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Corporate Governance Approaches and Jordanian Companies Law

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ABSTRACT

There are two major approaches towards the realization of corporate governance: The institutional approach, and the legal approach. The choice of the appropriate approach towards corporate governance is a logical consequence of the development of economic impact factors.

There are no official regulations regulating the corporate governance in Jordan yet, however, the Jordanian Companies Law considers some of the Corporate governance principles in it is articles.

The objective of the article is to analyze the corporate governance methods to find out which of them could be applicable to Jordan. This could be achieved by giving an idea about the institutional and legal approaches and then, analyze the base of Corporate Governance at the Jordanian Companies law.

Keywords: Corporate Governance, Shareholders, Stockholders, Companies Law.

1. Introduction

Many countries tend to lean towards the pattern of free market economy, some of these effects could be shown in the decline of the governments from having a hand in the economic activity, leaving the matter for private law players. This is creating a new need to have a new financer in place of the government, and this consideration in particular is one of the most important factors that pushes towards more liberalized markets (Gourevitch: 2003).

Free market economy needs to be attractive for private financiers which will set an important need for the existence of dependable protection. Moreover the economy should be appealing to international financers, and this implies the need for, besides good protection, some kind of harmonization and approximation between local norms and internationally accepted practices in order to enable a greater enlightened and informed investment decisions.

Starting from an idea that said that Law is the tool by which the society responds to the need to protect a particular interest, and when it comes to the interests that corporate law is made to guard, it can be normally affected with a number of factors, most important of which are the economic and political factors (Gourevitch: 2003).

Most of corporate laws responding to three sources of opportunism: 1- Managers and shareholders conflicts, 2- Improving coordination between enterprises sections, 3- Reducing opportunism among different constituencies which reflecting the major principles of corporate governance (Reiner: 2009).

In defining corporate governance in the legal context, and its placement amongst the science of law, it was said that corporate governance is largely part of that branch of law that can be called corporate law. Corporate law is part of a much larger realm of the law that can be called economic law (Groot: 2009).

The term of corporate governance defines as assets of relationships between: a company's management, its board, its shareholders, and other stakeholders. It is sets and identifies the responsibility of the managers and executives of the company towards its stakeholders (Abou-El Fotiuh: 2010).

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There are two major approaches towards the realization of corporate governance: (Pareds:2005).

1- The institutional approach.

This approach is a Market-oriented model that relies on relatively little mandatory law to protect shareholders and depends on a host of other formal and informal mechanisms, such as incentive-based compensation and hostile takeovers to hold managers and directors accountable.

2- The legal approach,

Which depending on an obligatory model of companies law, setting strict rules in order to define shareholder property rights and shareholder protections.

In fact choosing the appropriate approach towards corporate governance is a logical consequence of the development of economic impact factors.

Jordanian corporations are regulated by the Companies Law of 1997 and Securities Act of 2002. Both laws require interval, transparency and timely disclosures of financial and non-financial information. (Ajlouni:2008)

Study Problem

There are no official regulations regulating the Corporate governance in Jordan yet, however, the Jordanian Companies Law considers some of the Corporate governance principles in its articles, with which we could say that there is a strong base for a Corporate governance regulation. For example Article (140) and Article (141) from Companies Law of 1997.

In partnership with the International Finance Corporation (IFC), World Bank Group Companies Control Department Issued in 2012 a non mandatory code of conduct and Corporate Governance Codes and Principles - Jordan, for Private Shareholding Companies, Limited Liability Companies & Non Listed Public Shareholding Companies this code sores was the OECD Corporate Governance Principles. (Company Control Department: 2012)

The article aims to analyze the corporate governance methods to find out which of them could be applicable to Jordan. This could be achieved by giving an idea about the institutional and legal approaches and then, analyze The base of Corporate Governance at the Jordanian Companies law.

Methodology

The study will adopt the descriptive and analytical inductive method, by analyzing -In the first chapter- the institutional and legal approaches and their characteristics will be given, followed by a study of Jordanian company law which reveals which approach of Corporate Governance is adopted in Jordan and the advantages of this approach as well as the development opportunities of Corporate Governance that Jordan could undertake taking into account the current legal and economic situation.

1- The Institutional and legal approaches of Corporate Governance.

In the following, an idea about the institutional and legal approaches and their characteristics will be give.

The Institutional approach.

The institutional approach for corporate governance gives less weight for mandatory provisions that dictate on managers and officers what to do, leaving the matter of compliance with the good practices to more voluntary, or perhaps non official methods. Such methods can either be rooted down to practices that constitute customs developed over time and recognized by case law, or practices that depend on the moral and conscious determination of the managers and directors on what is considered right and wrong, i.e. norms, or might be oriented by incentives granted in order to motivate their compliance and endeavors in working for the good of the company and for the realization of profits for shareholders. (Bainbridge: 2002)

This approach gives a relatively wide discretion to the directors, where the source of their obligation towards the company (shareholders in particular) based on an idea says that shareholders own the corporation and accordingly. Directors and officers are mere stewards for the shareholders' interests, therefore it could be noticed that in this approach the law does not primarily lay down what is a good governance and what is not, but it gives a general idea and gives the mangers the flexibility to follow it. (Bainbridge:2002)

Agency theory is defined as: “A relationship between the principals, such as shareholders and agents-such as the company executives and managers.” (The owners are principals and the managers are agents.) This theory can be employed to explore the relationship between the ownership and management structure, shareholders who are the owners of the company, hires the gents to perform work. (Valentine & Abdullah: 2009) (Roberts: 2004).

According to the Agency Theory, in a publicly held company, management can be perceived as a duty on managers as well as a right that is vested with shareholders, however when there is a lack of time and experience, the shareholders delegate such a duty to a board of directors who shall supervise the operation of the company as such operation is executed by managers. In return for their efforts in executing such delegated duties, managers are granted a set of incentives, they are however, under the supervision of the shareholders as can be exercised, for example, in general assembly meetings. (Roberts: 2004).

In shareholding companies the board of directors are appointed or elected by the shareholders, the members of the board should be shareholders as well. The board has a legal obligation to ensure that a company is operated in a proper, legal, good-corporate style. (Volker: 1997).

The board of directors provides a monitoring of managerial actions on behalf of shareholders which will be the major structural mechanism to curtail managerial opportunism. The model is predicated upon the notion of an in-built conflict of interest between owner and manager. Following the separation of ownership and control is how the principal can ensure that agents serve their shareholders interests rather than their own. (Valentine & Abdullah: 2009).

There are two key elements of the fiduciary duty of board members and they are the duty of care and the duty of loyalty. The duty of care requires board members to act on a fully informed basis, in good faith, with due diligence and care (Sami: 2005).

The duty of loyalty underpins effective implementation of Corporate Governance principles. For example, the equitable treatment of shareholders, monitoring of related party transactions and the establishment of a remuneration policy for key executives and board members. (OECD: 2015)

Characteristics of the Institutional Approach

There is an important role of the law in the institutional approach.

Law is a major component of such a system, and it plays a significant role in giving guides for directors and managers in practicing their duties and responsibility.

This role that the law generally plays under an institutional system is more of an enabling role, meaning that it provides the officers and the managers of a company the necessary freedom to manage the company the way they deem fit.

For example Managers Self Autonomy and Non- Legislative Tools for their Compliance, e.g. Incentives, Stock Options, their care for Reputation, etc.

The text gives a general idea about the final objective of the board duties but the legal text did not set methods or techniques to achieve those objectives.

In this regard, there are three main techniques available in order to ensure that the board of directors will serve the shareholders interests. These are:

1. Giving shareholders appointment and/or removal rights in respect of the directors (this is the most obvious way to make the board accountable to the shareholders as a class). This could be achieved by making it easy for the shareholders to remove all or any of the board members if they find that the member/s do not serve their interests. (Davies: 2009).
2. Subjecting directors to legal duties which require them to exercise their discretion in the interests of the shareholders as a class. Imposing liability upon directors who act incompetently or disloyally would seem to be an obvious legal strategy to deal with the principal/agent problem between management and shareholders as a class. All systems in principle have provisions which could be invoked to impose liability on directors who act incompetently. (Davies:2002) (Al Ukeli :2002).
3. Structuring the incentives of the members of the board so as to induce them to promote the interests of the shareholders as a class. (Davies: 2009).

The law may also impose special procedures for altering a default rule. For example, the law may impose a rule that is highly protective of non-controlling shareholders, and then permit deviation from that rule only with approval by a supermajority of all shareholders, or with separate approval by a majority of the non-controlling shareholders, thereby providing some assurance that the default rule will be altered if the chosen alternative is superior for all shareholders. (Reiner: 2009).

The Judiciary Role in the Institutional Approach

Judges also play an important role in covering the matters that are left by the relevant pieces of legislation uncovered where they intervene to decide on whether certain practices are sound corporate practices or not.

They are supposed to identify the rules that they depend on for separating good practices from those that are not, and to give the sufficient analysis and reasoning, by which they not only decide on the particular matter in question, but also set precedents that become a reference for good and sound practices for future instances alike, participating in the integration of the fresco of an institutional corporate governance complete system. (Davies: 2009).

Moreover the relation is not limited between the body of shareholders and the directors and managers since there are also stockholders which include any other private parties who have an interest in the company business such as lawyers, auditors, accountants, consultants, bankers and other financial facility providers who all play important roles in this regard and in forming an institutional approach of corporate governance (Volker: 1997).

All of this shows that the directors authority is not absolute and that they work only in order to achieve what's best for their business and find what is necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation.

The legal approach

The legal approach for the application of corporate governance, gives substantial weight to the mandatory and regulatory provisions that dictate managers and officers on what to do, "depending on a mandatory model of corporate law, therefore this approach perceives to a certain degree detailing the duties relevant to disciplining managers and other company senior executives as a legal subject (Pareds: 2005).

The term "mandatory" means legally mandated, with penalties applying to those who fail to comply with the legal rule in question to the contrary of the other approach, i.e. the institutional approach, which gives, as illustrated above, a considerable degree of freedom for the controllers of the companies to apply what they consider good, and enables the decision makers of the company to apply what they deem most appropriate as in regards to the best interest of the shareholders. Therefore the market participants– if the legal approach applies - will be compelled to comply with the law, otherwise they will face the regulatory penalties for non compliance (Anans: 2005).

Where Law Should Intervene?

The law should intervene in some situations even if the companies have the ability to develop the appropriate, (Coffee: 2001) realization of the good of the society as well as the wealth of the shareholders which should not be a matter left to the initiatives of the companies' insiders, and it is agreed that "corporations need to be regulated to keep them focused on their primary responsibility and to ensure they do not create undue social costs" (Kent: 2005).

The duty of managers is to maximize the shareholders wealth, while the observation of the social good might be costly that it can be on the expense of the good of shareholders. On the other hand the companies have a social responsibility, and this interest generally conflicts with maximization of the shareholders wealth objective, therefore, it is possible to avoid the conflict by setting the social responsibility as an obligation by the law, and this could be an example that supports the need to set some duties by the law (Kent: 2005).

Another example of a situation where the law should Intervene is the decision making process. Participatory process is needed for decision making in corporations, whereby all major players and stakeholders need to be present in the decision making processes.

The boards of directors are formed of persons whom shareholders, owners of the capital of the corporation, elect other stakeholders such as leaderships of labor unions of which the corporation depends on to operate, and who in one hand contribute to the success of the company, and on the other, are directly affected by the decisions of the company, and therefore such categories need to have heard voices in the board by being voting members thereon.

There are many arguments stating that the law should intervene to give stakeholders voting rights in the board and things should not be left to the voluntaries of the corporations itself, it shall be mandated by the law, and It is obvious that there are various conflicting interests that need to be regarded and the interrelation between them might be complex. It is therefore a considerable requirement that a legislator need to ideally address all these concerns, and where they will need to intervene, be it the obligatory rules of the law, the self enabling rules, or a combination of the two.

There are many constraints imposed on companies by bodies of law designed to serve the general law objectives, these laws may not be limited to the corporate law there are other laws affecting the company's actions. (Reiner: 2009).

For example Bankruptcy law affects a shift in the ownership of the company from some investors to another's or from shareholders to creditors, as well as Tax law affects the internal governance of corporations at various points.

Why the legal approach?

There are many reasons that could push some countries to adopt the legal approach such as:

1- Immature Capital Markets.

Many of the developing countries have a very short history of liberalizing markets, and therefore their economies are not equipped with the needed experience to deal with capital markets efficiently. A clear example is the countries that are starting to adopt free market approaches where the state itself is withdrawing from being a market player by itself or from being an institutional holder of a considerable portion of publicly held companies (Pareds: 2005).

Therefore, some argue that developing countries, in particular with regard to the well established practices within the market and the readiness of companies to turn into being publicly held to gain access to a pool of funding, not to forget that the state itself is not ready to surrender certain historical roles that it plays within financial markets (Pareds: 2005).

2- Lack of Institutions in Support of Good Governance.

Developing countries lack most of the formal and informal institutions that are necessary to complement and enable corporate law, characterized as having relatively few shareholder protections. (Pareds: 2005) Therefore, a legal system should be available to compensate the lack of such institutions if a developing country is willing to adopt sound governance measures.

3- Limited Experience.

An institutional approach towards corporate governance is also supplemented with what are called second- line institutions, that should be well educated, mannered, and experienced in order to offer the needed support to the endeavors towards corporate governance, "the "second-order" institutions, such as investment bankers, accountants, lawyers, and the like, are largely nonexistent [in developing economies] and at the very least, they are not as experienced and ubiquitous as in developed economies (Pareds: 2005).

Even investors who are turning to the financial markets to generate the profit that they are looking for might need some guidance, maybe in the form of legal provisions, to be accustomed to the requirements and the ethics of financial dealings, and for their own protection alike (Pareds:2005)

Jordanian Company Law and Corporate Governance Approaches

As we mention before there are no official regulations regulating the corporate governance in Jordan yet, however, the Jordanian Companies Law considers some of the corporate governance principles in its articles which could be considered a very good base of corporate governance regulations.

We can clearly see that the Jordanian companies law, depending on a mandatory model of corporate law, is perceived by a certain degree of detailing the duties relevant to disciplining managers and other company senior executives as a legal subject.

Many articles in the law give substantial weight to the mandatory and regulatory provisions that dictate managers and officers on what to do for example if we read the articles regarding Monitoring and accountability Equal treatment of shareholders Protect the stockholders Conflict of Interest and transparency and Penalties we would find the following.

Monitoring and accountability: Article (144) set specific dates and procedures the board of directors must follow during the General Assembly Meeting and its Agenda.

Article (165) set the Right of the General Assembly to Dismiss the Chairman and Members of the Board of Directors and clarify the percentage required to do so.

As well as Article (172) clarify the percentage required to invite of the General Assembly to an Extraordinary Meeting.

Equal treatment of shareholders: article 98/d allow any shareholder and any stockholder allowed by court to have access to the shareholders register in connection with his shareholding for whatever reason.

Protect the stockholders Articles (140/141) set very clear dates and Duties to the Board of Directors regarding the transparency, such as the annual balance sheet of the Company, company profit and loss statement, and cash flows statements accompanied with their clarifications compared with those of the previous fiscal year, all duly certified by the

Company auditors, as well as The annual report of the Board of Directors on the Company activities and forecasts for the following year.

Moreover, In order to prevent Conflict of Interest and ensure the transparency Article (148) Prohibit Board of Directors Members from occupying a public post except in his capacity as representatives of the Government, as well as becoming members of the Board of Directors of another Company that carries out businesses similar to the businesses of the Company and prevent the chairman, general manager, and any employees, to have any personal interest in the contracts and projects.

And we can find clear and strict Penalties for violating the transparency and misleading for example in article (278) Penalized with Imprisonment of One to Three Years and a Fine of One to Ten Thousand Dinars anyone who:

- "Issuing shares, share certificates, or delivering them to their owners, or offering them for negotiation, prior to the approval of the Company Memorandum of Association, and the approval of the founding of the company, or permitting the company to increase its authorized capital before announcing that in the Official Gazette" .
- "Making fictitious subscriptions for shares, or accepting subscriptions therefore in an illusory or unreal manner for non-existent or unreal Companies".
- "Issuing corporate bonds and offering them for negotiation prior to its maturity, in a manner which violates the provisions of this Law".
- "Preparing the balance sheet of any company and its profit and loss account in a manner which does not reflect reality, or incorporating in the report of the Company Board of Directors or in the its auditors' report incorrect statements, and conveying to its General Assembly incorrect information, or concealing information and clarifications, which should be clearly declared by the force of Law, with the intention of concealing the real status of the Company from the shareholders or other concerned parties".
- "Distribution of profits which are fictitious or incompatible with the real position of the Company".

Therefore we can notice that the Jordanian company law coincides with the legal approach more than the institutional approach, the legal approach being more appropriate for developing countries that lack the complements that makes altogether the institutional corporate governance system seeing as developing countries are also keen, at the same time, to develop financial markets so that such markets will insure the needed access to financing, and ultimately for financial markets in such developing countries to play its role in economic development (Hill: 2007).

We have mentioned before some reasons that could push countries to adopt the legal approach in such a manner and if we take the Jordan case, we could find that Jordan has a short history of liberalizing markets, Jordan adopted liberalizing after it joined the WTO in 2000 and we need more experience to deal with capital markets efficiently. (WTO :2017) and yet we don't have any efficient Institutions in Support of Good Governance since there is a small number of departments at the Company Control Department for Governance but these departments need more enhancement and must be supported with a strong legal base which we need to face as well as a lack of experience. (CCD: 2017).

Conclusion.

If we analyzed the characteristics of both legal and institutional approaches with the legal texts of Jordanian companies law, we would find that the Jordanian companies law goes with the legal approach more than the institutional approach.

Although that we can find some of the institutional approach characteristics at Jordanian Companies Law such as giving shareholders appointments rights of board, but a closer look at law shows that the estimated authority of the board is very limited comparing to the authority in institutional approach, the law gives the board a strict detailed periods and tasks to be followed under criminal liability scope.

We can see the substantial weight to the mandatory and regulatory provisions that dictate managers and officers on what to do on Jordanian companies law at the detailed duties relevant to disciplining managers and other company senior executives.

This idea could be supported from practical side of Jordanian Companies system, Jordan has a short history of liberalizing markets, after Jordan acceded to the World Trade Organization (WTO) on April 11, 2000, (Karky:2010) and doesn't have any efficient institutions in support of good governance, taking into consideration the need of institutions that should support corporate governance to the experience, therefore we can find the legal approach characteristics are obvious at Jordanian legal and practical sides of companies system.

It is clear that the corporate governance framework in Jordan is in need of some support to achieve well defined legal provisions and obligations that set the firm basis for corporate governance. The law intervenes in many situations even if the companies have the ability to develop the appropriate abilities to structure transactions, evaluate business opportunities, and resolve disputes.

Issuing a legal regulation for corporate governance is required and this must be conducted thorough revision of Company law and taking into account the best international practices that could be harmonious with the economic and legal situation in Jordan.

At the same time the market institutions should work to reach the best standards of supporting elements such as powerful shareholders and sensitive financial press to governance issues, this may take time but everything could be achieved by effort.

At the end of those hard efforts, there will be a positive and modern corporate governance system in Jordan based on the best international corporate governance principles.

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مناهج إدارة الشركات وقانون الشركات الأردني

هيثم ابو كركي، حسين الحديثات*

ملخص

يمكن تطبيق حوكمة ألشركات من خلال نهجين مختلفين هما: النهج المؤسسي، والنهج القانوني. واختيار النهج المناسب للتطبيق في أي دولة هو نتيجة منطقية لتطور العوامل والمؤثرات الاقتصادية.

وبالرغم من عدم وجود تشريع خاص بحوكمة الشركات في الاردن الا ان بعض نصوص قانون الشركات تحوي اساسا لعملية الحوكمة.

تهدف هذة المقالة الى تحليل كلا نهجي حوكمة الشركات وقابلية كل منهما للتطبيق على النظام القانوني الاردني، ويمكن تحقيق ذلك من خلال إعطاء فكرة عن النهج المؤسسي والنهج القانوني ومن ثم تحليل ما يتعلق بحوكمة الشركات في قانون الشركات الاردني.

الكلمات الدالة: حوكمة الشركات، المساهمين، اصحاب المصالح، قانون الشركات.

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