

IN WHOSE INTEREST THE COMPANY SHOULD RUN

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ABSTRACT

Company being an artificial person should be working in the interest of persons that are associated with the company whether they are shareholders, employees, customers or creditors, and should not have any separate interest of its own. Corporate objective has always been the matter of debate from many years, in general a corporation is run by the contribution of different groups which includes shareholders, creditors, customers, employees etc. who all form the part of a successful corporation. However, when it comes to determining in whose interest the company should be working and the interest of which group should be of utmost importance becomes very difficult to determine in the words of Professor Paul Davis. The school of thought that is discussed in the light of this debate that in “whose interest the company should run”? The paper will further critically analyze the question in whose interest a company should run, by taking the two different approaches as references, also discussing the enlightened shareholder value approach which emerged as a balance between the two approaches along with the meaning of “company’s interest”.

Keywords: Shareholder theory, Stakeholder approach, Shareholders, Company, Enlighten shareholder value approach.

INTRODUCTION

Company being an artificial person should be working in the interest of persons that are associated with the company whether they are shareholders, employees, customers or creditors, and should not have any separate interest of its own.ⁱⁱ Corporate objective has always been the matter of debate from many years, in general a corporation is run by the contribution of different groups which includes shareholders, creditors, customers, employees etc. who all form the part of a successful corporation. However, when it comes to determining in whose interest the company should be working and the interest of which group should be of utmost importance becomes very difficult to determine in the words of Professor Paul Davis. The school of thought that is discussed in the light of this debate that in “whose interest the company should run”? Is the stakeholder theory which says that the company should not only work in the interest of its shareholders but should also work for the betterment of its different stakeholders like employees, creditors customers etcⁱⁱⁱ. The second school of thought that discusses this issue is the shareholder value principle which says that the objective of the company should be maximization of the shareholders wealth, in other words a company should work in the interest of the shareholders.

The argument is an ongoing debate in whose interest the company should work, the traces of which can be found in the past debates for instance a very famous debate between Dodd and Berle, where Dodd spoke, favoring the stakeholders whereas Berle stood in the support of shareholder primacy. The paper will further critically analyze the question in whose interest a company should run, by taking the two different approaches as references, also discussing the enlightened shareholder value approach which emerged as a balance between the two approaches along with the meaning of “company’s interest”. And with these two debates their criticism will also be discussed to further analyze the topic and finally the conclusion would be drawn.

DODD AND BERLE DEBATE

To answer any question, it is imperative to consider the historical background of the same. The question in whose interest a company should run was argued by Dodd and Berle in their paper

work respectively. Berle stood in the support of the shareholder primacy whereas Dodd on contrary argued the company should work in the benefit of the stakeholders as a whole.

Berle Views

In his article '*To Whom the Corporate Managers are Trustee for*' Berle argued that the powers that are granted to the management of a company or a corporation should only and necessarily be exercised in the interests of the shareholders. In his opinion the corporation is a vehicle that are driven to advance and protect the interest of the shareholders and similarly the corporate law should be interpreted in such a way that this principle gets reflected. He further added that, the very main concern or object of the corporation would be defeated if the companies functioned in any other account. Berle relied his belief on simple fact that the shareholders make heavy investments and bring capital to the company so they expect some fair returns and that should be given to them by the companies they are relying and trusting.

Dodd Views

Dodd in reply to Berle argued that, the companies are not only accountable to the community at large but the corporate managers who control the business, on their own, should act in good faith without any legal compulsion and manage the company in such a way that it fulfills all the responsibilities that it holds towards the community and the stakeholders. He further supported his argument by giving references of several business leaders and major corporations like General Electric and conveyed that these business leaders have also come to realize that the managers of the company need to take into account the social responsibility when running the business. Dodd provided several interpretations of this view relative to the requirements of corporate law. He further supported is argument by saying that if managers drive their attention towards the interest of the stakeholders that is, the needs of their employees and customers that would ultimately benefit the shareholders. He said that, by paying more attention towards the benefits of employees the company would increase their overall productivity and that would lead to increase in the profits of the company. And by applying this logic that is paying more attention to the stakeholders other than the shareholders, managers can actually increase their profits. Next, Dodd argued that court has given the corporate manager wide range of discretionary powers as to what policies will be best to promote the interest of their stockholders. For instance, according to Dodd's suggestion if corporate raised charities that

would not increase the wealth of the shareholders but would generate goodwill for the company in the society. And such kind of good will can later on benefit the shareholders, as it will change the mindset of the customers and will make them more preferable of the company and make them buy its products. According to Dodd the factors that affect the working of the business are not just laws and regulations but other factors like public opinion as to social obligations of the company. He claimed that the views and opinion of the public as a purely private corporation was taking a shift and the managers operating the company should realize that change of minds. And by placing the argument like, the managers should concentrate on this shift of public's opinion paved the way for more arguments regarding, corporations can and should act on the behalf of stakeholders other than the shareholders.

WHAT IS “INTEREST” OF THE COMPANY?

There was an update in 2009 on the non-statutory guidelines on the director duties from the Hong Kong Registry, which further stated that in its first principle that a director has a duty to act in good faith for the welfare of the company^{iv}. It further stated that the company's interest includes all the present and the future shareholders of the company. Apart from the local non statutory implication, it is also viewed by the majority in the context of common law that “company” refers to shareholders, thus interests of the company are to be equated with “the interests of the general body of shareholders”.^v

However, it has been said that the entire focus of the directors should not be on the shareholder's interest but should go beyond that. In the case **Brady & Anor V. Brady & Anor**, the court stated that the difference cannot be drawn between the interest of the company who is an artificial person, and the interest of the persons who show interest in that company. This has further elaborated the concept of “company's interests” as it includes the interest of other individuals that contribute in the success of corporate entity. ^{vi}

Consequently, as we go deeper with the concept, we will find that there is no definite answer to as to in whose interest the company should run or work. Nevertheless, by evaluating the different approaches we might extract some clues to answer the same.

SHAREHOLDER AND STAKEHOLDER DEBATE

The debate between these two theories have emerged with time. The shareholder's approach says that the company should work in the interest of the shareholders that is the shareholders interest should be the primary concern for any company which is "dominant principle in the corporate law".^{vii} Whereas the stakeholder theory states that there should be a balance maintained by the directors between the interests of different group rather than just focusing on the interests of shareholders. It is claimed by many observers that the scandals like Enron, World com etc. is a good evidence for the failure of the shareholder theory and success of the stakeholder theory. Both the theories are said to be the normative theories of corporate social responsibility, dictating the corporate role. Further we will examine both the approaches in detail and critically analyze the criticisms these approaches have faced.

SHAREHOLDER THEORY

This theory revolves around the objective that is, the shareholders interest should be the primary goal of any company. This approach is also called the shareholder primacy model. So any decision that is to be taken by the company should be based on the shareholder's interest rather than the entire stakeholder group. The concept of this theory was also earlier seen in the case **Dodge V Ford Motor Company**. In this case the court extended it support towards the shareholder primacy model.^{viii} Also professor Berle who is one of the strongest supporter of the shareholder theory said that the directors morally or legally should act in the interest of the shareholders, which is also regarded as "the substance of the corporate fiduciary duty".^{ix} There are in general three main arguments in favor of this theory.

The primary argument in the favor of the shareholder theory is of "residual claimants", in other words they are the residual claimants when the company is solvent. As shareholders are the equity investors of the company, so it is said that the company should be held accountable for the benefit of the shareholders as they are the "greatest stake in the outcome of the company". It is said that it is true that they benefit from the company's surplus but not to forget that they are exposed to the greatest risk as compared to other groups forming the part of the company and are also not adequately protected by the contractual means under most circumstances.^x So

keeping this the prime reason they should be given right to control above the stakeholders of the company because their interest is related with every decision that they take for the company.^{xi}

Secondly it is said that the shareholder theory causes reduction in the agency cost. Under the agency cost theory, the agents (in this case the directors) have to act on behalf of the shareholders' interest. However, where there is the absence of the shareholders primacy it is most likely that the directors will avoid or neglect their duties, so in that case there will be an agent appointed to monitor the activities of the directors that is the agency cost will incur in order to avoid the abuse of their positions. So, to avoid such kind of situation or agency cost it is vital to uphold the value of the shareholder and directors are made responsible for the shareholders' interest.

Lastly it is said that if the shareholder primacy is made the major concern then the directors would be able to make better decisions for the corporation. Also, it would be next to impossible for the directors to strike a balance between the non-shareholders group because of the diverging interests. Other than this even for the court it would be difficult to formulate or enforce fiduciary duties to ensure that the directors act in good faith and make decisions that are efficient for the stakeholders. Hence the reason behind that the shareholder theory is preferred more is that it is more certain and easier to administer as compared to the stakeholder theory.

Shareholder theory is one of those theories that are highly misinterpreted in a sense that, first of all it is said that it urges managers to do anything to make profits. Although it does urge the manager to make profit but that is only through legally means. Second misunderstanding that this theory faces is that it prohibits giving corporate funds to charitable projects or may be prohibiting investments in the improved employee morale. However, the theory supports such kind of investments or efforts to an extent that these initiatives are the best investments of capital that are available.

STAKEHOLDER APPROACH

According to professor Freeman stakeholders are group of individuals who are likely to get affected or who affects the goal of an organization therefore a director should act on behalf of not only the shareholders but the stakeholders like employees, customers, creditors etc.^{xiii} the vitality as to why the stakeholders' interest should be considered can be seen in the following parts:

Interest of the creditors

Normally, when the company is in a state of insolvency or bankruptcy the creditors interest are taken into consideration, as there is a great risk that the debts will remain unpaid to the creditors unlike the other groups that form the part of the organization. Also there are numerous cases to support that the duty towards the creditor will shift from shareholders to the directors under such situations.^{xiii} Taking Brady's case as an example where the court stated that the interests of the company becomes the interest of the creditors alone when a company becomes insolvent or where there is a doubt about its solvency. This statement was reaffirmed in the case **West Mercia Safewear Ltd v Dodd**, where the court suggested that in the times when the company is facing financial crises the directors of the company are ought to take the interests of the creditors into consideration.^{xiv} Also in the case **GHML Trading Ltd v Maroo and Others, 2012**, the court stated that: it is the duty of the director to act in good faith for the benefits of its members as a whole. And where interest of the creditors is important, it is the duty of the director to give regard to the interest of the creditors as a class.^{xv}

Therefore, it is not likely to happen that the interests of the creditors will be given exclusive focus by the directors under normal circumstances as creditor's interest is considered important only when the company is on verge of insolvency. And also, the duty of the director is to protect rather than to promote the interest of the creditors.

Interest of the employees

Employees, they contribute their knowledge, skills and hard work in the company hence they are considered to have an interest in the company. Besides, in high technology companies where technological innovations are required the employees play a great role in contributing to that innovation, thus it can be said that human capital is sort of an investment made by the

company. So, in regard with this, directors should also give some focus to their interests as they are the key workers who contributes in promoting the competency and enhances the sustainability of the company.^{xvi}

Interest of the customers

The importance of customer's interest can be explained better through the success story of Toyota in the U.S. automobile markets. As the U.S. automobile market was unsuccessful in producing the fuel efficient automobiles and continued failing by not meeting the changing demands of the customers which made the customers switch to more fuel-efficient cars produced by Toyota, which in turn made the market value of the Toyota to rise to twice the combined market value of three big U.S automobile companies in 2005.^{xvii} Therefore making it a good example as to why the directors of the company should focus on customer's interest as they are important assets of the company. Hence, we can say that the consumers contribute in the success of the company.

Interests of other stakeholder group

Other stakeholder groups like suppliers holds interest in the company as they make some specified investments for the needs of particular consumers, and they are also likely to share the surplus generated by the company. It becomes very essential for the companies to build a good trading relation within the supply chain as suppliers form most important part of the production.^{xviii} Other than this companies also have some social responsibilities towards the communities at large as their corporate decision might affect the same. Therefore, the interests of these communities should be given some recognition by the companies while discharging their commercial activities.

If we go back in the past there are number of writers, scholars and lawyers who have supported the view that a company should take interests of the stakeholders into account one of the examples is of Late, Mr. Owen. D. Young an American industrialist, diplomat and a lawyer who also believed that the company should take the interests of the stakeholders into consideration. He classified the group of people into three categories. The first group comprised of the people who have invested their capital into the company that is the shareholders, the second group comprised of the thousands of labour and employees who put their skill, knowledge and lives to reach the target set by the company and promotes its success and lastly

the group of people were the consumers and public at large as the customers have right to demand, so in regard with this a company should perform its duties as well as meets its obligation towards public, and should carry out its business honestly.

Further he added that, a company's duty is first to use the capital wisely and honestly and to keep it safe along with providing fair rate of return. Otherwise companies will have no capital and in return to these employees will have no means to perform their work that is no tools for labour. Secondly the employees should be awarded with fair wages, continuity of employment, and recognition of their right to their jobs as they have acquired these special skills for this. Thirdly, the customers should be offered a price that is compatible with the obligation to the employees and shareholders who have put in their capital and skills. And at last the interest of public at large should be considered as they will want the business to function and discharge its duties accordingly as a good citizen.

CRITISISMS OF THE SHAREHOLDER AND STAKEHOLDER APPROACH

Taken the arguments regarding these approaches into consideration, the approaches have several drawbacks that makes them less preferable.

For the shareholder theory it normally faces the criticism like:

- The shareholder theory gears up to short term profit maximisation at the expense of the long run.
- It is also claimed that the shareholder theory resist providing corporate funds to charitable projects or investing in improving the employee morale.

Other than this, the main criticism that the shareholder theory faces are that the, the theory claims that the shareholders are sole residual claimant which is said to be rather misleading and especially under the situations where company is solvent or is not bankrupt. It is not the specific investments of the shareholders that has made their position in the firm more vulnerable when comparing with the other stakeholder groups. The stakeholders like employees, suppliers and other stakeholder groups suffer equally as shareholders when the

company fails to perform. In the case of public company, the decision regarding the distribution of the dividend whether it will be paid to shareholders or used to raise the earnings for the employee's salaries lies in the hands of the board of directors. As they are the ones who control that decision. Thus, solely focusing on the interest of the shareholders and protecting it, based on the argument that they are the sole residual claimant is not justified to the other stakeholder group that also form the part of a company.

And, for the stakeholder theory it usually faces criticism like:

- It is claimed that the stakeholder theory does not demand that a company should focus on making profits.
- Also, it is claimed that the theory does not provide any means through which the disputes of interest between the stakeholders can be adjudicated which rises the doubt about its implementation.

As discussed above one of the main criticisms that stakeholder theory faces is the failure regarding dealing and balancing the conflict of interests between the different stakeholder groups. Even so, there is no means for these constituencies to claim if there is any default on the part of the directors. Also, there are no clear boundaries set for these constituencies to be considered by a company. Professor Sternberg also pointed out the problem that the company being accountable to everyone is accountable to no one.

In my opinion, both of the approaches are not convincing in the sense that the shareholder theory focuses on the implementation but fails the justification and its visa-versa for the stakeholder theory that it fails to implement. A mid-way can be drawn to come up with the approach that can be acceptable. Thus, a new approach has emerged as the “Enlightened Shareholder Value”.

ENLIGHTENED SHAREHOLDER VALUE APPROACH

The basis of enlightened shareholder value (ESV) approach is still the shareholder primacy model, that the main aim of the company is to maximise the shareholder value and working for their benefits. Even though the approach is based on the maximisation of the shareholder value,

it is considered to be enlightened and balanced, because directors are supposed to work towards achieving the success of the company in a way that it benefits the shareholders along with taking into consideration all the relevant stakeholder groups for that purpose^{xix}. Which involves maintaining long term relations with the employees, customers and the suppliers along with the impact that company might have on the community at large through its activities.

After the company law reform bill was passed in 2005 the enlightened shareholder approach became the part of the UK Company's Act 2006, which in its section 172(1), clearly states that the directors should work for the benefits of the shareholders as they owe a duty towards them, yet they seek to consider the boarder range of matters in order to fulfil that duty. ^{xx}The whole idea behind adopting this approach by the UK government was that, it promoted the modern view of social corporate responsibility in a way that, the profits that would be raised at the expense of the local authorities such plans will be rejected by the company. This view was adopted by the Professor Jensen way before the emergence of the enlightened shareholder value approach, that fostering good and sustainable relations with the various constituencies would help in increasing the long-term market value of a company. As it is not at all difficult to understand that the company who has poor relations with their suppliers, and the range of customers who does not like the product, and the set of employees who continuously goes on strike, will bring ultimate loss to the shareholders value.

In my view, focusing on the shareholders wealth maximisation is not the bad decision as it is the effective way of achieving the ultimate objective of the company along with the social benefits. Company by taking into account the interests of the other stakeholder groups will make reasonable corporate decisions. So, by combining the elements of the stakeholder and shareholder approach the enlightened shareholder theory becomes the balanced and an acceptable approach.

CRITICISMS OF ENLIGHTENED SHAREHOLDER VALUE

One of the main criticisms this approach has faced is regarding the hierarchy of the stakeholders, which this approach has not clearly defined. This approach has put more burden on the directors by broadening its range as the expectation that there will be more responsible

business behaviour will also increase such as, what impact a company's behaviour will have on the public or communities or on environment, also taking the interest of the employees into consideration. This pressure has been imposed on the directors via shortcoming of section 172 of the UK Company's law act which has adopted this new approach. The shortcomings states that the 'list is not exhaustive'. In the result of this it becomes very difficult for the directors to prioritise the stakeholders in order to promote success for the company. In other words, the directors have to achieve long term goals for the company while distinguishing among the stakeholders and there is no guidance or an exhaustive list provided to help the directors.

Another criticism that was raised, that in case if there is any conflict in the interest of different stakeholders in promoting the success of the company, the approach has not provided with any clearance in that area. Also it is not of much help to the directors when it comes to making any corporate decision, as it does not provide any guidance, the courts find difficulty in reviewing the actions of the directors. This flaw may also lead in giving the directors the wide discretionary powers with less accountability for their decisions by the company.

Another drawback of this approach is that, no real rights are granted to the stakeholders since there is less enforceability. For example, under section 172 (1) of UK Company Act 2006, which provides the duty to promote the success of the company, a director should act in the good faith to promote the success of the company for the benefit of the members as a whole, and while doing so have regard to;

- (a) The most probable outcome of any decision in the long term,
- (b) The interests of the company's employees,
- (c) The need to develop the company's business relationships with suppliers, customers and others,
- (d) The impact that a company's operations will have on the community and the environment,
- (e) The desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) The need to act fairly as between members of the company'.^{xxi}

Section 172 of the UK company act 2006 provides very less protection against the violation of any rights of stakeholders as it requires the directors to perform their duty in good faith along with the success of the company. So without making any strong arguments the directors can discharge their duties, the assertion that certain subject was discussed with the board will be enough to base their argument that the decision was taken in the good faith.

In the light of the enlightened shareholder approach, section 172 does not grant shareholders with the rights to bring any suit against the company in case there is breach of stakeholder's interest. Again there is no penalty on the directors for breaching the interests which may lead to directors being less concerned about the interest of the stakeholders. However it was expected that when this approach was taken by the UK company act 2006 it will bring a change in the UK corporate governance.

Based on the above discussion in my opinion enlightened shareholder theory is better than the two alternative approaches because to some extent it has been successful in filling the gaps between both the approaches that is the shareholder and the stakeholder approach by combining the merits of both the approaches. Also the enlightened shareholder theory points out the flaws that stakeholder theory possesses, by adopting the motive to maximise the profits for the shareholders, thus promoting efficiency and responsibility. Therefore it is said that this approach kills two birds with one stone as shareholders maintains the goal that is the profit maximisation while still holding the directors accountable and the stakeholders continue to seek their consideration. However, it is still restricted by the short comings as mentioned above.

Moreover, it will be too soon to make a comment on this theory. As the success of this theory depends on lot of factors like:

- How the directors will make use of the powers given to them under section 172(1) of the UK company act 2006.
- How the courts will interpret the duties of the directors
- What role scholars will play by making researches to further improve this theory
- Lastly, how the society perceives the implication of this approach, for example NGOs^{xxii}

The suggestion that can be given in the light of this theory is that more research should be done according to the recent practices by surveying more advantages and disadvantages to this

theory and to see till what extent this theory has been successful in bridging the gap between the shareholder and the stakeholder approach.

CONCLUSION

This paper has explored the advantages and disadvantages of shareholder, stakeholder and enlightened shareholder value approach. And it was found that shareholder theory holds a very narrow perspective as the main objective of the theory is to earn profits for the shareholders alone and ignores the interests of the stakeholders for example the environment. In the light of this, there is lot of costs involved in monitoring the actions of the directors so there are chances and a possible risk that the directors may exercise their powers and delegations to fill their own pockets and it will be difficult to keep the track. Similarly, for stakeholder theory there are lot of shortcomings to it, for instance, there no guidance and list provided to the directors for the stakeholders as the list is said to be non-exhaustive, also there is a confusion about the hierarchy of the stakeholder's interest. The theory brings less accountability for directors as there is no one motive to achieve. Furthermore the paper highlighted that the enlightened shareholder value theory is a better option at present as to some extent it was successful in filling the gap between the shareholder and stakeholder approach. But as said earlier it would be too soon to make a comment on the ESV theory.

So, to sum up, the corporation should work for the interest of the groups who have the greater stake in the success of the business. Considering the interpretation of different theories, the constituencies in question can be either be shareholder or the stakeholder. Keeping in mind the ongoing development of the communities and society as whole, inclusion of more company objectives so even today it becomes very difficult to answer the question in whose interest the company should serve. Due to more influence of the objective of 'corporate social responsibility' on the firms nowadays enlightened shareholder value might seem to be applicable. But since society is becoming so volatile it might not be the case in future. Taking into account all the discussions, in my opinion, it is not possible to adopt any one approach for company's aim and objectives. As the stakeholder group that seems vital for the company at one time does not mean the case would be same the other times. In my view, it should be left on the directors to determine the best interest of the company depending on the nature of their

business, the socio-economic conditions and other important considerations prevailing at the particular time.

ENDNOTES

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