

**CONSIDERING THE USE OF ARTIFICIAL INTELLIGENCE IN THE BOARD OF
DIRECTORS: A CORPORATE LAW REVIEW****Yolanda Simbolon**Faculty of Law, Universitas Atma Jaya Yogyakarta
yolanda.simbolon@uajy.ac.id**ABSTRACT**

Director is one of the crucial organs in a Limited Liability Company. The Director has great trust in managing the company. Some companies have placed Artificial Intelligence on the board of directors. This is because Artificial Intelligence can make decisions efficiently and independently. This raises legal issues regarding whether Artificial Intelligence can become a board of directors or is there another alternative and how about the responsibility. The aim of this article is to contribute to the development of company law in the future which is related to Artificial Intelligence. The method of this research is normative juridical. This research also uses a conceptual approach. The data used to analyze is secondary data. This research has novelty compared to other similar studies because the approach used is corporate law, especially in relation to the principle of fiduciary duty and business judgment rules. The results show that Artificial Intelligence currently cannot be placed as a member of the board of directors. As an alternative, Artificial Intelligence can be used as a business advisor on the board of directors.

Keywords: Artificial Intelligence; Corporate Law; Director; Liability

INTRODUCTION

In this Society 5.0 era, human existence is very close to technology.(1) One of them is evidenced by Artificial Intelligence being a technology that is in great demand in various business sectors. Artificial Intelligence is not only limited to being a program that can conduct conversations through text commands or generate answers to questions from users according to its database. Artificial Intelligence is also not only limited to being the creator of a work of art. Currently, Artificial Intelligence is also at a level that is believed to be able to match the ability of humans to provide business advice and decisions. This business decision helps the director to manage the company. Even some companies have declared that Artificial Intelligence is appointed as a member of the board of directors.

In Hong Kong, a company named Deep Knowledge Ventures developed an Artificial Intelligence that known as Validating Investment Tool for Advancing Life Sciences or people

usually call Vital.(2) This vital function is to predict and analyze the company's investment risk.(2) Vital's skills led to his appointment to the board of directors of Deep Knowledge Ventures.(3) Indonesia has also currently developed an Artificial Intelligence that is claimed to occupy the position of director of the company.(4) PT Suryadhamma Investama appointed an Artificial Intelligence named Ardi to become a Director. Ardi's role is to provide strategic business recommendations based on real-time data analysis.(4)

Based on these phenomena, it is possible that Artificial Intelligence will occupy a position as a member of the board of directors in companies. This is because Artificial Intelligence can make decisions efficiently and independently.(5) That may seem like a far-fetched premise that is not worth thinking about in the present. However, the rapid development of Artificial Intelligence technology allows it to be implemented by companies and can be realized in a relatively short time.

Some companies that have placed Artificial Intelligence on the board of directors claim that the company cannot run properly without the advice given by Artificial Intelligence. Of course, Artificial Intelligence placed on the board of directors can raise some legal issues. If this intelligent system has the capacity to act and think like a director, does that mean it should also have the legal rights and responsibilities of a director?

Director is the organs in a Limited Liability Company. Directors have great trust to manage the company.(6) This act is committed by the director as an organ as well as the management of the Company.(7) As an independent legal subject, a Limited Liability Company is separate from its management because requires organs, one of which is a director who represents it to be able to perform legal acts. The director independently is also a legal subject, but because a director is an organ of the Limited Liability Company authorized to represent the company, the director acts for and on behalf of the Limited Liability Company.

A person who can represent the company is someone who has the authority. This authority to act is attached to a legal subject that fulfills the following conditions.(8) One of the legal subjects authorized to act as a director is an individual who is capable to perform legal acts.(7) Legal capacity for individual legal subjects according to the Civil Code is based on age and guardianship.(9)

If Artificial Intelligence is equated with members of the board of directors, it will cause legal problems related to the position of Artificial Intelligence which is not a legal subject. A Limited Liability Company as an independent legal subject can only be represented by a director who is also a legal subject and has the authority to act.

Directors in carrying out their duties must carry out the principles of prudence and good faith. This is because the existence of a Limited Liability Company is highly dependent on the decisions made by each member of the board of directors. Due to the requirement that the members of the board of directors are individuals who are legally capable, the directors can be held liable. Each member of the board of directors is liable for the losses of the limited liability company if negligent in carrying out director's duties.⁽¹⁰⁾ Director shall be personally liable for such losses.⁽¹⁰⁾

The liability of the directors for losses incurred by the Company is closely related to the directors who are legal subjects and can be held liable. If the current Artificial Intelligence is not a legal subject, then it certainly cannot be held liable. One alternative that can be applied instead is to place Artificial Intelligence as a decision maker, not as a member of the board of directors. However, this also raises legal issues relating to the application of corporate governance principles and liability. If Artificial Intelligence is placed as a decision maker causing losses, it is necessary to analyze the liability. This is because Artificial Intelligence is an autonomous computer program that can make decisions outside human control.

Based on the explanation above, a Limited Liability Company can be represented by a director who is legal subject and has the authority to act. It is also known that the director is obliged to carry out his functions in good faith and is responsible for the Company's losses due to negligence. If some companies make a breakthrough in the field of technology by placing Artificial Intelligence as a member of the board of directors, it is necessary to consider several questions, including whether Artificial Intelligence can occupy the position of director of a Limited Liability Company? If Artificial Intelligence is placed as a decision maker of a Limited Liability Company, how about the liability that can be applied to members of the board of directors?

This article is different from another article which discusses the connection between Artificial Intelligence and corporate. The other article discusses the effects of technology that process large data give impact to the corporation. (11) The other article is exploring the opportunity that director will be replaced by Artificial Intelligence.(12) These articles different with this article which discuss the liability of director if Artificial Intelligence is placed as a decision maker in the Limited Liability Company. This article uses two theories include business judgment rules and fiduciary duty.

METHODS/IDEAS

This article uses a normative juridical method with a conceptual approach. The conceptual approach rests on the views and doctrines of various experts who have developed in legal science.(13) This research focuses on the development of corporate law and its relation to technology. Normative research is research that analyzes Secondary Data.(14) Secondary data used in this article are the Civil Code, laws and regulations, books related to the topic of this article, and articles from other parties' research. The research object is described according to the findings systematically, and thoroughly. Conclusions are drawn using deduction or syllogism thinking. This way of thinking is done by starting from an existing theory, then linking it with the facts found to draw a conclusion.(15)

RESULTS AND DISCUSSION

1. Artificial Intelligence and the Concept of Board of Directors

Until now, there is no single provision in Indonesia that provides a strict definition of Artificial Intelligence. In practice, Artificial Intelligence is equated with a computer program that can produce outputs without the need to get detailed commands from humans. Artificial Intelligence produces outputs from the learning and training process based on data that has been entered into the system.(16) That's why Artificial Intelligence is often referred to as machine learning.

The set of inputted data will be studied by the system.(17) Then from the learning results of the data set, Artificial Intelligence will train the system.(17) After that, Artificial

Intelligence can produce outputs in the form of completing certain tasks. Because Artificial Intelligence has learned and practiced, it does not need to be given instructions on detailed task descriptions by its users. This is why Artificial Intelligence is known as an autonomous computer program, although the level of autonomy varies.(18)

Artificial Intelligence can accomplish tasks efficiently and accurately. For certain tasks, especially those based on large and complex data sets, computer algorithms in Artificial Intelligence are superior to humans in making these decisions.(12) Most company management requires making business decisions that consider large amounts of data to determine strategies. This business decision-making can be taken over by Artificial Intelligence through automation.

Artificial Intelligence automation arises because the system is able to produce outputs without human assistance.(19) Such Artificial Intelligence capabilities show that Artificial Intelligence is at the level between humans and animals.(20) Artificial Intelligence is different from computer programs in general where humans still have to direct by giving detailed commands.

Despite claims that Artificial Intelligence is autonomous, and its intelligence is between humans and animals, until now no State has granted Artificial Intelligence status as a subject of law. There are two recognized subjects of law, namely natural person/ *natuurlijk persoon* and legal person/ *rechtspersoon*. Both entities may bear rights and obligations. As for Artificial Intelligence until now it cannot bear rights and obligations, so it is only a legal object of a legal relationship.(21)

In its development, a limited liability company has organs that represent it to carry out legal actions. These organs include the board of directors, commissioners, and the GMS (General Meeting of Shareholders). The function of the board of directors is to perform *beheer* and *beschikkingsdaad deeds*. *Beheer* acts are daily management actions carried out by the directors, while *beschikkingsdaad* are management actions carried out by the directors must obtain approval from the General Meeting of Shareholders in advance.

The Board of Directors of a limited liability company consists of one or more director. The Limited Liability Company Law requires that those who can become members of the

board of directors are individuals who are capable to perform legal actions. The phrase "person" in the Limited Liability Company Law indicates that those who can occupy the position of directors are legal subjects in the form of *natuurlijk persons*. This provision provides rigid limitations that directors cannot be occupied by other than *natural persons*.

An individual is recognized as a subject of law, that is, from birth to death.⁽⁹⁾ Individuals who can become members of the board of directors are not only subject to their status as legal subjects but must also be capable of carrying out legal actions. The legal act in question is that the individual must have reached maturity, at least 21 years old or have carried out marriage, and not be under guardianship.⁽⁹⁾

Legal subjects who have this ability can then be given the authority to perform a legal act, include being appointed as a member of the board of directors for a certain time. The requirements of members of the board of directors as described are not met by Artificial Intelligence at all. Therefore, Artificial Intelligence cannot be positioned as a member of the board of directors. Another method is needed besides placing him in the board of directors.

2. **Artificial Intelligence as an Advisor in The Limited Liability Company: an Alternative**

The above analysis has outlined the facts that Artificial Intelligence cannot be placed as a member of the board of directors of a limited liability company. Some companies in various countries with Artificial Intelligence involved in corporate governance have not received recognition from their countries.⁽²²⁾ Artificial Intelligence is treated as a member of the board of directors but is not juridically a member of the board of directors.

Artificial Intelligence involved in corporate governance brings several benefits. Artificial Intelligence makes it possible to retrieve relevant information, analyze data, and provide predictions related to business risks. Artificial Intelligence can perform rapid analysis of large amounts of existing data sets. The results of the analysis arise as a form of rational and objective prediction, not based on hunches as done by the board of directors.⁽²³⁾ This is because Artificial Intelligence has studied existing data patterns.

The Board of Directors is an organ that plays an important role in the company. The Board of Directors is the only organ authorized to act for and on behalf of the company, so the progress of the company depends heavily on the policies taken by the directors. The

basis of great authority is based on fiduciary duty. The Board of Directors has gained great trust from shareholders to manage the company in accordance with the articles of association and laws and regulations.

The Board of Directors needs to manifest fiduciary duty through duty of loyalty and duty of care. Through duty of loyalty, directors are required to provide loyalty to the company, one of which is management in high good faith.⁽²⁴⁾ Maintaining independence is one form of good faith. Every policy taken is a policy solely for the benefit of the limited liability company. Not for the benefit of directors, shareholders, or third-party interests.

Directors as entrepreneurs have high dynamics including interpersonal relationships with other members of the board of directors, with shareholders or with third parties. Decisions made by directors are difficult to believe as objective decisions because directors have strong interpersonal relationships. In this condition, directors are very prone to not carrying out the duty of loyalty. The interests that are prioritized are not the interests of the company.

This is where Artificial Intelligence can come into play. Artificial Intelligence can produce decisions that are neutral.⁽²⁵⁾ Artificial Intelligence is free from conflicts of interest because Artificial Intelligence is a computer program that can analyze data independently without any direction from the user. Artificial Intelligence is not affected by the interpersonal relationship of directors with their affiliates.

If the decision produced by Artificial Intelligence causes losses to the company, it is necessary to examine first whether the directors can be held responsible for the loss. In corporate law, in principle, directors cannot be held liable for losses incurred to the company for business decisions they make. This can be done with several conditions that are also related to the application of fiduciary duty. The absence of accountability to the board of directors with several conditions is known as the principle of business judgment rule.

First, the loss was not due to the fault of the directors. Artificial Intelligence is different from calculating numbers using spreadsheet programs where users must enter formulas so that they are prone to errors when users enter calculation formulas incorrectly. Artificial Intelligence can generate decisions automatically without any such detailed

commands from its users. In this case, the directors as users who do not provide any input to the Artificial Intelligence system have no role in the error of making decisions by Artificial Intelligence.

Second, the board of directors must manage in good faith and prudence for the benefit of the company. Placing Artificial Intelligence on the board of directors is by no means the same as using decisions that are generated absolutely. The Board of Directors must still carry out management with a duty of loyalty and duty of care. Every decision made by Artificial Intelligence needs to be reanalyzed by the board of directors as a form of prudence. Artificial Intelligence is placed as an advisor for the company whose decisions are not binding. If the decisions produced by Artificial Intelligence show signs of risk, then the board of directors needs to review the decisions made by Artificial Intelligence.

Third, the board of directors has no conflict of interest in the action that caused the loss. This can be anticipated because the character of decisions produced by Artificial Intelligence is independent. Artificial Intelligence when trained only uses related data. In his system intellectual intelligence is developed, not emotional intelligence.⁽²⁶⁾ This is why Artificial Intelligence has no empathy or feelings. Unlike the case with decisions made by directors, these decisions are very prone to be influenced by interpersonal relationships with business partners or with other parties.

In addition to the first to third conditions, there is one more condition that must be met, namely that the board of directors has taken action to prevent losses. This fourth condition is closely related to the second condition. If Artificial Intelligence recommends a decision, and the board of directors knows that the decision contains risks, the directors must take precautions. Vice versa, if the directors know that the decisions produced by Artificial Intelligence will cause losses if not implemented, the directors must take immediate action.

CONCLUSION AND SUGGESTIONS

1. Conclusion

Artificial Intelligence has a big role in business development. Its character that can produce decisions quickly, efficiently, and neutrally is very suitable in corporate

governance. However, Artificial Intelligence currently cannot be placed as a member of the board of directors. Alternatively, Artificial Intelligence can be used as a business advisor on the board of directors. The decisions made by Artificial Intelligence are not absolute and binding. The board of directors must review the decisions made by Artificial Intelligence, especially if the decisions contain business risks. The board of directors can be exempted from liability for losses arising from Artificial Intelligence business decisions if the board of directors has sought the implementation of fiduciary duty and the business decisions adopted from Artificial Intelligence have met the elements of business judgment rules.

2. Suggestions

Company that uses Artificial Intelligence can use Artificial Intelligence as business advisor, not as board of directors or absolute decision makers. The board of directors must still apply the principle of prudence over decisions made by Artificial Intelligence.

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