

# SHAREHOLDER OWNERSHIP AND SHAREHOLDER VALUE

SHARON BUYANZI\*

## **Abstract**

*Whereas shareholders were, traditionally, viewed as the owners of the company, there seems to be a general consensus amongst contemporary legal scholars and other commentators that shareholders do not own the company, a factor that determines how rights are allocated within the company. This paper investigates the place of shareholders in the corporation and relies on theoretical foundations of corporate governance to establish whether shareholders are the true owners of the corporation.*

## **1. A Critical Discussion of Company Ownership Structure**

### **1.1. Introduction**

Traditionally, shareholders were viewed as the owners of the company. Until recently, this conception had enjoyed general acceptance. However, today, there seems to be a general consensus among legal scholars and other commentators that shareholders do not own the company. The claim that a shareholder owns the corporation has recently been dismissed as being a mere theory. Nonetheless, outside the legal debates,

the views remain very traditional. It is the view of most people, including politicians, bureaucrats and media, that shareholders are indeed the owners of the corporation.<sup>131</sup>

This disconnect is potentially justified by the belief that contemporary scholarship has indeed done a better job in critiquing shareholder ownership than of disproving it. As a matter of theory, the issue of company ownership is necessary for a proper conception of the nature of the corporation and corporate law. The issue is an important consideration in the allocation of the rights in the company. Thus, if shareholders are the owners of the corporation, then the balance of rights will tip more heavily in their favor and against others, than if they are not. Ownership of a company may really not settle any specific question of corporate governance, but it would indeed make a significant difference in the analysis.<sup>132</sup>

The notion of company ownership has led to the perception that in its operation, a company should always aim at benefiting shareholders. This notion is described by one commentator, Friedman, in his seminal paper *The Social Responsibility of Business is to Increase its Profits (1970)* in the sense that the basic responsibility of a corporate executive is to the persons who own the company, the shareholders.<sup>133</sup>

The concept of ownership of a corporation is complex, powerful and controversial. Historically, ownership was the principal explanation and justification for the central role of shareholders in the affairs of the company. Shareholders have an important role to play in ensuring

---

131. \*The author is a Senior Associate in Banking, Finance, and Real Estate Practice Group at Mohammed American journal of g, Finance, and Real Estate Practice Group at Mohammed American journal.

132. Zattoni Alessandro, 'Who Should Control a Corporation? Toward a Contingency Stakeholder Model for Allocating Ownership Rights' (2011) 103 (2) *Journal of Business Ethics* <<https://link.springer.com/article/10.1007/s10551-011-0864-3>> accessed 18 November 2022.

133. Velasco Julian, 'Shareholder Ownership and Primacy' (2010) 897 *University of Illinois Law Review* <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/unillr2010&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/unillr2010&section=27)> accessed 19 November 2022.

good governance of the company. Such governance requires shareholder supervision and control. Underlying this consensus is the assumption that shareholders of corporations own the company. This paper intends to critically investigate the place of shareholders in the corporation. It relies on theoretical foundations of corporate governance to establish whether shareholders are the owners of the corporation.

## **1.2. Theoretical Foundation of Company Ownership**

### **1.2.1. The Contractarian Theory of Corporate Law**

This theory elucidates that the relationship that exists between the shareholders and managers of a public company is one of a contractual nature. As the company owners, entrepreneurs and other shareholders always want the shares of their company to command high prices when sold to the public.<sup>134</sup> The price that the shares of a company command in the market depends upon the promises that entrepreneurs and shareholders make to potential public shareholders regarding the governance arrangements the company will adopt once it is publicly held. This theory, therefore, opines that corporations will go public with corporate contracts that provide for governance structure that are net of the costs of maintaining the structure.<sup>135</sup>

The primary idea for treating companies as social contracts arises from the stakeholder theory. This theory was developed as a result of the ‘rejection of the idea that the company should only strive towards

---

134. Klausner Michael, ‘The Contractarian Theory of Corporate Law: A Generation Later’ (2005) 779 (31) *J. Corp. L.* <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl31&section=42](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl31&section=42)> accessed 20 November 2022.

135. Attenborough Daniel, ‘Empirical Insights Into Corporate Contractarian Theory’ (2017) 37 (2) *Legal Studies* <<https://www.cambridge.org/core/journals/legal-studies/article/empirical-insights-into-corporate-contractarian-theory/7065ABAD84E2A367A1E97475E111FA93>> accessed 18 November 2022.

maximizing the benefits of a single stakeholder, the shareholders.<sup>136</sup> However, there is a shift in interests within the field of business theorists and legal professionals. Some commentators advocate for the adoption of a legal model of company, which is based around the stake-holding principles similar to the ones majorly found in Germany and Japan.<sup>137</sup> However, others seek to reinvigorate the traditional British-American model which is particularly shareholder oriented.<sup>138</sup>

There is still a widespread notion within the field of corporate governance that shareholders indeed have an important role to play in ensuring good governance. The existence of this notion informs the need to try and bridge the line of shareholder ownership and the corporation as a social contract.<sup>139</sup>

With the existence of different philosophical theories on the management and ownership of the company, most of the theories mainly focus on the provision of tools for the managers of the company to make informed choices and ethical decisions instead of discussing in more details what an ethical company actually ought to be like.<sup>140</sup>

Within the corporate governance structure, the company shareholders are those who hold a share in the company. Therefore, shareholders are often seen as owners of the company. This concept can be understood in a more practical and actual sense of owning the company. Moreover,

---

136. Wijnberg Nachoem, 'Normative Stakeholder Theory and Aristotle: The Link Between Ethics and Politics' (2000) 25 (4) *Journal of Business Ethics* <<https://link.springer.com/article/10.1023/A:1006086226794>> accessed 19 November 2022.

137. Velasco (n 3).

138. Ireland Paddy, 'Company Law and The Myth of Shareholder Ownership' (1999) 32 (62) *Mod. Law Review* <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/modlr62&section=12](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/modlr62&section=12)> accessed 17 November 2022.

139. Velasco (n 3).

140. *ibid.*

it can be understood within the theories that claim that a corporation cannot be owned. The company shareholders can be seen as the ones who own the company's capital.<sup>141</sup>

Apart from the shareholder, a company has a number of other stakeholders. Therefore, even if a corporation is not publicly traded and as such would not be having shareholders, the corporation would still necessarily have other stakeholders. The list of company stakeholders includes, inter alia, the company workers, suppliers of raw materials, the customers, the community within which the company operates, the shareholders and the different parties of the corporation's distribution network.<sup>142</sup>

This means that all the parties that have something to gain or lose through the company's activities can potentially be said to have a hand in the operations of the corporation. The persons are jointly referred to as company stakeholders.<sup>143</sup> The stakeholder theory, in its wide conception, can easily be discussed within the context of political philosophy. However, the issues with this theory is that it dismisses the importance of shareholders and demotes them to the level of company stakeholders. This view is unacceptable to those who see a company as a private property.<sup>144</sup>

The issue that arises from neglecting the importance of shareholders and private ownership is that the corporation becomes a public property of sorts. The stakeholder theory tends to view a company as a creation of social contract similar to a state. This view suggests that a company and a state are both social institutions with defined objectives. This is because a company, same as the state, is composed of a large number of people

---

141. Paddy (n 8).

142. Velasco (n 3).

143. Ireland Paddy, 'Shareholder Primacy and the Distribution of Wealth' (2005) 68 (1) *The Modern Law* <[https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.2005.00528.x?casa\\_token=DmwMD1NtzFYAAAAA:vk06WNp5-hU95vn005d0eHKpOW8fW-DFQIhTZ31Bi-0Eg5ZpolnpQNRc0-8Pbb6u3\\_3zUgaJSd8ghS4mg](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.2005.00528.x?casa_token=DmwMD1NtzFYAAAAA:vk06WNp5-hU95vn005d0eHKpOW8fW-DFQIhTZ31Bi-0Eg5ZpolnpQNRc0-8Pbb6u3_3zUgaJSd8ghS4mg)> accessed 19 November 2022.

144. Klausner (n 4).

who are divided into multiple classes that are ordered in a hierarchical manner. Both the company and the state comprise a group of people organized to pursue a common purpose. The contractarian theorists argue that companies exist as artificial societies which are created through a collection of voluntary bonds somewhat similar to friendships.<sup>145</sup>

Friedman discusses the idea of corporate citizenship in his corporate ownership conception. However, his conception seems to attract inadequacies and the idea of the company as a citizen is insufficient due to the internal conflicts of the corporate citizen. This is justified by the fact that members of a company are not necessarily part of the contract that contributes to the well-being of the corporation. Rather, they are part of the contract because they want to achieve their own private ends by using the corporation as a means.<sup>146</sup> What follows is that corporations should be seen as being more analogous to an actual state, rather than being mere members of a social contract.<sup>147</sup>

Therefore, there exists a contradiction between the inabilities for most of the members of the contract to partake in the decision-making processes of the reciprocal system that they are part of. The employers and citizens of the company are required to bear a part of the possible burdens with regards to their nation or company.<sup>148</sup> The major problem with regard to social contract approach to corporate governance is the plethora of

---

145. Carson Thomas, 'Friedman's Theory of Corporate Social Responsibility' (1993) 12 (1) *Business and Professional Ethics Journal* <[https://www.pdcnet.org/bpej/content/bpej\\_1993\\_0012\\_0001\\_0003\\_0032](https://www.pdcnet.org/bpej/content/bpej_1993_0012_0001_0003_0032)> accessed 17 November 2022.

146. F. Ignacio et al, 'Must Milton Friedman Embrace Stakeholder Theory?' (2014) 119 (1) *Business and Society Review* <[https://onlinelibrary.wiley.com/doi/abs/10.1111/basr.12024?casa\\_token=obm\\_2bLbilwAAAAA:gkDI5P5Xw3DncVtuukb1VvnKwdpvCJQ9JznKcFfIFDx\\_5yU3Vj7KCsY-SvGgEsHNOhSzgNLuP17zkNsOqw](https://onlinelibrary.wiley.com/doi/abs/10.1111/basr.12024?casa_token=obm_2bLbilwAAAAA:gkDI5P5Xw3DncVtuukb1VvnKwdpvCJQ9JznKcFfIFDx_5yU3Vj7KCsY-SvGgEsHNOhSzgNLuP17zkNsOqw)> accessed 21 November 2022.

147. Sikavica Kate and Amy Hillman, 'Towards a Behavioral Theory of Corporate Ownership and Shareholder Activism' (2008) 1 *Academy of Management Proceedings* <<https://journals.aom.org/doi/abs/10.5465/ambpp.2008.33718573>> accessed 17 November 2022.

148. Paddy (n 8).

different social contract theories which exist and how the academicians have tried to combine the ideas from these different traditions with corporate governance.<sup>149</sup>

The ideal contract serves a point of reference while discussing how companies should operate and what they should pay attention to. The current legal approach to the operation of companies allows shareholders to enter into a contract that would be most beneficial to them without any constraints from other parties.<sup>150</sup> The possible content of the ideal contract theory can be approached in a number of ways. Firstly, the company shareholders are able to discuss the content of the contract from the position of authority. Therefore, the shareholders will know what part they will play when the veil of incorporation is lifted.<sup>151</sup>

The benefit of treating shareholders as the original contractors is that they effectively limit the amount of interests that need to be taken into account. What is more, because shareholders are seen as being mainly driven by self-interest and profit, it is thus possible to begin from a point that does not include prior ethical duties. Furthermore, by the exclusive use of shareholders as the original contractors, the shareholders are made to become active in the companies.<sup>152</sup>

---

149. *ibid.*

150. Vincent Okoth, 'The Relationship Between Ownership Structure and Firm Performance: An Empirical Analysis of Listed Companies in Kenya' (2011) 5 (6) *African Journal of Business Management* <<https://academicjournals.org/journal/AJBM/article-full-text-pdf/9F1531A22395>> accessed 18 November 2022.

151. Mang'anyi Eric Ernest, 'Ownership Structure and Corporate Governance and its Effects on Performance: A Case of Selected Banks in Kenya' (2011) 2 (3) *International Journal of Business Administration* <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.837.4840&rep=rep1&type=pdf>> accessed 18 November 2022.

152. *ibid.*

A very important aspect of the original company contract would also affect the way the company treats its workers and the community it operates in. It would, therefore, be in the shareholders' interest to ensure that their company provides an adequate working condition for all and brings about some positive changes in the community it operates in.<sup>153</sup>

### **1.2.2. Shareholder Ownership**

According to Arthur Levitt Jr, the principle that shareholders own the corporation in which they invest is central to modern capitalism. The idea of shareholder ownership is somewhat separate from the idea of the company being a product of a social contract. The necessity of shareholder ownership is fundamentally more important than just the mere establishment of a company as a social contract. If shareholders are the true owners of the company, what follows is that shareholders as owners have a reason to demand the management of the company to run the company in a particular manner. Additionally, regardless of the criticism put forward, corporations do still hold shareholders as being somewhat important to the operation of the company by allowing them to vote during the company's annual general meetings and elections.<sup>154</sup>

Commentators characterize shareholder company ownership as a myth within the context of modern companies which have evolved from the times when shareholders had a claim to the corporation's assets. Accordingly, academicians posit that the company shareholders are nothing more than rentier investors with an interest that is very similar to that of debenture holders.<sup>155</sup> This, according to Ireland, is a result of the company having become more de-personified yet insistent on treating shareholders as somehow inherently important to the company. However, this is not to

---

153. Ongore Vincent, 'The Effects Of Ownership Structure, Board Effectiveness And Managerial Discretion On Performance of Listed Companies In Kenya' (Dissertation University of Nairobi, 2008). <<http://erepository.uonbi.ac.ke/handle/11295/23447>> accessed 18 November 2022.

154. Velasco (n 3).

155. Paddy (n 8).



say that shareholders could be dismissed completely, but rather Ireland's point concerns the multinational corporations with multiple subsidiaries. Subsequently, the sheer size of the company leads to the shareholders becoming distanced from the actual company and its assets, and as such, they should not be seen as the owners of the company.<sup>156</sup>

The justification for allowing only one vote per shareholder can be found by changing the original position where the shareholders would have an equal amount of shares, to a situation where the shareholders would not know how many shares they might own in the company. It always seems more acceptable that the shareholders with more shares also have a greater stake in the company and stand to potentially lose more. However, it would seem to be in the best interest of the individual shareholders that regardless of the number of shares they own, their interests and opinions would also carry an equal weight in the decision-making process.<sup>157</sup>

Agreeing the position of one shareholder one vote would serve to mitigate both the risk of hostile shareholders and the possible conflict of interest between shareholders.<sup>158</sup>

### **1.2.3. The Conceptualization of Corporation Ownership and the Stakeholder Theory**

According to Charron, the conceptualization of company ownership is approached differently. The different approaches to company ownership makes the corporate structure to be attacked by both outer and inner forces. She, therefore, sees the main agenda of stakeholder theorists or the goal of any other corporate revisionists as being to disestablish the company as a privately owned, publicly traded entity. In its place, they

---

156. Velasco (n 3).

157. Yermack David, 'Shareholder Voting and Corporate Governance' (2010) SSRN 1523562 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1523562](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523562)> accessed 17 November 2022.

158. *ibid.*

seek to ensconce an institution which is publicly owned and controlled by political decisions rather than by the market. According to Charron, by asserting the management as the ultimate head of the corporation, the organizational structure of the company is ultimately weakened.<sup>159</sup>

Being that the managers of the company have no concrete third party whom they are answerable to, they become responsible to all of the stakeholders. This encourages managers to increase their own profits and pursue their own interest. This is because the weakened structure allows the company managers to reward those groups of stakeholders who behave in a manner that benefits the managers' interests the most.<sup>160</sup>

Moreover, the stakeholder theory has more pragmatic concerns than the mere allowing of managers to pursue their own interests. Whenever the company shareholders are distanced as the main party who benefits from a given company's actions, the issue as to who the company's actions ought to benefit arises.<sup>161</sup> There is, however, no feasible way of determining which stakeholders' needs the managers ought to prioritize. The company's manager would be required to have an in-depth understanding and knowledge about all of the actions of the company and stakeholders. This is something that is predominant in small, rather than multinational corporations.<sup>162</sup>

According to Charron, the stakeholder theorists claim that all the stakeholders are, so to say, equal within the corporate governance structure. However, this appears not to be the case. Some commentators claim that shareholders have become weak and that they do not hold real power anymore. Different stakeholders compete to be made part

---

159. Charron Donna Card, 'Stockholders and Stakeholders: The Battle for Control of the Corporation' (2007) (1) *Cato J.* <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/catoj27&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/catoj27&section=4)> accessed 19 November 2022.

160. *ibid.*

161. Keay Andrew, 'Stakeholder Theory in Corporate Law: Has it got What it Takes' (2010) 249 (9) *Rich. J. Global L. & Bus.* <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/rjnglbs9&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/rjnglbs9&section=16)> accessed 19 November 2022.

162. *ibid.*

of the company in terms of the ability to deliver goods or services to the company, and as such, their input becomes part of the assets of the company. However, shareholders do not normally follow this rule. The shareholders normally receive a part of the assets of the company by the mere virtue of the ownership of shares. The shareholder therefore receives a certificate of private ownership, establishing a right to returns in perpetuity.<sup>163</sup>

What therefore follows is that within the corporate governance rank and structure, the shareholder becomes more superior to other company stakeholders. The corporation merely becomes a consumer of the services of the other stakeholders. The company has the right to refuse the services of the other stakeholders at any time. This is, however, not the case with the shareholders. During the shareholding process, the company is acknowledged as a trustee of the individual shareholder's private property and the company is not able to terminate this relationship. The termination of the relationship between corporation and shareholder can only be initiated by the shareholder through selling or trading their shares in the company.<sup>164</sup>

The only way by which a shareholder can terminate their relationship with the company is when the shareholder sells shares. Without such selling, the relationship between the company and the shareholder remains indefinite and lasts for the entire time the corporation lives. The relationship can even continue after the company is sold through the shareholders being able to change their shares for shares in the new company.<sup>165</sup>

Even though the relationship between the company and the investor is finite, the investors are only a part of the company until their instrument of investment matures. The relationship subsequently terminates.

---

163. Card (n 29).

164. *ibid.*

165. Keay (n 31).

Reasserting the shareholder to the center of the corporate governance structure can also lead to the most beneficial situation for all the stakeholders. This is due to the fact that the corporation would be seen as the private property of shareholders, hence motivating shareholders to engage more with the company.

Consequently, this would lead to the company becoming more efficient by having a clear direction and leadership structure. Alternatively, where the interests of the company are those of different stakeholders with no proper ownership, it would lead to the company becoming a public concern. The effect is that it would lead to no party taking actual responsibility of the corporation as the different stakeholders would be interested in pursuing their own goals through the company. The result is that the situation could lead to a point where all stakeholders would try to benefit from the company with a little regard for the company itself.<sup>166</sup>

The stakeholder theory has somewhat watered down the importance of shareholders in a company. It, however, seems that shareholders are fundamentally important to companies on the very ethical level that the stakeholder theory attacks them, as they can accelerate the growth of a company if they are active. As such, companies need to recognize the importance of their shareholders.

Charron's school of thought opines that contract theories removed from shareholders the ownership of control rights entailed by private property. According to some commentators, shareholders do own the company, or if not 'own' as such, they have the ultimate right to govern the company.<sup>167</sup>

A company should be seen as a tool for social contract for the sole reason that the company allows for the tools of political philosophy to be used in the evaluation of the ways that different companies function. If the

---

166. Velasco (n 3).

167. Suortti Ilmari, 'Shareholder Ownership and the Company as a Social Contract-Bridging the Gap' (2014) <<https://www.diva-portal.org/smash/record.jsf?pid=diva2:726607>> accessed 20 November 2022.

shareholders of the company are seen as the original contractors within the company structure, then the corporation becomes more of a personal entity. This view dismisses the position that shareholder ownership could be a myth. The placement of shareholders back into the center of the corporation's nexus of contracts means that the corporation will not only have a clear goal, the maximization of shareholder wealth, but it will also have a clear set of rules about how to achieve the goals.<sup>168</sup>

#### **1.2.4. The Options Theory**

According to this theory, the subscribers say that from the standpoint of the financial claims and risks that are being borne by the two parties in a corporation, it becomes equally sensible to describe the stockholder or the institutional bondholder as the true owner of the company, with the other party holding some sort of contingent claim.<sup>169</sup> The options theory destroys any notion that shareholders can be uniquely described in economic terms, at least, as the owners of the corporation. They justify this position by claiming that because equity and debt interests are economically equivalent, the shareholders cannot be considered as the owners of the corporation.<sup>170</sup>

It is worth noting that a broad interpretation of this theory would basically undermine the concept of company ownership altogether. Options theory suggest that once a company has issued debt, it makes just as much sense to say that shareholders and the debt holders own the company, but have sold a call option to the shareholder, as it does to say that the shareholders own the corporation but have bought a put option from the debt holders.<sup>171</sup>

---

168. *ibid.*

169. Smith Jeff, 'The Shareholders Vs Stakeholders Debate' (2003) 44 (4) MIT Sloan Management Review <<https://www.sciencedirect.com/science/article/pii/S1059056016000022>> accessed 19 November 2022.

170. Velasco (n 3).

171. Hart Oliver, 'Corporate Governance: Some Theory and Implications' (1995) 105 (430) The Economic Journal <<https://www.jstor.org/stable/2235027>> accessed 22 November 2022.

The theory suggests that once a person has borrowed money, it makes just as much sense to say that the lenders own the assets of the borrowers, but have sold a call option to the borrower as it does say that the borrower owns the assets, but has bought a put option from the lenders. Being that everyone takes some debt, the embracing of the options theory simply denies the concept of ownership. However much this theory may provide many interesting insights into the nature of the various interests in a company, it does not really support the claim that shareholders do not own the company.<sup>172</sup> This is because it is not possible to say that stock resembles an option on the assets of the company. An argument that it may be theoretically possible to create a series of options transactions that would approximate the economic interests of stock is merely a claim not as persuasive.

This theory is a financial theory and not a legal one. This is because it focuses on the economic interests of those who hold security while neglecting their other interests in the company. However, these interests that the theory neglects are important interests such as control rights. In the legal arena, it hugely makes no sense that the bondholders own the assets of the company merely because options theory suggests that their economic interests are in some way similar to those of shareholders. The theory is, therefore, not capable of determining the legal rights of the various security holders in the company.

### **1.3. A Corporation as Capable of Being Owned**

The company is a separate legal entity having an identity that is distinct from its very owners. The governing body of the company is the directors. The law grants ultimate authority to the board of directors to manage the business and the affairs of the company. However, as owners,

---

172. Velasco (n 3).

the company shareholders are entitled to elect directors. The directors are also legally obligated to pursue and act in the best interest of the shareholders.<sup>173</sup>

The traditional conception of company ownership enjoyed acceptance until recently. This traditional conception has only been strained by the separation of ownership and control in public companies. This leads to the fact that many people have found it difficult to view public shareholders as owners in strictly the same sense that individual sole proprietors are owners. For one to effectively displace the traditional notion of shareholders as owners, it requires one to take a major reconceptualization of the nature of corporation.<sup>174</sup>

According to the contractarian theory of corporation, a company is not a thing capable of being owned. Rather, it is a nexus of contracts among various parties. The fact that each of the participants in the corporation makes an investment in the corporation in exchange for a contractual right to a return on his or her investment makes shareholders to have no special role in the company. Therefore, their rights, like those of other participants, are limited to the extent provided by the contract. The contractarian theory posits that companies should pursue the interests of shareholders because the shareholders have contracted for them and that it is the efficient outcome. Contractarians and communitarians agree on the principle that shareholders do not own the company.

The direct restriction on the power of shareholders are supplemented by a host of other rules which indirectly prevent the shareholders from exercising significant influence over the decisions of the company. It is, therefore, difficult to deny Bainbridge's assertion that the direct shareholder control in the company is limited. However, this claim only seems to suit the public companies. This is because the shareholders in

---

173. Alessandro (n 2).

174. *ibid.*

closely held companies often have significant control of the company. Accordingly, it is the dispersed ownership rather than a corporate form of a corporation that reduces shareholder influence.<sup>175</sup>

In the case of public corporations, shareholders are indeed able to exercise a huge deal of influence. This is justified by the fact that the plurality of voting has long rendered it impossible for the corporation's shareholders to remove directors without a proxy contest. Nevertheless, the company directors have often found it hard to remain on the board in the face of a significant minority of withhold votes. This means that the shareholders have arguably had more power than the law and even circumstances suggest they should. In addition, the shareholders have recently become a much more powerful voice in corporate governance.<sup>176</sup>

An individual shareholder in a company is virtually powerless with very few exceptions. This is because an individual shareholder owns a very small percentage of the public company. Therefore, according to the traditional conception of corporate governance, the individual shareholder ought to have a very small say in the company. However, the aggregate shareholders indeed have great control over the company.<sup>177</sup> The working together of shareholders in a public company can result in them voting to remove directors and replace them with directors of their own choosing. Therefore, the claim that shareholders lack control over the corporation rests not on the actual powerlessness, but basically on the existence of presumably insurmountable collective action and coordination problems.

---

175. Boatright John, 'Fiduciary Duties and the Shareholder-Management Relation: Or, what's so Special about Shareholders?' (1994) *Business Ethics Quarterly* <<https://www.jstor.org/stable/3857339>> accessed 21 November 2022.

176. *ibid.*

177. Holderness Clifford & Dennis Sheehan, 'The Role of Majority Shareholders in Publicly Held Corporations: An Exploratory Analysis' (1988) 20 *Journal of Financial Economics* <<https://www.sciencedirect.com/science/article/abs/pii/0304405X88900499>> accessed 21 November 2022.



Whenever the shareholders of a company are dissatisfied, they can sell their shares which henceforth causes a negative impact on the company's stock-price. This renders the company more vulnerable to a hostile and harsh takeover.<sup>178</sup>

#### **1.4. Shareholders as Owners of Shares of Stock**

According to Martin Lipton, shareholders do not own corporations. They just own the securities and share of stock. This entitles them to the very limited electoral rights and the right to share in the financial returns produced by the company's business operations. The conception of public shareholders as owners may, in particular scenarios, be a helpful metaphor. Nonetheless, this is never an accurate description of the rights of shareholders under the rubrics of corporate law.<sup>179</sup>

Shareholders own the shares of stock. This, however, does not mean that they do not own the corporation as well. Therefore, whether or not shareholders own the corporation depends on what share of stock are. According to Lipton, the shares of stock are mere contracts similar to debt securities. If this is so, it makes sense to say that the shareholders of the company own the company.<sup>180</sup>

Lynn Stout argues that shareholders do not own the company. She proceeds to reason that the directors of public companies are not required by law to maximize shareholder value. Further, she claims that the directors of the company have full control of the company. Shareholders have no legal right to govern the activity of a company for their own benefit. The

---

178. Velasco (n 3).

179. Booth Richard, 'Who Owns a Corporation and who Cares' (2001) 77 (147) Chi.-Kent L. Review <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/chknt77&section=13](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/chknt77&section=13)> accessed 17 November 2022.

180. *ibid.*

company directors can decide to reduce and not increase the share price if they believe it is in the company's best interest. Shareholders own the stock in the corporation, but do not own the assets.

The corporation owns its assets. Shareholders can come into stock when they want and leave when they want with very few exceptions. In today's world, the stock owner may be a machine and shares may be held for a short time frame. This is a logical argument that precludes the shareholder from being the true owner of the corporation. Legally, there is no evidence that shareholders are owners of the company.

Lipton says that he does not hold the view that shareholders are outright owners of the corporation. He justifies his claim by saying that shareholders are mere investors in the corporation and own the equity. They are important constituents of the corporation, but not the owners. Corporations can only exist within the overall umbrella of the government and society.

The law defines shares as a unit of ownership in a company. Therefore, legally, shareholders are the owners of the company. However, this claim is not as easily settled. The law does not state expressly that shareholders do not own the corporation. Neither does the law state expressly that shareholders own the corporation. Courts have held that the directors of the company owe their fiduciary duties to the company and the shareholders. Consequently, courts have held the considered opinion that directors of a corporation are permitted to consider the interests of other company stakeholders aside from shareholders only. Such permission, however, only applies if the interests of the other stakeholders are rationally related benefits accruing to the stakeholders of the company. This inevitably means that shareholders ought to be the primary concern of the directors of the company.<sup>181</sup>

---

181. Grantham Ross, 'The Doctrinal Basis of the Rights of Company Shareholders' (1998) 57 (3) *The Cambridge Law Journal* <<https://www.cambridge.org/core/journals/cambridge-law-journal/article/doctrinal-basis-of-the-rights-of-company-shareholders/8DAE5550D8F94DC4E13A46439F9239D3>> accessed 18 November 2022.

In the American case of *Unocal Corp. v Mesa Petroleum Corp.*,<sup>182</sup> the court generally spoke of the company and its shareholders. However, in one particular instance, the court instead referred to the company and its owners. Moreover, American courts have continuously grounded shareholder inspection rights on the notion of company ownership. In the case of *Seinfeld v Verizon Communications, Inv.*,<sup>183</sup> the court explained that the American company law provides for the separation of legal control of the corporation and its ownership. According to the court, the legal responsibility to manage the business of the corporation for the benefit of the stockholder owners is conferred on the company's board of directors by virtue of the law. The fiduciary duties of directors to constrain their own conduct while discharging that statutory responsibility is an imposition of the common law.<sup>184</sup>

The common law imposes the shareholder's rights to inspect the company's books of account and records. This is because, as a matter of self-protection, the shareholder is entitled to know the manner in which his or her agents are conducting the affairs of the company which he or she is a part owner. The American Supreme Court explicitly recognized that shareholders are indeed the owners of the company in the case of *North American Catholic Educational Programming Foundation, Inc. v Gheewalla*.<sup>185</sup> The court held that the individual creditors of an insolvent company have totally no right to assert direct claims for breach of the fiduciary duty against directors of the corporation.

In the course of its opinion, the court established the traditional conception of company ownership by opining that the law provided for a separation of control and ownership. It thus asserted that the directors of a company have the sole legal obligation to manage the business of a

---

182. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

183. *Seinfeld v Verizon Communications, Inc.* 909 A.2d 117 (Del. 2006).

184. *ibid.*

185. *North American Catholic Educational Programming, INC v Rob Gheewalla and 2 Others* 930 A.2d 92 (2007).

company for the benefit of its shareholder owners. In other words, from the position of the court, it is clear that shareholders are owners of the company and the directors are obliged to run the company in a manner benefiting the shareholders. Bearing in mind the separate legal entity of a corporation, it is not merely possible to find courts directly opining on the issue of company ownership.

## **1.5. Shareholders as Corporation Owners**

Contemporary authors summarize this issue by pointing out that shareholders do not resemble the traditional owners. Professor Jill notes that shareholders are fluid and fluctuating group of investors, many of whom hold short-term interests. Most importantly, they do not exercise control which is associated with the traditional property rights. The argument is that because the shareholders of the company do not resemble owners, it really does not make sense to speak of them as being owners or even to afford them the rights that are commensurate with ownership of the company.<sup>186</sup>

This argument seems reasonable on its face. However, traditionalists hold the diverging view that shareholders do resemble owners of the company. Traditionalists argue that public companies are simply larger versions of small businesses. Thus, the scale is the only difference between the two. No one actually denies that a sole proprietor is the owner of the sole proprietorship. A sole proprietor is thus the sole proprietorship.<sup>187</sup> When a company grows and attracts more shareholders, many, nevertheless, feel comfortable denying that the company's shareholders are the owners.

---

186. Booth (n 49).

187. Ciepley David, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 (1) *American Political Science Review* <<https://www.cambridge.org/core/journals/american-political-science-review/article/beyond-public-and-private-toward-a-political-theory-of-the-corporation/23BF8CB7FBBFC1BE29C5771A887862A9>> accessed 16 November 2022.

This appears quite contradictory. Apparently, at some point during the life of the company, the nature of interests dramatically changes thus losing the claim to ownership.<sup>188</sup>

In partnerships, the partners are deemed co-owners of the partnership. Thus, partnership cannot be the point at which the equity holders lose their ownership interest. When the shareholders contribute money or any other assets in exchange of shares of stock, the company proceeds to become the owner of the contributed assets.<sup>189</sup> It is, therefore, possible to claim that shareholders voluntarily relinquish their ownership claim. That claim would, however, be somewhat inaccurate. This is because shares represent a unit of ownership interest in the company. Therefore, the shareholders virtually give up their ownership of the business interest, but consequently receive ownership of the entity that holds the assets. It, therefore, appears that ownership is simply transformed rather than relinquished.<sup>190</sup>

The act of incorporating a company in itself does not cause the loss of the ownership interest. Shareholders in closely held companies resemble owners as much as partners do in the case of a partnership. The shareholders perhaps lose their ownership claim when the company expands to the point that shareholders, as a group, are no longer involved in the management of the company.<sup>191</sup> This is explained by the fact shareholders in small corporations are commonly active participants in the management and control of the company. The inverse is true for shareholders in larger corporations. Notwithstanding this assertion, the corporate governance structure is similar in both small and huge corporations.<sup>192</sup>

---

188. *ibid.*

189. Booth (n 49).

190. *ibid.*

191. Marks Stephen, 'The Separation of Ownership and Control' (1999) 3 *Encyclopedia of Law and Economics* <[https://edisciplinas.usp.br/pluginfile.php/3805906/mod\\_resource/content/1/marks.pdf](https://edisciplinas.usp.br/pluginfile.php/3805906/mod_resource/content/1/marks.pdf)> accessed 19 November 2022.

192. *ibid.*

Authors, however, argue that involvement is a very poor determinant of ownership status. Pragmatically, it would be extremely difficult to specify a level of shareholder involvement that would be necessary to avoid forfeiture of the ownership interest. It is equally challenging to determine whether shareholders could reclaim their ownership interest by becoming more involved.<sup>193</sup>

The question, ‘who owns the corporation?’ is a controversy which lies in two versions. One version feels a deep need to protect the interest of the shareholder. The other version feels the pain that comes from deprioritizing the other stakeholders in the corporation. The purpose of a corporation is to maximize the short-term shareholder value. This is fair because shareholders own the company. The directors, officers and other stakeholders may just be employees of the corporation while shareholders own the corporation.

## **1.6. Shareholder Control and Ownership**

The idea of shareholder control refers to how shareholders directly or indirectly exercise control over the operations of a corporation. They exercise such control through the elections of the board of directors, external auditors, CEO and obtaining timely and regular information about the status of the company. Shareholders can exercise the control of companies through influencing the appointments of the important personalities of the company.<sup>194</sup> Therefore, it transpires that those who have influence over important company decisions ultimately determine those who have the power to do the appointment of the top executives of the company. If an individual has the power to appoint the key executive

---

193. *ibid.*

194. Stout Lynn, ‘The Mythical Benefits of Shareholder Control’ (2007) *Virginia Law Review* <<https://www.jstor.org/stable/25050361>> accessed 16 November 2022.

officers, then the individual can influence the management decisions of a company to act on their behalf. This implies that indeed shareholders exercise control over management decisions of the company.<sup>195</sup>

There are two main essentials of an ownership structure in a company which provide incentives to actively monitor management thus improving corporate governance. They include the identities of shareholders and the size of the equity that is held by the shareholder.<sup>196</sup> Commentators posit that the ownership structure determines the shareholder control because shareholding concentration creates strong and effective shareholders that can monitor the management of the company. Literature affirms that when a large portion of company stocks are in the hands of a single shareholder, it induces the owners to change the managers when the need arises.<sup>197</sup>

Ownership interest exists in intangible things. Corporations are capable of being owned. The most common argument against the traditional conception of company shareholder ownership is that the shareholders cannot be considered the owners of the corporation because they lack the most important right of ownership which is control. Practically, an owner has the power to control the property which he or she owns. Shareholders, however, have no control over the corporation. However, in the conceptual property law, ownership never conveys absolute control and therefore, the rights which are associated with ownership can be disintegrated.<sup>198</sup>

---

195. Castellini Monia & Otuo Serebour Agyemang, 'Ownership and Board Structures to Ensuring Effective Corporate Governance through Ownership and Board Control Systems' (2012) 9 (2) *Corporate Ownership and Control* <<https://pdfs.semanticscholar.org/fee8/c1243bf569bd5c7d456b671bdf112c325f06.pdf>> accessed 21 November 2022.

196. *ibid.*

197. *ibid.*

198. Alessandro (n 2).

Scholars, nevertheless, comment that owning the shares of stock in a company does not mean shareholders can move themselves into a corner office or order the company to hire their children. This is because the power to direct the corporation rests with the directors. A company or any type of business cannot function if every owner has equal access to the assets of the company or business for personal use. Shareholders act together in electing directors who are henceforth given the power to control the company. Therefore, shareholders do not lack control as they merely exercise the very control albeit indirectly through the elected representatives.<sup>199</sup>

Some authors, such as Professor Bainbridge, make the assertion that shareholders do lack control over the company. He says that shareholders' control of rights is so weak that they scarcely qualify as part of corporate governance. Instead, company law vests the board of directors with a non-reviewable power of discretion fiat. Therefore, as a formal matter, only the election of directors and the amendment of by-laws do not formally require board approval before shareholder action is possible.<sup>200</sup>

## **1.7. Conclusion**

If the traditional view of corporate ownership is correct, then shareholders become the owners of the company. Corporate governance must, therefore, be primarily about them and their interests. However, shareholders exercise indirect control over the corporation through the directors. The concept of corporation ownership is hugely implicit in our understanding of corporate law.

---

199. *ibid.*

200. Bainbridge, Stephen M, 'The Case for Limited Shareholder Voting Rights' (2005) 53 (601) *UCLA L. Rev* <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/uclalr53&section=23](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uclalr53&section=23)> accessed 18 November 2022.



Universally, the corporation is described as having a separation of ownership and control. On the one hand, the shareholders own the shares of the corporation. On the other hand, the corporation in having a separate legal capacity does own the assets. This assumption is consistent with the traditional view because, as owners, shareholders hold the residual claim over the assets of the company. It has, however, been discussed that many authors claim that shareholders own only the residual claim rather than the whole corporation in itself. The law does not specifically provide shareholders as residual claimants.<sup>201</sup>

It is not sufficient to say that corporation ownership is implicit and obvious. Courts have held that indeed shareholders are owners of corporations. Shareholders, however, do not resemble corporation owners in a lot of respects. It has been established that directors, rather than shareholders, have control over the corporations. Control is viewed among the most important aspect of ownership, something that shareholders have in respect of sole proprietorships.<sup>202</sup>

---

201. Paddy (n 8).

202. Paddy (n 13).