance with the provisions of laws and regulations.

This can be one of the options that minority shareholders have, which in the event that there are other shareholders who want to sell their shares, then minority shareholders can

⁷ Shofia Shobah, "Perbedaan Penerapan Derivative Action Di Indonesia Sebagai Negara Civil Law Dibandingkan Dengan Negara-Negara Penganut Sistem Hukum Common Law (Studi Putusan Perdata Nomor 02/Pdt.G/2010/PN.Jkt.Sel)," *Jurnal Hukum & Pembangunan* 48, no. 4 (October-December 2018): 793-795, <https://scholarhub.ui.ac.id/jhp/vol48/iss4/6/>.

buy these shares to offset share ownership, so that at least minority shareholders have 10% of the issued and paid-up shares of all shareholders.

Another option that can be offered is to increase the company's capital with the hope that other shareholders will not add to the capital they have paid up, so that the majority shareholder's share ownership will be diluted. With the dilution of the majority shareholder's shareholding, minority shareholders can increase their shareholding to balance the majority shareholder or at least own 10% of the issued and paid up shares of all shareholders. The three things above that have been explained by the researcher aim to provide minority shareholders with preventive legal protection to avoid unlawful actions including negligence, fraud, and mistakes from company organs with majority shareholders. Minority shareholders with these options are provided with the possibility to protect themselves by increasing their share ownership or selling their share rights over shares to third parties because by increasing share ownership in these ways, with a minimum limit of 10% share ownership by minority shareholders can open up several repressive legal protection options described earlier, while by transferring the rights to these shares is also a good option with the consideration that the dividends to which the minority shareholders are entitled to but cannot receive, they can receive them by becoming shareholders of other companies. These options provide an opportunity for minority shareholders to safeguard themselves and provide preventive legal protection for themselves.

4. CONCLUSION

The legal protection which can be provided by the UU PT to minority shareholders have been provided within several articles. Among others Article 61, Article 62, Article 97 paragraph (6), Article 114 paragraph (6), Article 138 paragraph (3) dan Article 144 paragraph (1) of the UU PT. The whole is a legal protection to minority shareholders based on derivative rights⁸ from the relevant shareholder, namely to file a lawsuit to the court for actions which are suspected to violate the law and rights of the minority shareholders to receive dividends. This is very possible, but in practice it will be difficult to do because there are several obstacles, especially in the minimum limit of share ownership and also certain situations where the implementation of this legal protection requires approval from the GMS in advance, which is very unlikely in the event that the majority shareholder is involved in unlawful acts of not giving dividend rights to minority shareholders. Only Article 62 of UU PT differs and provide authority to minority shareholders to request the company to buyback their shares, however unfortunately in order to trigger this article, the actions conducted by the other company organs shall amend the articles of association; transfer or encumbrance of more than 50% of the company's asset; or merger, consolidation, acquisition, or spin off. This also needs to be considered because there are limitations that have been regulated in Article 37 of the UU PT to maintain the company's own finances, where the shares repurchased must not cause the company's net assets to become smaller than the amount of issued capital plus mandatory reserves that have been set aside; and the nominal of all shares which are repurchased by the Company and pledge of shares or fiduciary security over shares which is held by the company itself and/or other company which shares are directly or indirectly owned by the Company, does not exceed 10% (ten percent) of the shares issued within the Company. For the execution of legal protection in

⁸ Munir Fuady, *Perseroan Terbatas Paradigma Terbaru* (Bandung: PT Citra Aditya Bakti, 2003), 174.

entirety. The overall implementation of these legal protections is inherently difficult and requires a number of situations and conditions where not all minority shareholders are able to execute them. In this case, the PT Law is considered to only provide repressive protection which is less effective in providing protection to minority shareholders.

In the protection of minority shareholders, it is not always necessary to use repressive protection where shareholders try to use their derivative rights to sue to the court for fraud, negligence, or misconduct of the company organs and majority shareholders who conspire with each other. Minority shareholders in this case can protect themselves before adverse actions occur. Several options which can be exercised by minority shareholders have been regulated within among others Article 41, Article 52 paragraph (1) and Article 57 of the UU PT. Article 41 of the UU PT provides opportunities for the minority shareholders to increase the company's authorized capital in hopes that the shareholding ownership of the majority shareholder can be diluted, therefore creating a balance of shareholding ownership. This option can be difficult to execute if the majority shareholder still want to increase the authorized capital of the company, hence, the option offered by Article 57 of the UU PT where the articles of association can regulate regarding shareholders which intends to conduct transfer of shares is obliged to offer in advance to other shareholders, in order for minority shareholders to buy such shares with a minimum threshold of 10% from the entire shares paid up and issued by the company. By owning 10% shares, the minority shareholder can exercise other legal protection which have been explained above. The last option which can be exercised is sale of shares owned by the minority shareholders to a third party to avoid fraudulent activities from any party.

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