PAST AND FUTURE OF COMPANIES:

A MAJOR CHARACTER IN ECONOMY AND LAW

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I. Introduction

Commerce is located at the very core of human history. The journey began with an exchange between primal communities and reached such a point that every single day there are millions of transactions worldwide thanks to huge corporations. In this current period of time, multinational companies control economies even larger than many countries' and affect every aspect of life; from daily errands of a single person in one of the least developed country to world's major economic and political problems. Although the history of companies as we know it dates back to a few centuries ago, it is not until the last decades that they took a vital role in shaping the future as well. Thus, it is fair to say that <u>the company is one of the biggest and most influential inventions of the human history</u>.

Of course, such an invention would not be left unregulated. Lawmakers tried to explain such a concept from a legal point of view and set forth rules to govern it, but they could not also ignore economic parameters and necessities. There has always been a mutual relationship between law and economics; economic needs influenced company law and company law shaped economies. Due to this fact, in the last few years we have been witnessing a new direction in legal policy regarding the main principles of company law following serious economic depressions; delimiting the limitation in responsibility and making the figures behind corporate veil visible again. Such progress demonstrates us that company law is actually proceeding towards the very beginning point; the problem of balancing benefits of creating huge corporations

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by basic instruments of company law such as separate legal personality, limited responsibility etc. with the economic and social damages incurred from these very instruments.

In this work, we will explain the historical and economic/legal justifications for companies. Subsequently, we will begin exploring the current status of company law by giving examples of legal solutions and developments. Then, we will discuss the current trends and the future of company law. While doing that we will primarily focus on the principles of modern company law and revisit underlying justifications of our need for companies in order to examine whether such principles are well suited for the needs of society or are being abused. After that, we will try to demonstrate lawmakers' regulatory tools to prevent these principles from being abused. Finally, we will make a prediction on the direction towards which company law is moving. For the purposes of this work, we will mainly concentrate on Turkish law, which adopted the continental European (mostly Swiss-German) company law system, while there are also considerable effects of Anglo-American legal influences perceivable on the Turkish system.

II. History and Models of Companies

Before understanding the history of companies, we should address the history of commerce and partnerships[1]. There is a credible argument which can be made that the history of commerce overlaps with the history of humanity. Commerce began with the interchange among people from early ages as they moved on from the hunter-gatherer lifestyle, started production in order to satisfy their own needs and commerce satisfied demands of different communities. This trend also contributed towards the progress of the arts and culture.

After the development of basic commerce between people, partnerships/companies flourished. It is known that in 20th Century (BC) Babylon partnerships/companies were regulated to some extent in the Code of Hammurabi.

[1] For the brief history explained here see Reha Poroy / Ünal Tekinalp / Ersin Çamoğlu, **Ortaklıklar Hukuku I**, 13. Bası, Vedat Kitapçılık, İstanbul 2014, p. 3 onwards.

Moreover, in the 18th Century (BC), the fact that Assyrians used the partnership/company model in a Middle-Anatolian colony was deduced from cuneiform. It is also accepted that the partnership/company model was implemented in different circumstances in Ancient Greek as well as Islamic states.

In Rome, after the death of *pater familias*, a community of heirs called *"consortium"* was established. According to the Roman legal system, *consortium* constitutes partnerships since third parties were also able to attend *consortium* in order to preserve and develop the inherited assets, thus resulting one of the main elements of even modern day companies; *affectio societatis.* After a while, *consortium* yielded to *societas*, which is *consensu contrahitur*, an agreement which parties entered into with their own will. In the middle ages, *commenda* and *cumpania* took place which are thought to be the basis of modern-day companies.

Emergence of large (joint stock) companies dates back to late 16th and 17th centuries. At that time, first companies were large organizations established by the permission (privilege) and protection of English, French and Dutch states/kingdoms and they were mostly in profitable colonialism, shipping and mining activities. Since these profitable activities required high costs, peoples' savings steered towards those companies. By doing so, investors' savings are operated in privileged businesses and profits are distributed among them. Moreover, negotiable papers representing the shares in these companies are circulated in secondary markets with high profit rates above their nominal value. However, the lack of legal regulation and protection caused huge bankruptcies and losses, unjust enrichment and lost fortunes. As a consequence, especially for joint stock companies, state control and regulation mechanisms have developed. Modern-day company law is based upon these principles: Securing fair and productive use of the capital belonging to investors, protecting the economic interests of investors and entrepreneurs, while in turn contributing to private and public welfare.

During the evolution of business models, we had a large spectrum. On one end of the spectrum, we have the "sole trader", the most primitive model of trade. On the other end of the spectrum, we have "joint stock companies" which even serve international commerce, while employing thousands of workers, managers and belonging to numerous shareholders/investors. Between these two edges, we have

different types of companies designed for differing interests and necessities. Now we will look upon those business models in its entirety.

As we stated immediately above, the first and most simplistic business model is the sole trader. A sole trader has his/her own capital and organization, and s/he takes the risks on and makes profit or loss by him/herself. The investment, which is crucial for the sole trader, is made by the owner of the business with personal savings or bank loans. The owner enters into transactions in his/her own name, there is no limitation of liability and no asset partitioning between the assets of the business and that of the trader, which means creditors can even recover from trader's personal belongings[2]. The benefit of being a sole trader is that there are no complicated organizational problems and it is adequate for small-scale businesses.

If we take another step, there is the simple partnership[3]. Partnership is the basic organization we come across in commercial law. In essence, it is a type of contract, which also creates grounds for larger models. What is interesting about partnerships is that in many jurisdictions partnerships can be formed by oral agreement or inferred by conduct without a need of a written agreement[4]. In other words, partnerships can be formed by coincidence without an explicit declaration of the will of partners. In this model, there is still no separate legal personality; therefore, no separation between assets, partners are jointly and severally liable for the debts of the partnership[5].

Being a sole trader or having a partnership might not be sufficient when a business expands and capital requirement grows or in order to invest in venture sources. One way to collect the needed capital is to ask people to give their own savings in exchange for a share in the business, which will grant them financial and

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2 Alan Dignam / John Lowry, **Company Law**, 7th Ed., Oxford University Press, Oxford 2012, p. 4.

3 For partnership models in Germany, the UK and the US see Andreas Cahn / David C. Donald, **Comperative Company Law**, Cambridge University Press, Cambridge 2010, p. 26 onwards. Also see Mads Andenas / Frank Wooldridge, **European Comperative Company Law**, Cambridge University Press, New York 2009, 99 onwards.

4 Dignam / Lowry, 2012, p. 4.

5 In some jurisdictions there might be limitation of liability for particular partners. Dignam / Lowry, 2012, p. 5.

administrative rights. In order to meet such necessities, highly sophisticated and well-organized business models are required. Companies are the answer to such needs. Companies, especially joint stock companies, facilitate savings of ordinary people and make large scale projects possible.

Companies can also be subdivided into two categories; public and private. In private companies the relationship between partners are closer, membership is limited, and thus, entering/leaving the company is not that easy[6]. However, in public companies, partners do not even know each other, being a partner or leaving the company is rather easy[7]. Since they collect public investment, public companies are generally subject to strict regulations[8].

Now we will focus on company limited by shares or joint stock company. Firstly, the main virtue of these companies is the limitation of liability. In other words, partners are liable for only the amount of capital they subscribe at the time of the formation of the company. Once they pay that amount, they have no other liability against the company or creditors of the company. This is very attractive for those who have capital to invest but would like to avoid greater losses. Therefore, in joint stock companies, people can securely bring their money to a stranger's business knowing that the maximum amount of loss would be equal to the money invested, and no one can claim anything other than his/her capital commitment. So the investor's personal assets have the immunity against creditors of the company.

At first, joint stock companies were desired for making certain costly major works possible, such as shipping overseas. Today, joint stock companies have reached another level. For example, groups of companies have dozens of affiliate companies established in different countries, trading internationally and offering shares in the markets of those countries. As a result, there are thousands of transactions completed every single day in stock markets around the world. Moreover, investors' options are

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[6] Dignam / Lowry, 2012, p. 8.

[7] Dignam / Lowry, 2012, p. 8.

[8] Public companies are allowed to offer their shares to the public, but may have chosen not to do so. Public companies that have offered their shares to public may or may not have listed their shares on a regulated stock exchange.

not only limited with shares, they can also prefer other securities issued by the companies.

III. Economic and Legal Justification for Companies

In order to understand companies, we should address the necessities that brought us to such an invention. However, before proceeding, we need to divide our explanation into two parts: The first part reflects human needs for creating companies which are in line with the history we explained above. The second part is more about the macroeconomic and political reasons as to why we needed companies and how they grew.

First, as explained previously, a company is a tool to collect people's investments. By forming a company and providing shares for investors, it is a lot easier for entrepreneurs to reach the capital they need. Investors are also satisfied with it since they get shares of the company and they also get their portion from the profit that the company makes. It is also beneficial for investors to exchange shares in sophisticated markets since they do not have to wait until the profit is made and distributed in order to get a revenue. If the business performs well, the value of its shares rise and shareholders can offer their shares with the prices higher than their nominal value. After a while, it became more reasonable to only buy and sell shares as a short-term investment instead of waiting for profit to be distributed in long-term, since capital markets had grown, and it had become easier to observe the instant value of shares and to trade in shares. Therefore, such economic necessities after the very invention of the company model resulted in the gradual development of company law by lawmakers. From the legal perspective, there has to be a separate legal personality whose shares are distributed, a limitation for the responsibility of shareholder to attract investors, a solid capital structure to assure investors and a professional management for companies to avoid from a massive collapse, which would harm investors. As a result of economic and legal problems and solutions, we have arrived at today's capital markets and company law system.

The reasons mentioned above rendered the joint stock company a reasonable and desired institution/model, which facilitates under-the-mattress savings of people. However, it also served in other fields. When liberal thought began to take control over the global economic system, especially after the fall of the Eastern Bloc, a new era emerged and the competition/war between various actors of the global system moved to another level. In this period, the market economy had been the field on which the war was staged and international-supranational institutions were important tools to overcome rivals. While this rivalry was going on, it reached to such an extent that those institutions have even surpassed the economic size of many countries. As it currently stands, it is rather vague as to whether the race is between the states controlling economic actors or the economic actors controlling the states. However, if we are to comprehend this race, we need to understand the actors.

Economic actors can be described from the legal perspective as undertakings who involve in economic activity under an organization[9]. An economic organization has the labor - capital - entrepreneur trio with the aim of generating income. This is the same for sole traders as well as multinational companies which dominate in their industries. However, the needs of modern society and the economic system almost made it impossible for sole traders to compete, therefore, companies emerged to run the race as a result of a need for more efficient business models and complex economic rules[10].

Initially, in the market, supply and demand were regulating companies and deciding who would win the race nationally and internationally. After a while companies became the regulator of the market, in lieu of the *"invisible hand"*. Today we have companies worth a trillion dollars (USD), which are exactly the ones affecting not only the domestic but also the global economic system as a whole. Inherently, these actors also influence economic and legal developments, which is another factor bringing us to today's capital markets and company law system.

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9 Ali Paslı, **Anonim Ortaklığın Devralınması**, Vedat Kitapçılık, İstanbul 2009, p. 7.

10 Paslı, 2009, p. 9.

Having explained the main economic and legal reasons behind companies, we will not discuss the economic impact that these entities create and rather we will focus on legal outcomes. Nevertheless, we need to keep in mind that today's legal system is the outcome of the aforementioned reasons, especially the strong economic impact that companies have had on the development of company law, which in turn has shaped the modern company law.

IV. Principles of Modern Company Law

The main issues of focus in this paper are derived from the principles of separate legal personality and limited liability of shareholders. Such principles are located at the core of company law and they are also the main reasons and outcomes of why companies were invented. While explaining the related problems and principles, the examples and explanations we will highlight will be based on Turkish Law, specifically the provisions enacted for the protection of different interest groups. However, the basic rules of company law are spread all over the world and, surprisingly, they are almost identical/unchanged.

Another outcome of company theory is the separation between ownership and management of company, i.e. shareholders being distanced from the board. Especially in public companies, this feature results in outsider managers tasked to govern assets of company, which are brought by shareholders with whom board members have no direct relationship with. On the other hand, corporate governance principles which is one of the most popular topics of recent periods, are also supposed to address the problems based on the aforementioned separation, which we also will discuss below.

A. Separate Legal Personality

First of all, legal personality is a common ground for all company models[11]. We have explained that a simple partnership does not have a separate personality, thus

[11] For detailed information about personality of companies see Dignam / Lowry, 2012, p. 15 onwards.

constitutes an exception. However, when it comes to joint stock companies, the feature of separate legal personality is a must. A company gains its legal personality when registered in the Trade Registry. Upon registration, a company can have its own assets, own responsibilities, credits and debts, it may sue or be sued. Although a company is founded with the capital invested by shareholders, this capital belongs to the company itself as soon as the company acquires legal personality, and that capital/asset is run by professional managers appointed as the corporate bodies of that company. This makes shareholders invisible and the only entity that third parties transact is the company itself. The fact that shareholders hide behind a corporate veil is open to abuse to the detriment of third parties, such as creditors and employees. Therefore, some solutions must be introduced for the problems originating from the principle of separate legal personality.

Initially, accurate and timely information is required be provided for third parties willing to enter into a legal relationship with the company. This issue is also one of the aims that capital markets law and corporate governance principles are dealing with, yet in the Commercial Code we encounter some provisions that provide transparency. For example, in order to incorporate a company, compulsory information has to be provided in the Articles of Association and it must be registered in the Trade Registry which is accessible to the public for inspection.

Apart from that, since the company has legal personality, it can have its own assets separated from the assets of the shareholders. However, it is fair to say that, especially for Turkish practice, many joint stock companies are still run by small group of shareholders, mostly by families. Since that brings about shareholders to use company's assets as if their own, Turkish Commercial Code (TCC), similar regulations/codes of other European countries, has adopted some principles which does not allow shareholders to use company's assets as they wish.

According to the Art. 358 of TCC, unless shareholders pay the debts due by their capital subscriptions and the company's profit, including free reserves, is sufficient enough to cover losses from previous years, shareholders may not borrow from the company. When the cited provision was first drafted, shareholders were completely prohibited from becoming indebted to the company. However, the

provision was amended prior to its' entry into force, and the current version took effect. Still, we can claim that this provision prevents shareholders from using the company's resources to a certain extent.

On the one hand, we have seen that the separate legal personality is inevitable for better organization, issuing shares and other securities. Having a separate responsible body leads to encouraging investors as well as expanding the company's financing opportunities. On the other hand, it has certain drawbacks, which are subject to different legal provisions/solutions. While these problems are not completely solved, we will discuss below another major problem caused by a further main principle of company law accompanying separate personality.

B. Limited Liability for Shareholders

A company is also the person with whom third parties enter into transaction. In other words, a company has its own commitments. When the company fails to fulfill obligations derived from binding contracts, creditors can only recover their receivables from the company's assets. They cannot sue shareholders or managers of the company, except for the particular cases where managers are held liable according to legal provisions. For joint stock companies, it is a strict rule that shareholders have the sole obligation to fulfill their capital commitment[12]. Moreover, it is also accepted that creditors of a company cannot sue its shareholders even if they failed to pay their only debt to the company[13]. This is not a natural result of the existence of the legal entity. Despite the existence of a legal entity, there are some types of companies where the

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12 For logic behind limited liability and reputed Solomon case see Dignam / Lowry, 2012, p. 18 onwards.

13 Even though this is a principle of the Turkish Company law, enshrined also in the TCC Art. 329 al.2, Turkish Court of Cassation has overturned its long-standing jurisprudence and now accepts that under the provisions of Enforcement and Bankruptcy Code, creditors of a company may pursue for their own receivables from the latter the shareholder who failed to fulfill their capital commitment. See the following rulings: Yargıtay HGK (*Civil Law General Assembly*) T.11.05.2016, E.2014/12-1078, K.2016/600 and Yargıtay 12. HD. T.02.06.2016, E. 2016/1954, K.2016/15638. See also Ali Paslı, **Yeni Türk Ticaret Kanunu, Anonim Ortaklık Hükümlerinin Tanıtılması I**, BATİDER, 2011/3, p. 142, footnote 8.

company's partners are responsible for company’s debts after the liquidation of the company in second degree. So the potential risk may exist even if the company has its own legal personality. Therefore, in order to eliminate this risk, this second characteristic –limited liability- should be added to the legal entity for at least some types of companies.

Such a special feature, as it is a limited liability principle, has its roots in the very justification of creating a company, limiting liability in order to encourage investors to take risks. However, this creates a double-edged sword. While we try to encourage investors to make larger investments by ensuring that they will not be liable with their personal assets, we also give a unique opportunity for ill-minded investors to be deceived, and such practice should be vehemently discouraged. The only thing that is needed to deceive people and not to be held responsible, is simply to establish a company.

On the other hand, we should accept the fact that statutory provisions cannot take all the possibilities into account that can lead to abusive behavior. Therefore, the solution for this problem has emerged in jurisprudence, and some of these solutions, which are further explained below, are enacted by the legislator. As a result, one can claim that the two main founding principles of company law are also the reasons underlying some serious problems and lawmakers work to address them appropriately. The examples illustrated above demonstrate that joint stock companies are based on separate personality and limited responsibility, which are inevitable for the system to work. Nevertheless, these features can also give serious damage when used by malevolent hands. Therefore, either by law or jurisprudence, these principles are occasionally ignored in order to protect third parties’ interests. Now we will focus on the enacted provisions for delimiting limitations, providing transparency, making shareholders visible and responsible again.

C. Circumstances Where Law Interferes

1. Lifting the Corporate Veil

In order to prevent shareholders from abusing the limited liability principle, courts lift the corporate veil in order to reach people who are truly responsible. This situation is also called as “penetrating”, “piercing”, “parting” the veil[14]. It can also be observed in groups of companies. However, groups of companies will be addressed below and here we will only focus on lifting the veil in an ordinary (independent) company.

Some jurisdictions have statutory examples of veil lifting[15]. For instance, the Art. 98 of the Turkish Capital Markets Law states that; *“In case of the bankruptcy of capital market institutions or when they go through gradual liquidation according to Article 86, the Board[16] is authorized to request the individual bankruptcy of their shareholders who have directly or indirectly more than ten per cent of the shares, their members of board of directors who have resigned or are holding office and their managers having an authority to sign ... provided that their responsibility has been determined in accordance with Article 97”.*

However, courts have also played a crucial role in order to establish such an approach in company law. In cases where shareholders act fraudulently and the company is used to conceal the facts or to avoid responsibility, the company is deemed as a tool for damaging creditors. The courts hesitated at first, nonetheless they adopted “veil lifting” after a while, when it was unjust to stick to the principles of company law any longer.

In Turkish law[17], it has been accepted in general that there are three main occasions that the corporate veil is deemed necessary to be lifted: Where assets of the company and shareholders are confused, where shareholders identify themselves with the company and where resources are insufficient in some separate regulated

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14 Dignam / Lowry, 2012, p. 31.

15 As an example in UK Law see Dignam / Lowry, 2012, p. 32 onwards. There are also provisions in Turkish tax law holding shareholders and managers responsible from public receivables in limited liability companies.

16 Capital Market Board of Turkey.

17 For brief explanation of veil lifting in Turkish law see Ersin Çamoğlu, **Ticaret Ortaklıkları Bağlamında Perdenin Kaldırılması Kuramı ve Yargıtay Uygulaması**, Banka ve Ticaret Hukuku Dergisi, 2016/2, p. 5 onwards. (HeinOnline)

companies. For example, Court of Cassation lifted the veil where a debtor used the veil of a family company in order to avoid from personal creditors[18]. However, in order to lift the veil there must be an abuse of control.

We will not expand further on the veil lifting. Yet it is a good indicator of when the founding principles of company law is abused and how this problem is dealt with. Nevertheless, courts should decide prudently to lift the veil since if it becomes an everyday practice for courts, then one of the founding pillars of company law will be demolished.

2. Group of Companies

Another legal concept we would like to point out is group of companies[19]. The notion of "Group of Companies" can be defined as *"Companies, which are directly or indirectly controlled by a controlling company, constitute a group of companies together with the controlling company. The controlling companies are the parent companies and the controlled companies are the subsidiaries."* In other words; a "group of companies" is an economic integrity without legal personality consisting of controlling and controlled companies. If a group of companies exists, there may be different outcomes according to different legal systems. However, in some countries such as Germany and Turkey, groups of companies are regulated under a separate body of rules which govern the relations between the controlling and controlled companies, while protecting shareholders and creditors vis-à-vis the entire group.

Specifically, an enterprise acquiring certain percentages of the shares of a capital company has the obligation to notify, register and announce its' holding. The board of a controlled company is obliged to prepare a report regarding its affairs with the other group members, any shareholder can demand information regarding the

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18 For examples form Turkish law see Çamoğlu, p. 16.

19 For corporate groups in Germany, the UK and the US, see Cahn / Donald, 2010, 677 onwards. Also see Andenas / Wooldridge, 2009, p. 448 onwards. Another study on German and Nordic legal system see Holger Fleischer / Jasper Lau Hansen / Wolf-Georg Ringe, **German and Nordic Perspectives on Company Law and Capital Markets Law**, Tubingen 2015, Mohr Siebeck, p. 157 onwards.

controlled companies, and -most importantly- as a result of control, a special liability regime is created. Besides, the right to request a special audit, the right to purchase and the liability arising from the trust are among these consequences. Liability of the controlling company is one of, if not the most, important outcomes.

An important part of law regulating groups of companies is the liability system. Here, the main pillar of company law, namely the limited liability based on a separate legal personality, seems to be weakened[20]. In groups of companies, that separation of responsibility becomes blurred. As an economic reality, a controlled company cannot follow its own interests. It serves the group's policy under the direction of the controlling company. However, the notion of control does not grant a controlling company the right to exercise that power in a way that would make the controlled company incur losses. If the controlled company incurs loss because of the controlling company's direction, then the controlling company must compensate that loss, which might be demanded by the subsidiary itself, or shareholders and creditors of said subsidiary. This means, the controlling company, which is mostly a shareholder in the subsidiary, can be held liable for the loss of the subsidiary. In other words, a shareholder in a joint stock company who exercises control might be held liable from the losses of that joint stock company. Obviously, this system conflicts with the principle of shareholders' limited responsibility in joint stock companies.

In classic theory, liability arises from contract, tort or unjust enrichment. However, the classic theory does not answer the needs of a rich spectrum of relations between people. In between contract and tort, liability arising from trust based on good faith plays an important role, In order for liability to exist; there has to be a legal relationship between the parties, a party must have gained the counter party's trust by active or passive conduct, hence, the counter party must exhibit proper prudence and attention, and take action trusting the first party. Then, the first party must violate the obligation of acting in good faith and cause harm. This is a concept originated from a famous decision of the Swiss Federal Court (the "Swissair" decision). After the Swissair decision, it is made clear that the controlling company might be held liable

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[20] For examples from UK Law see Dignam / Lowry, 2012, p. 44 onwards.

for its actions or failure to act timely and correctly, if it leads damage to controlled companies' customers. This line of reasoning makes clear that, having a separate personality and a limited liability structure does not *per se* grant immunity. Controlling shareholders in a group scheme also have a responsibility against creditors based on their actions contradicting good faith. Turkey is the first country which introduced this concept positively. According to the Art. 209 of TCC, if the group's reputation has reached the sufficient level so as to gain the public's or consumers' trust, the controlling company is held liable for the trust gained as a result of its reputation, provided that reputation has been used by controlled company directly or indirectly in the legal/commercial relation with the third party.

3. Corporate Governance

The last important development of company law, which mainly took place in the 21st Century, is corporate governance. Corporate governance is a management system which aims at solving problems related to operation of joint stock company caused by managerial abuses, misconduct, conflict of interest and power gap as a result of ownership-management separation[21].

After a series of scandals in huge multinational companies, which have in the past deeply shaken the economies around the world, lawmakers and international organizations decided to interfere and regulate the governance of joint stock companies with a series of rules. The OECD published corporate governance principles in 1999, with revisions in 2004 and 2015. This is a proposal for national lawmakers which aims to provide a common framework for the creation of a secure environment for investors as well as constituting a solid organizational structure with a 'checks and balances' system benefiting shareholders, board members and other relevant parties, i.e. stakeholders. In some jurisdictions these principles are mandatory; all the principles must be applied, otherwise legal sanctions are imposed. On the other hand, in some jurisdictions, an apply or explain system prevails, i.e. companies might

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[21] Ali Paslı, **Anonim Ortaklık Kurumsal Yönetimi - Corporate Governance**, Çağa Hukuk Vakfı Yayınları, İstanbul 2005, p. 35.

choose principles that they want to apply and an explanation has to be provided as to why the remaining principles are not applied. In the Turkish system, we have also adopted corporate governance rules into our Capital Market Law and some principles are mandatory for public companies, such as the appointment of certain number of an independent board member. In TCC, corporate governance is also advised to other joint stock companies.

Corporate governance principles are based on fairness, transparency, accountability and responsibility. Such principles aim to achieve the same goals in the economy, which aims to raise investor confidence as well as making it easier for companies to access capital. As a result, corporate governance will provide a secure environment for shareholders and stakeholders assuring them their rights are protected, while making it easy for companies to attract investors and to reach market. This will ultimately increase the company value and benefit the company's itself. In order to maximize shareholding value, a management model is reached for the benefit of the company legal entity. In this sense, there is a mutual interaction between the interests of the company, shareholders and even the other stakeholders.

In the global competition of companies, corporate governance principles are crucial for them, which will also provide larger markets in order to reach investors. If companies are in line with these principles, then investors will be assured that the company in question has at least adopted a set of rules which protect their investments, also providing a more competent and professional management. As we can see, the purpose of corporate governance parallels with the same ends of the fundamental principles that are discussed throughout this paper.

Corporate governance principles do not directly interfere with the principles we focus on this work. However, it brings a set of rules to be implemented in joint stock companies, in order to obstruct the possible abusive behavior of controlling shareholders and managers. In other words, corporate governance protects those principles from being eroded by protecting company, managers, shareholders, stakeholders all together. We will not go into detail on corporate governance principles, yet we will provide some examples of how this protection is served.

In particular, the principles relating to transparency must be pointed out. The corporate governance framework aims timely and accurate disclosure of all information regarding the corporation, including the financial situation, performance, ownership, and governance of the company. In order to do that, a corporate website is mandatory in certain joint stock companies, and the minimum information to be published in that website is determined. Moreover, the contents of annual board reports are also set forth, which must disseminate correct and complete information.

Another aspect of corporate governance is related to management. Function, activity, structure, meetings of the board and financial rights of managers are issues that concern corporate governance. This reminds us of another issue that we face in modern company law; separation of ownership and control. Shareholders are the ones who actually own the assets of the company in an economic capacity via the shares they hold. However, in large companies, usually they are not the ones controlling the assets they own. Pragmatically shareholders should not directly control the assets in large scale public companies because at this level professional management is required since the field and size of activity are diverse[22]. Nevertheless, separation of ownership and control brings certain problems, which is another cause of corporate governance. Professional managers might not work sincerely to make the company more prosperous, more profitable and to raise the value of assets that the company which, in economic terms shareholders own[23]. Managers will not have the freedom to manage other people's assets as if it's their own, as long as they get their salary. In substance, we can still assume that control still belongs to shareholders, since they hold the power to appoint managers and economic ownership of company's assets belongs to them[24]. Yet, in order to avoid a problem caused by separation, the law provides some provisions that prevent managers from getting into a conflict of interest with the company and ascribes them the burden of acting in favor of company's interest at all times.

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[22] Paslı, 2005, p. 31 onwards.

[23] Paslı, 2005, p. 33.

[24] Paslı, 2009, p. 28 onwards.

For example, corporate governance principles require the board to establish special committees which will work for risk management and audition of the board. Moreover, principles divide board members as executives and non-executives and it provides that the majority of the board must consist of non-executive members. Consequently, in a board of directors, independent members have to be appointed and the criteria of independence is determined by law and secondary legislations. Certain board decisions have to be approved by these independent members and if they do not approve, the general assembly shall decide.

There are also some other provisions seeking to solve the same problem in TCC. For example, in Art. 396, managers are prohibited to run a business which overlaps with field of operation of the company unless the general assembly allows them to do so. Another example is that Art. 369 provides that, managers are obliged to perform their duties prudently as expected from a prudent director and safeguard the interests of the company in compliance with the principle of honesty.

In conclusion, we can claim that law interferes with the management of companies for the purposes of protecting stakeholders. This approach is rooted in the separation of ownership and management/control, which is the result of separate legal personality we confer on companies. Also corporate governance provides professional management, therefore assures investors that shareholders will not and cannot abuse the power of limited liability.

It seems that at the beginning, lawmakers felt the necessity of creating the notion of company with a legal personality and limited liability due to economic necessities, which encourages investors to form a company as they wish with their personal assets. However, lawmakers today feel the requirement of limiting the structural/organisational freedom of a company, again with the aim of attracting investors, since it is prone to get out of control. The principle of mandatory provisions enshrined in TCC Article 340, which renders the provisions of the TCC relating to joint stock company’s mandatory, constitutes one of the most remarkable examples of this trend.

V. Future of Company Law

We have seen the past and recent status of company law. In order to understand the future, we need to observe the way this area of the law has developed. At first, we have invented the foundational principles to attract investors and to make major business opportunities possible. Then we brought transferable shares and securities into play, resulting in the emergence of the capital market and regulations. Subsequently, we have detected substantive abuses of our main principles and decided to interfere, since not only the managers or shareholders but the whole society paid a price for such misuses. We have enacted some protective provisions in basic laws, we have also developed a set of advisory rules for a better management and social welfare. However, we have always refrained from over-regulation, because if we were to destroy the main pillars, the company law system would collapse. Now we have reached a point where it should be closely examined whether or not narrowing down the existing limits, and thus, the reverse of the trend in which company law has developed, provides for a better approach.

The issue we are facing now has many *façades*. The tool that was created, i.e. companies, serve many different interests. On the one hand, it is still commonly used by small scale entrepreneurs and investors to create goods and services, and wealth for themselves; and many economies rely on these economic activities undertaken by these companies. On the other hand, certain companies worldwide have grown to such a scale that they are larger, wealthier and more complex in administrative manner than many countries. Company law must regulate the same 'company' in a way that it does not restrict such legal instrument's use for different needs.

Furthermore, the global economy is more intertwined than ever by the phenomenon of, *inter alia*, cross-border companies. One can refer to such companies as international, and even, supranational. An economic problem in one country originated by these companies that carry systemic risks for the rest of the world, can create a snowball effect and may have a devastating impact on the whole economic system. This creates a need for additional thinking over policy, thus the law regarding companies. Company law itself should aim to create enough room for companies to further the global economic relations, thus allowing societies to benefit from a better

supply of goods and services; while at the same time limit the harmful, sometimes catastrophic, effects done by the short-comings of these companies.

These type of challenges seems like there is an impossible task at hand. One thing is for sure; the law will never suffice for the needs and tools of economic developments and it will always follow the latter. Another certain thing is that we will always have ill-minded investors, shareholders and managers. That makes modern day company law questionable. As explained above, companies emerged as a result of the need for more capital and a safe harbor for investors. Lawmakers responded generously, we have granted full immunity for shareholders and allowed them to collect money from people as they wish. Nowadays we want to inspect and interfere more. What is needed to be done is to strike a balance between the needs of investors and protection of the society. If we grant too much immunity, misuses are inevitable. If we destroy the limitation of liability, we would struggle to find investors in large numbers. As a result, the system must be closely observed to interfere timely. In particular, a point of focus should be to find proper precautions rather than trying to find proper solutions, since prevention is better than the cure.

Above all, it is important for lawmakers to primarily determine whether there is a market failure in the relevant jurisdiction. Once it is confirmed that a market failure exists, then one must closely analyze the reasons of such problems with a view to tackle the issues with accurate regulatory tools. However, regulation of an issue is not always the best response. Regulation itself has its' own costs and benefits. It must be reminded that each regulation is accompanied with its transaction costs. Furthermore, over-regulation may lead to destabilization of the current balance of interests, if any. At this point, a diligent comparative analysis from a functional point of view may contribute to addressing the legal problems of the modern company law.

Comparative analysis, when conducted with a functional perspective, may help better understanding of each legal problem and provide for alternative regulatory techniques. One must keep in mind that each jurisdiction has its own problems inherent in own social and economic conditions. Hence, drawing inspiration from and adapting suitable legal instruments, rather than identically adopting as is, seems like the accurate approach. Nevertheless, since economic conditions of different societies

approximate each other as a result of globalization and internationalization, legal principles and norms are expected to converge, as well. For instance, many countries take model laws, restatements or corporate governance principles into account while modernizing their domestic law.

Consequently, the history of company law informs us that the pendulum swings over time from one to the other and back. The future of company law appears to be repeating itself, that is to say; pro-regulation trend is expected to be followed by relaxation of legal rules. It is, therefore, predicted that harmonization of laws, combined with the pendulum effect, may lead to stricter rules for publicly held companies in order to protect small investors, whereas closed companies is expected to benefit from more organizational freedom.