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Comparison of Derivative Action Regulations in Indonesia and South Korea in Providing Legal Protection for Minority Shareholders

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Abstract

The board of directors can harm the interests of minority shareholders considering that shareholders are passive parties who do not participate in managing the company, thus there is a possibility of infringing upon the rights of the shareholders. A derivative action is a lawsuit by a shareholder on behalf of and representing the corporation against members of the board of directors who have made mistakes that resulted in losses to the corporation. Derivative action plays an important role in providing balanced protection for minority shareholders. The purpose of the research is to find a comparison of the regulation of derivative actions in Indonesia and South Korea in providing legal protection for minority shareholders. The research methodology uses a normative juridical method with a comparative research type. The research results indicate that the quality of protection for minority shareholders can be seen based on the jurisdiction of each country, which is rooted in the system used by that country. The fundamental difference between derivative action in Indonesia and Korea is that South Korean law has regulations regarding public shareholders who can file derivative lawsuits, with the requirement that they must have been shareholders for at least 6 consecutive months. In contrast, Indonesia does not have any regulations regarding this matter.

Keywords: *Legal Protection, Derivative Lawsuit, Minority Shareholders*

Abstrak

Direksi dapat merugikan kepentingan pemegang saham minoritas menimbang pemegang saham adalah pihak pasif yang tidak ikut serta dalam mengurus perseroan sehingga terdapat kemungkinan terciderainya hak-hak pemegang saham. Derivative action adalah gugatan pemegang saham atas nama dan mewakili perseroan terhadap anggota direksi yang telah melakukan kesalahan dan mengakibatkan kerugian kepada perseroan. Derivative action berperan penting dalam memberikan perlindungan yang seimbang bagi minority shareholders. Tujuan penelitian adalah untuk menemukan Perbandingan Pengaturan Derivative Action di Indonesia dan Korea Selatan dalam Memberikan Perlindungan Hukum terhadap Pemegang Saham Minoritas. Metodologi penelitian menggunakan metode yuridis normatif dengan jenis penelitian komparatif. Hasil penelitian menunjukan Kualitas perlindungan minority shareholders dapat dilihat berdasarkan yurisdiksi masing-masing negara yang berakar pada sistem mana yang digunakan oleh negara tersebut. Perbedaan mendasar derivative action Indonesia dengan Korea adalah hukum negara Korea Selatan telah mengatur terkait pengaturan terhadap pemegang saham terbuka yang dapat mengajukan gugatan derivatif dengan persyaratan harus telah menjadi pemegang saham selama minimal 6 bulan secara berturut-turut, sedangkan di Indonesia tidak terdapat pengaturan terkait hal tersebut.

Kata Kunci: Perlindungan Hukum, Gugatan Derivatif, Pemegang SahamMinoritas

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Introduction

The economic growth of a country also affects the development of that country. Whether a country grows or not depends on whether the business climate in that country develops or not.[1] Therefore, one of the key players in the development of a country is the company. The definition of a company according to Law Number 3 of 1983 concerning Mandatory Company Registration can be interpreted as any form of business that conducts any type of business that is permanent and continuous, established and located within the territory of the Republic of Indonesia, with the aim of obtaining profit or gain. The types of companies based on their legal status can be classified into legal entities and non-legal entities. A limited liability company is a legal entity that is a partnership of capital established based on an agreement to conduct business, which has capital consisting of shares, where the owners hold a portion of the shares they own.[2]

The board of directors can make decisions to run the company as long as they do not violate company regulations. The board must act in good faith for the best interests of the corporation. In the concept of a corporation, shareholders are passive parties who do not participate in the management of the company, which makes them susceptible to deviations. The rights of company shareholders are very important to the concept of Corporate Governance. The company must not neglect the interests of its members and shareholders. Shareholders are not an organ of the company because the organ of the

[1] Dewi, Yetty Komalasari, "*Hukum Persekutuan di Indonesia Teori dan Kasus*", (Jakarta: Prenada Media Group, 2022), p 1

[2] Putri, Rizha Claudilla, "*Bentuk Hukum Perusahaan Persekutuan di Indonesia dan Perbandingannya di Korea Selatan"*, Jurnal FH Unila, Volume 4 Nomor 1, Januari-Juny, 2020, p. 17.

company is the General Meeting of Shareholders (RUPS), so balanced protection is needed for shareholders, especially minority shareholders.

Derivative action is defined as a lawsuit by shareholders on behalf of and representing the company against members of the board of directors who have committed errors resulting in losses to the company.[3] This lawsuit is filed because the company lacks the will to sue or recover its rights for certain reasons. It can be concluded that the concept of derivative action grants shareholders the right to take extraordinary measures through the court with the aim of restoring the company's rights or preventing losses.[4]

One effect of ownership structure through shares is the creation of majority and minority shareholders. The provision that the more shares one owns, the more power one has in making decisions can be detrimental to the interests of minority shareholders. George T. Washington argues that derivative action plays an important role in providing balanced protection for minority shareholders.[5] Indonesia, as a civil law country, has regulations regarding derivative action, although they are still somewhat limited, as these provisions are outlined in several articles of Law Number 40 of 2007 concerning Limited Liability Companies.

The research update to be conducted in this study will discuss the comparison of derivative action regulations in Indonesian corporate law and South Korea. As an additional point of knowledge, South Korea was chosen because derivative rights have been recognized there since 1962, and there has been no research addressing the comparison of derivative action regulations between South Korea and Indonesia.

Method

The research in this paper uses a normative legal method with a comparative type of research. In this research, the author conducted a literature study by examining library materials or secondary data.[6] This research will examine the comparison of derivative action provisions in South Korea and Indonesia, referring to corporate law provisions since the enactment of Law Number 40 of 2007 on Limited Liability Companies, Korea

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[3] Freshfields Bruckhaus Deringer, *Derivative Actions Under The Companies Acts 2006*, Summary September 2007, p.1

[4] Taqiyuddin Kadir, "*Gugatan Derivatif: Perlindungan Hukum Pemegang Saham Minoritas*", Sinar Grafika, Jakarta, p. 20.

[5] Stockholders Derivative Suits: The Company Role and a Suggestion, Cornell Law Quarterly 25, 1940, p 361

[6] Soerjono Soekanto dan Sri Mahmudji,"*Penelitian Hukum Normatif, Suatu Tinjauan Singkat",* (Jakarta: Raja Grafindo Persada, 2003), p. 13.

Commercial Code Act No. 5591 of 1998, and Korea Commercial Code Act No. 10600 of 2011.

The author conducts the research using a statutory approach. This approach involves examining and analyzing regulations and other legal sources relevant to the topic of this research.[7] In conducting normative legal research, the author uses legal research sources, namely primary legal materials, secondary legal materials, and non-legal materials.

Discussion

Derivative Action as Legal Protection for Minority Shareholders

A Limited Liability Company ("PT") is a legal entity that is a partnership of capital and is established based on an agreement to conduct business, which has capital consisting of shares, owned by individuals who possess a portion of the shares they own. One effect of ownership structure through shares is the creation of a structure of majority and minority shareholders. Basically, each shareholder has the same rights. Especially regarding voting rights, which is one share one vote, where this provision can be clearly regulated in relation to the classification of shares.[8] Generally, there are many issues in limited liability companies related to shares, management, and company policies, as well as disagreements between majority and minority shareholders both in times of profit and in times of loss. This issue is usually resolved through the General Meeting of Shareholders (GMS), which always applies the principle of majority voting to determine the outcome of decisions, thereby putting the interests of minority shareholders at risk of being harmed by the majority shareholders.[9]

The role of the board of directors is very important in balancing the relationship between majority and minority shareholders. In carrying out management duties, the board of directors has an obligation to adhere to the principles of good faith and full responsibility. Mistakes and negligence committed by the board of directors in managing the company will result in personal liability. The board of directors has the authority to sue parties that have committed wrongdoing and harmed the interests of the company on

[7] Samanta S. Tang, "*Corporate Avengers Need Not To Be Angels: Rethinking Good Fauth In The Derivative Action*", Journal of Corporate Law Studies, 2016

[8] Putri, Rizha Claudilla, "*Bentuk Hukum Perusahaan Persekutuan di Indonesia dan Perbandingannya di Korea Selatan*, Jurnal FH Unila, Volume 4 Nomor 1, Januari-Juni, 2020, P. 17

[9] Harjono, Dhaniswara, "*Monograf Gugatan Devariatif dalam Perseroan Terbatas*", (Jakarta: UKI Pres, 2020), P. 1.

behalf of the corporation. If the directors have acted in bad faith and caused losses to the company, the corporation has the right to sue or take legal action against the negligent directors who have caused harm to the company.

Sanctions against board members who have been proven guilty and harmed the company can be decided through the General Meeting of Shareholders (GMS). Problems will arise if the board members who have harmed the company receive support from the majority shareholders, thus preventing the company as a legal entity from exercising its right to sue the board members. With the mechanism of share ownership and the related issues, legal protection is needed for minority shareholders who are at risk of having their interests harmed by the power of majority shareholders. In corporate law, there is a doctrine known as Derivative Action. Derivative Action is the right of a shareholder to sue the Limited Liability Company on behalf of the company against its management for unlawful acts.

Derivative Action is a concept that has long been recognized in the world. The concept initially developed in countries that adhere to the common law system in the United States, but it became popular first in England.The derivative action first appeared in history in 1843 through the case Foss v. Harbottle 67 ER 189 in England. The case of Foss v. Harbottle originated from a lawsuit filed by Richard Foss and Edward Starkie Tuton (Minority Shareholders) against the Directors of Victoria Park Company (VPC), Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, and Richard Bealey. The lawsuit filed by Foss and Tuton is based on allegations of the misuse of company assets by the VPC Board of Directors. At that time, the board engaged in the act of purchasing a 180-square-meter plot of land in Manchester, England, at an above-market price, and the VPC Board also mortgaged the company's property at an inappropriate price.[10]

Based on the actions taken by the PVC Board of Directors, a lawsuit has been filed against the VPC Board of Directors by Richard Foss and Edward Starkie. However, the lawsuit was rejected by the English Court, with the ruling stating that in the event of a mistake or fraud, the party entitled to sue is the corporation itself as a legal entity or an individual designated by law as the representative of the corporation. The judge opines

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[10] https://smartlegal.id/badan-usaha/pendirian-pt/2022/01/06/hati-hati-kasus-pemegang-saham-menggugat-direksi- dan-komisaris-pt/, diakses pada tanggal 18 Desember 2023.

that a company is a separate legal entity, which means that as a legal subject, it has the same rights and obligations as a human being, thus Richard Foss does not have the right to file a lawsuit against PVC. This ruling clearly disadvantages minority shareholders and benefits the board of directors, as it is the board that has the authority to represent the company in a lawsuit. However, in its development, there are exceptions to the case of Foss v. Harbottle, namely:[11]

1. Ultra Vires, shareholders can sue on their own behalf in the event of actions by the Board of Directors or majority shareholders that exceed their authority.
2. Special Majority, shareholders can sue on their own behalf for violations of the articles of association where corporate actions are approved by a majority of shareholders, while the articles of association have specific requirements.
3. Personal Right, shareholders can sue the corporation in the event of violations by the company against shareholders, their shares, or signed contracts.
4. Fraud on The Minority, minority shareholders have the right to sue in court on behalf of the corporation if the majority shareholders commit fraud against the minority shareholders.
5. Derivative Action, shareholders have the right to file a derivative lawsuit against the Board of Directors or majority shareholders in cases of breach of fiduciary duty, negligence, and other serious misconduct.

With the developments in those five exceptions and the ruling in the case of Foss v. Harbottle, there is now protection for minority shareholders to defend corporate interests through the court system by proving that the directors and commissioners have acted negligently or made mistakes in carrying out their duties.[12] It is important to note that when minority shareholders file a derivative lawsuit, the lawsuit is not filed to represent themselves, but rather for and on behalf of the company. Thus, at the time the derivative lawsuit is filed, the recovery or compensation will be paid to the company, while shareholders only benefit in the form of an increase in stock prices. In corporate law in Indonesia, the concept of derivative rights was first regulated in Law Number 1 of

[11] Rohan Aniraj. "*FOSS VS. HARBOTTLE (1843)*". Jus Corpus Law Journal (JCLJ), Vol 1 Issue 3. p. 316.

[12] Sofia Sobah, *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, Volume 48, Nomor 4, 2018, P. 795

1995 concerning Limited Liability Companies, which was then re-regulated in the Company Law. [13]

However, neither of these laws explicitly mentions derivative lawsuits. Article 97 paragraph (6) of the Company Law regulates that on behalf of the company, shareholders representing at least 1/10 of the total shares with voting rights may file a lawsuit through the district court against members of the board of directors who, due to their mistakes or negligence, have caused losses to the company. It should be interpreted that a Derivative Lawsuit is an exception to the provisions of the Company Law that grants the Board of Directors the authority to represent the Company both in and out of court.[14] Furthermore, in cases where there are actions by the directors that harm the company, shareholders who meet the requirements as stipulated in the aforementioned article may represent the company to file a claim or lawsuit against the directors in court.

Meanwhile, Article 114 paragraph (6) of the Company Law states that on behalf of the company, shareholders representing at least 1/10 of the total shares with voting rights may sue members of the board of commissioners who, due to their mistakes or negligence, have caused losses to the company in the district court.[15] Based on that article, a derivative lawsuit can only be filed by 1/10 percent of shareholders, which means that shareholders holding less than 1/10 do not have the right to sue the Board of Directors, the Board of Commissioners, and the Majority Shareholders. These restrictions may limit the rights of shareholders in using derivative lawsuits. In practice, it is not always easy to meet the minimum requirement of 1/10, especially for Public Companies, as it is difficult to fulfill 1/10 of the shares that are circulating on the Stock Exchange. The regulation of derivative lawsuits in the Company Law is considered still too basic and does not explain the mechanisms for regulating derivative lawsuits in a more rigid manner. It can be seen that the Company Law only regulates two articles related to derivative lawsuits. Here are

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[13] Taqiyuddin Kadir, *Gugatan Derivatif, Perlindungan Hukum Pemegang Saham Minoritas*, Jakarta: Sinar Grafika, 2017, p. 22

[14] M Teguh dan Nurul Aulia. *Hukum Perseroan Terbatas Dan Perkembangannya Di Indonesia*. UII Business Law Review: Volume Three. 2017. p. 29.

[15] Monica Caecillia. "*Perlindungan Hukum bagi Pemegang Saham Minoritas yang Dirugikan Akibat Direksi Melakukan Kesalahan atau Kelalaian*" Jurist-Diction: Vol. 2 No. 3, 2019, p. 989.

some things that need to be done to refine the arrangements related to derivative lawsuits, namely:[16]

1. Regulation on the categorization of derivatives, as there is no clarity on what is meant by negligence or losses caused by directors and/or commissioners.
2. Regulation regarding the requirements for filing a derivative lawsuit.
3. Regulation concerning the duration as a shareholder who can sue.
4. The notification period for shareholders wishing to file a lawsuit against the Board of Directors or the Board of Commissioners can be carried out.
5. What is the legal procedure for filing a derivative lawsuit in the District Court

However, the Company Law has also regulated several articles related to the rights of minority shareholders, as follows:

1. Right to sue

   Shareholders have the right to file a lawsuit against the company through the District Court that has jurisdiction over the company's location if the company's actions harm their interests.
2. Right to access company information

   Shareholders can conduct an examination of the company if there is suspicion that the company and/or members of the board of directors have committed unlawful acts that harm the shareholders.
3. Right to fair treatment (Appraisal Right)

   Shareholders have the right to request the company to buy their shares at a fair price if they do not agree with actions taken by the company that harm the share holders or the company itself.
4. Priority rights (Pre-emptive Right)

   Pre-emptive Right is the right granted to minority shareholders to have priority in owning or purchasing shares offered by the company.
5. Derivative Rights

[16] Wachid Aditya dan Krisnadi Nasution. "*Reformulasi Hukum Tentang Hak Gugat Bagi Pemegang Saham Dibawah 1/10*". Jurnal Hukum Bisnis Bonum Commune Volume 5. 2022. p. 111

> Derivative rights are the rights of shareholders to sue the board of directors or commissioners on behalf of the company in cases where the directors or commissioners have committed errors that have caused losses to the company.[17]

In essence, not all lawsuits filed by shareholders on behalf of the corporation can be recognized as derivative actions. The case of derivative lawsuits that occurred in Indonesia was experienced by PT. Bank Danamon Indonesia, Tbk, which operates in the banking and financial institution sector. This case occurred in 2009, when the Board of Directors and Commissioners made a decision that bound the company in conducting foreign exchange transactions (derivative transactions) with affiliated companies.35 It is known that the actions taken by the Commissioner and the Board of Directors are acts that fall outside the scope of the company's activities, and these actions were never submitted for approval by the General Meeting of Shareholders beforehand, as stipulated in the Company's Articles of Association.

According to the shareholders, the actions taken by the Board of Directors and Commissioners constitute speculative agreement transactions that could result in losses for the company. After calculations, it turns out that the actual loss suffered by the company amounts to 328 million Rupiah, with a potential loss of 3.5 billion Rupiah. This poses a threat of bankruptcy for the company, as its paid-up capital is only 2 billion Rupiah. Based on this, one of the shareholders filed a lawsuit on behalf of the company against the Board of Directors and the Board of Commissioners. The lawsuit was filed with the Bandung District Court to seek compensation for actions deemed detrimental to PT. Danamon Indonesia, Tbk against the Board of Directors, Commissioners, and partner companies. In the end, the Panel of Judges decided to accept everything in the ruling of case number 06/Pdt.G/2009/PN.BB.36.[18]

Based on the case, it can be seen that the shareholders have made efforts to protect the company from potential losses due to actions taken by the board of directors and commissioners that bind the company in conducting foreign exchange transactions with partner companies without first obtaining approval from the General Meeting of

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[17]Riska Fitriani. "*Gugatan Derivatif Oleh Pemegang Saham Minoritas Pada Perseroan Terbatas*". Jurnal Ilmu Hukum: Vol. 2 No. 1. 2011. p. 190

[18] Decision of the District Court Number 06/Pdt.G/2009/PN. Bale Bandung dated November 20, 2009.

Shareholders, as stipulated in the company's Articles of Association. In that case, the shareholders were right to use derivative action as the basis for their claim, considering that the impact of the defendant's actions did not directly harm the company at the time of the transaction, but only had the potential to cause losses in the future. In addition, based on the number of ownership aspects, the shareholders are classified as minority shareholders because they only hold 50% of the shares, which is in accordance with the provisions of Article 97 paragraph (6) of the Company Law. Based on this, it can be concluded that the Company Law has provided protection to minority shareholders, and these shareholders also recognize that derivative lawsuits can offer protection to minority shareholders in cases where the directors or commissioners make mistakes in carrying out their duties and authorities.

Currently, the Company Law has provided protection to minority shareholders in companies, but so far the protection offered has not been optimal, resulting in minority shareholders being harmed by unlawful acts carried out in bad faith. The Organization for Economic Cooperation and Development (OECD) has developed a principle called Good Corporate Governance, which includes transparency, fairness, accountability, and responsibility. The National Committee on Corporate Governance Policy has established guidelines regarding Good Corporate Governance, but they have not been consistently implemented by companies in Indonesia. This is because the guidelines established by the committee do not include legal sanctions for companies that do not comply. In addition, based on the common law system, derivative actions can only be processed after obtaining permission from the court. The Indonesian Court should have issued a decree or interim decision first to establish the representation of shareholders who will represent the company in the derivative lawsuit.

Comparison of the Mechanisms for Implementing Derivative Action in Indonesia and South Korea

The quality of protection for minority shareholders can be seen based on the jurisdiction of each country, which is rooted in the system used by that country.[19] The civil law system is a legal system that developed in Continental Europe and has legal

[19] Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, Delaware Journal of Corporate Law, 1999

sources derived from written legal codifications.[20] John Henry Merryman, in his writing, states that there are three sources of law in civil law countries, namely statutes, derivative regulations, and customs that do not contradict the law, where judicial decisions in the civil law system are often not considered a source of law.[21] One civil law country that provides legal protection to minority shareholders from arbitrary actions of corporate management is South Korea. Korean law allows shareholders to file derivative lawsuits against directors who have made mistakes or been negligent on behalf of the company. Derivative lawsuits in Korea were first regulated by the Korean Commercial Code, Act No. 1000 of 1962, which came into effect in 1962 and was influenced by United States law. Based on Article 403, paragraph (1) of the Korea Commercial Code Act No. 5591 of 1998, a shareholder who owns at least 1% of the total issued shares of a corporation may file a derivative lawsuit against the directors who are at fault on behalf of the corporation.[22]

As for public companies, shareholders who own at least 0.01% of the total shares issued by the corporation for at least six months will have the right to file a derivative lawsuit. This is regulated in Article 542-6 paragraph (6) of the Korea Commercial Code Act No. 10600 of 2011. Although the ratio of 1% or 0.01% can be met collectively by many shareholders, this requirement is one of the main obstacles to filing a derivative lawsuit against directors who have made mistakes in Korea.[23]

Based on Article 404 paragraph (1) of the Korea Commercial Code Act No. 5591 of 1998, only shareholders can be plaintiffs, and those who are responsible to the corporation (typically directors who violate fiduciary duties) can be defendants. Corporations are only allowed to participate in legal proceedings on the plaintiff's side, and only if the plaintiff wishes it, as stipulated in Article 404, paragraph (2) of the Korea Commercial Code Act No. 5591 of 1998. According to Article 403, paragraph (1) of the Korea Commercial Code Act No. 5591 of 1998, before filing a derivative lawsuit, shareholders must request that the corporation file a lawsuit against the relevant director.

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[20] Gerald Paul Mc Alinn, et al., *An Introduction to American Law*, (Carolina Academic Press, 2010), p.4

[21] John Henry Merryman, *The Civil Law Tradition: An Introduction To The Legal System Of Western Europe And Latin America 2nd Ed*, (California: Stanford University Press, 1985), p. 23-24

[22] Kyung-Hoon Chun. *Understanding Korean Corporate Law and Governance*. Journal of Korean Law, Vol. 21, 253-288. 2022. p.277

[23] Ok Rial-Song. *Improving Corporate Governance Through Litigations: Derivative Suits And Class Actions In Korea*. Seoul National University. p. 10.

If the corporation does not file a lawsuit within 30 days from the date of the demand, then the shareholders may immediately file a derivative lawsuit on behalf of the corporation. If there is a possibility of irreparable loss, shareholders can immediately take derivative action without filing a lawsuit.[24]

According to Korean law, shareholders can hold an extraordinary general meeting, initiate amendments to the articles of association through shareholder proposals, dismiss directors without cause and at any time through a special resolution on the matter, and have the right to preemptively subscribe to securities. This is due to the fact that Korean law is modeled after English law, which provides protection to shareholders. However, in reality, there are significant obstacles that must be addressed regarding the ownership threshold for filing derivative lawsuits, which is considered restrictive in submitting such claims. In filing a derivative lawsuit, the corporate laws of South Korea and Indonesia grant shareholders the right to sue the directors or commissioners on behalf of the company in cases where the directors or commissioners have made mistakes that resulted in losses to the company. Both countries base derivative lawsuits on the losses of the company rather than the losses of the shareholders, so any compensation awarded is paid to the company, not to the suing shareholders. In South Korea, there is a requirement that shareholders of public companies must have been shareholders for at least 6 consecutive months in order to file a derivative lawsuit, whereas in Indonesia, there are no regulations regarding this matter.

In the context of share ownership, Indonesia does not have regulations regarding the differences in share ownership requirements between public and private companies. For both public and private companies, a minimum ownership requirement of 10% of the total shares is applicable to file a derivative lawsuit in the District Court. Meanwhile, South Korea has different regulations concerning share ownership requirements. In South Korea, there is a requirement that derivative lawsuits can be filed by 1% of shareholders and 0.01% of shareholders for public companies. It can be seen that South Korea has better arrangements regarding share ownership requirements in Indonesia. This is because such restrictions can limit the rights of shareholders to file derivative lawsuits.[25] In

[24] Kyung-Hoon Chun, *Multiple Derivative Actions: Debates in Korea and the Implication for a Comparative Study*, 15 Berkeley Bus. L. J. 306, 306-336 (2019). p. 311

[25]Monica Caecillia. "*Perlindungan Hukum bagi Pemegang Saham Minoritas yang Dirugikan Akibat Direksi Melakukan Kesalahan atau Kelalaian*" Jurist-Diction: Vol. 2 No. 3, 2019, p. 989

practice, it can sometimes be difficult to meet the minimum requirement of 1/10, especially for Public Companies, as it is challenging to fulfill the 1/10 requirement based on the shares circulating on the Stock Exchange.

Conclusion

The Company Law has provided protection for minority shareholders, which can be seen in Article 97 paragraph (6) and Article 114 paragraph (6) of the Company Law that regulates derivative rights. Derivative rights are the rights of shareholders to sue the board of directors or commissioners on behalf of the company in cases where the board of directors or commissioners have made mistakes that caused losses to the company. However, the protection provided by the Company Law is not yet optimal. Here are several things that need to be done to refine the regulations regarding derivative lawsuits: (1) regulation on the categorization of derivatives, as there is no clarity on what is meant by negligence or losses caused by the board of directors and/or commissioners, (2) regulation on the requirements for filing a derivative lawsuit, (3) regulation on the duration of time as a shareholder who can file a lawsuit, (4) the timing of notification of the shareholder's intention to sue to the board of directors or the board of commissioners, and (5) how the legal proceedings for filing a derivative lawsuit in the District Court should be conducted.

The quality of protection for minority shareholders can be seen based on the jurisdiction of each country, which is rooted in the system used by that country. The fundamental difference between derivative action in Indonesia and Korea is that South Korean law has regulations regarding public shareholders who can file a derivative lawsuit, with the requirement that they must have been shareholders for at least 6 consecutive months, while in Indonesia there are no such regulations. Additionally, in filing a derivative lawsuit, Korean corporate law stipulates that a derivative action can be initiated by 1% of shareholders and 0.01% for shareholders of public companies, whereas in Indonesia, a derivative action can only be filed by 1/10 or 10% of shareholders.

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