Regulatory on the corporate social responsibility in the context of sustainable development by mandatory in the world trade organization law perspective (case study in Indonesia)[1]

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Abstract

Regulatory on the Corporate Social Responsibility (CSR) by mandatory in Indonesia as stipulated in Article 74 of Law No. 40/2007 on the Limited Liability Company (hereafter the Company Law) raises a contradiction. Those who agree argue that the company is not solely for profit, but more than that are participating in social issues and the preservation of the environment within the framework of sustainable development. Conversely, those who disagree view that social issues and the environment are the full responsibility of state. The involvement of a corporation in social and environmental activities is voluntary.

Verdict of the Indonesian Constitutional Court in case no. 53/PUU-VI / / 2008 dated 13 April 2009 which rejected a requesting of material test of the Article 74 paragraph (1), (2) and (3) of the Company Law confirms the existence of the CSR by mandatory in international trade traffic today.

The analytical results indicates that mandatory CSR regulation in the Company Law is not a form of a state intervention to the private activities. In addition, the arrangement is not contrary to the principles of free trade within the framework of the General Agreement on Tariffs and Trade (GATT) / World Trade Organization (WTO).

Keywords: *Corporate Social Responsibility, Environment and Utility.*

JEL Classification: K22, K23

A. Introduction

1. Background

A fact that the implementation of development in many countries, including Indonesia in this regard, of great benefit in improving the quality of life and well-being for humans on this earth. Especially with the development and advancement in the field of Science and Technology recently, increasing the quality of life and people welfare.

However, one thing can not be denied that the building was also a negative impact on human life itself. Particularly, in the field of environment, science and technology development of control speeding is in fact result in a catastrophe, either physically or socially. Some of them are leaking nuclear reactor disaster,

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destruction of the ozone layer, the acid rain, forest fires, mud of Lapindo and others.

Negative impacts can not be separated from the nature of human greed in natural resource management. In the name of freedom of the flag of capitalism, human beings treat nature and make it as a commodity through a variety of exploitation, mining, management and exploration. It was done on a continuous basis regardless of the relentless nature also systematically organized material that has limitations on the time will be damaged resulting in a systematic way nature works to be shaken even broken.

All of that makes the specter of a frightening and worrying that makes people always plagued the nightmares as a result of the implementation of the development itself. This does not mean that development must be stopped at all. On the contrary, with all its positive impact development should be continued and enhanced by taking into account all the negative impact that would occur. Development is not only oriented to promote economic growth per se, but more than that the sustainability of the development itself.

Basing on the above reality, a new breakthrough in the development of legal institutions in Indonesia is carried out by the Government together with the House of Representatives on August 16, 2007 with the enacted Law No. 40/2007 on Limited Liability Company (the Company Law) (State Gazette of Year 2007 No. 158 / No. 5336). This Company Law accommodate the concept of social responsibility and sustainable development paradigm. Article 74 of the Company Law clearly states:

(1) Company runs its business activities in the field and / or related to the natural resources required to run the Social and Environmental Responsibility.

(2) Social and Environmental Responsibility as referred to in paragraph (1) an obligation of the Company which are budgeted and accounted for as an expense of the Company whose implementation is carried out with respect to decency and fairness.

(3) the Company does not perform its obligation as referred to in subsection (1) subject to sanctions in accordance with the provisions of the legislation.

CSR in the formulation that would give a legal sanction according to the company that does not perform shows that CSR is a mandatory, not a voluntary as applicable in other countries. The regulatory of CSR by mandatory raises a contradiction. [3] Those who agree argue that the company is not solely for profit,

[3] The existence of CSR itself have created a contradiction. Milton Friedman and others have argued that a corporation's purpose is to maximize returns to its shareholders, and that since only people can have social responsibilities, corporations are only responsible to their shareholders and not to society as a whole. They perceive that corporations have no other obligation to society and CSR as in-congruent with the very nature and purpose of business, and indeed a hindrance to free trade. They argue that improvements in health, longevity and/or infant mortality have been created by economic growth attributed to free enterprise. Critics of this argument perceive the free market as opposed to the well-being of society and a hindrance to human freedom. They claim that the type

but more than that are participating in social issues and the preservation of the environment within the framework of sustainable development.

Conversely, those who disagree the view that social issues and the environment are the full responsibility of government/state. Involvement of the Corporate in social and environmental activities is a voluntary. This means that regulatory of CSR is a form of intervention or interference from the government / state in the private sphere. In addition, regulatory of CSR in mandatory is seen as a violation of the principle of non-discrimination as accommodated in the principles of the WTO.

In its development, among those who do not agree with the regulatory by mandatory apply to test the substantive chapter of the Indonesian Constitutional Court in case no. 53/PUU-VI/ 2008. Constitutional Court in its decision dated 13 April 2009 refusing application for material testing performed by Plaintiffs. This ruling further confirms the existence of CSR regulation by mandatory in international trade traffic today.

Furthermore, as the further implementation of CSR regulation, the government issued Government Regulation No. 42 Year 2012 on Environmental and Social Responsibility Company Limited (State Gazette of Year 2012 Number 89 / No. 5305).

Based on these objective conditions, the research problem can be formulated as follows:

a. whether mandatory CSR regulation as stipulated in the Company Law is a form of government intervention / state in the private sphere?
b. whether mandatory regulation is contrary to the principles of free trade within the framework of the General Agreement on Tariffs and Trade (GATT) / World Trade Organization (WTO)?

This study aimed to determine whether mandatory CSR regulation as stipulated in the LC Law is a form of government/state's intervention in the private sphere, and also to analyze whether mandatory regulation is contrary to the principles of free trade within the framework of GATT/WTO

This type of research is used to gather and analyze materials is a normative law. While the approach used in this study is a normative approach to legislation (statute approach) approach concepts (conceptual approach) and the approach to the case (case approach).

2. Theory Framework

The law can be distinguished in some form. *First*, Unwritten Law not made deliberately by state institutions, commonly referred to as customary law. *Second*, the laws (especially written) made by non-state institutions, such as the agreement between the subject of legal civil; *Third*, legislation. that is part of the written law

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of capitalism practiced in many developing countries is a form of economic and cultural imperialism, noting that these countries usually have fewer labour protections, and thus their citizens are at a higher risk of exploitation by multinational corporations.

made deliberately by state institutions,[4] and *Fourth*, a judicial decision that was made and determined by the judge. [5]

The establishing of the law, according to Lili Rasjidi and I.B. Wiyasa Putra, essentially includes several components: personnel constituent, constituent institutions, the formation process, and the legal form of its results. [6] In addition, the legal establishment is closely related to the development of the law, which according to Abdul Hakim Garuda Nusantara, in essence, is a renewal of the existing legal provisions and are considered obsolete, and the creation of new legal provisions necessary to meet developments in society. [7]

According to Burkhardt Krems as cited and described by A. Hamid S. Attamimi, legal establishment *(rechtvorming)* in terms of legislation *(Staatliche rechtsstzung)*, in principle covers two main points, namely: *first*, the activities on establishment of regulation content *(Inhalt der reguling)*, (a) activities related to regulatory compliance forms *(form der regelung)*, (b) the method of rules formation *(methode der der regelung ausarbeitung)*, and (c) the establishment of rules and procedures *(verfahren ausanbeitung der der regelung)*. In the formation of legislation, according to Attamimi, two main activities should be carried out systematically in order to apply the juridical, political and sociological. In this case, Krems found that the process of law-making legislation is basically an interdisciplinary activity or are *interdisiplinare von der Wissenschaft Staatliche rechtssetzung*, meaning interdisciplinary knowledge about the formation of state regulations. [8]

Second, if the contents in terms of the formation of legislation, it must be woven blend of harmony between the political preference of laws *(rechtpolitiek)* and the sociology of law *(rechtsoziologie)*. Politics through law, is necessary to formulate the basic ideas, bases, systems and legal purposes that will be built and correspond with objective conditions (empirical) community needs to be sharpened to approach the concepts of sociology of law. This is so formal and material content of legislation really can apply, be accepted and obeyed by citizens subject

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4 Hikmawanto Juwana. 2004. Politik Hukum Undang-undang Bidang Ekonomi di Indonesia *(Politic of Law of the Ecomonic Law in Indonesia)*, Jurnal Hukum Bisnis, 2 (23), p. 52 as cited by Taufiqurrahman. 2010. *Karakter Pilihan Hukum, Kajian tentang Lingkup Penerapan United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980*, PT. Bayumedia, Malang, p. 37.

5 Brian Bix. 1996. *Jurisprudence: Theory and Context*, Westview Press, Colorado, p. 152.

6 Lili Rasjidi and I.B. Wyasa Putra. 2003. *Hukum sebagai Suatu Sistem (Law as a System)*, CV Mandar Maju, Bandung, p. 163.

7 Abdul Hakim Garuda Nusantara, "Politik Hukum Nasional (The National Legal Politics)", *paper was presented to* Creation of Legal Aid Trainning held by Foundation of Indonesia Legal Aid and Surabaya Legal Aid, Surabaya, September, 1985.

8 A. Hamid S. Attamimi. 1990. Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara, Suatu Studi Analisis mengenai Keputusan Presiden yang berfungsi Pengaturan dalam Kurun Waktu Pelita I – Pelita IV (The Role of the Presidential Decree of that Republic of Indonesia in State Governmental Administration, an Analysis on the Presidential Decree that functions Governing in Period of the I –IV Development of Five Year), *Disertation*, Universitas Indonesia, Jakarta, p. 311.

to legislation. In addition, there are vertical and horizontal synchronization corresponding law, contains the value of the rule of law and not against each other.[9]

The importance of a harmonious blend between the political preferences of law and sociology of law is also confirmed by Gunther Teubner who said the words that:

> *"Legal development is not identified exclusively with the unfolding of norms, principles, and basic concept of law. Rather, it is determined by the dynamic interplay of social forces, institutional constraints, organizational structures, and last but not least conceptual potentials* ".[10]

The establishment of the law not just to form the substance of the law per se, but more than that is how the substance of the law is consistent with the values of law that developed in the community. The establishment of the law should be interpreted as an attempt to raise new legal values that live in the community, both in national and international contexts. The values of this new law which is the philosophical basis for the new law substance.

With regard to the substance of the law, through his work entitled Introduction to the Principles of Morals and Legislation (1780), Jeremy Bentham (1748-1832) introduced a theory about the purpose of the law. According to him, the law aims to realize what is useful or appropriate by the utility as his famous staying "*The greatest happiness of the greatest number*".

Bentham apply the general principles of the utilitarian approach to the law. According to him, the man would have done in such a way that he gets the maximum enjoyment and pressing as low as suffering. The benchmark assessment is made whether an action it produces happiness or not.

The ultimate goal of this legislation is to serve the greatest happiness of the greatest number of people. The principle of the greatest happiness is rooted very firmly on the belief Bentham. As such, the laws oriented towards usability, which give you happiness as big as the words "*the greatest happiness of the greatest number*".[11]

The Bentham's doctrine is called Utilitarianism. The theory was developed based on understanding the usefulness of this theory is known as Utility or also known as the Theory of Legislation. The essence of the theory of legislation is that only in order everyone will get a chance to realize the highest happiness. Axiological values developed by Bentham is the usefulness of law in society. The law should provide a great benefit for many people. The law does not merely pursue justice regardless of the certainty or otherwise pursue only certainty at the expense of justice, but must consider both these contradictory aspects.

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[9] *Ibid.*

[10] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law", Law and Society Review. 1983. *The Journal of The Law and Society Association*, 17 (2), p. 247.

[11] Hilaire McCoubrey and Nigel D. White, 1996. *Textbook on Jurisprudence*, Blackstone Limited, London, p. 240.

In this regard, Radbruch stated that the law has three basic values, namely justice, usability and legal certainty. [12] Existence value of certainty in order to maintain public order can not be ignored. In other words, the rule of law are prerequisites that must exist in the law to achieve social order. The rule of law itself can only be achieved through the establishment of norms in the form lege or lex.

Demands certainty as the value of the legal basis in along with the development of the philosophy of positivism. Thought flow of positivism in law peaked in the first half of the nineteenth century, since the advent of the various settings in the form of laws that require compliance and provide the threat of sanctions, in order to create an orderly society.

Speaking of legal positivism in the development of the flow can not be separated from the influence of Auguste Comte thoughts. According to him, the law is part of metaphysics that makes no sense and does not contain a moral. The law should be removed from metayuridis thinking as espoused by the flow of natural law. Any legal norms must exist in an objective nature as positive norms. The law should be stated in the form of a concrete contractual agreement between the citizens or their representatives. The law is no longer conceived as moral principles that abstract on the nature of justice, but *ius* which has undergone been positive as l*ege* or l*ex*, in order to ensure certainty as to what is called the law. [13]

Bentham insisted that the main elements that make up the law is a command, sovereignty and sanction. This view was expressed by Bentham in his statement: *[14]*

> *An assembled of sign declarative of a volition conceive of adopted by the sovereign in a state, concerning the conduct to be observed ... by ... persons, who ... are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events ... the prospect of which it is intended should act as a motive upon those whose conduct is in question*

According to the understanding from utilitarian, the "benefits" (utility) is a criteria for people to comply with the law. This is reflected in the following statement: *"... and the test of what laws there ought to be, and what laws ought to be obeyed, was utility".*[15]

Humans only have to follow the law in either a good legal system. As Bentham's principle *"the greatest happiness of the greatest people"*, whether or not the law is measured by the benefits of the law to mankind. Principle of obedience to the law if the law is beneficial. Bentham at length declared:

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[12] Gustav Radbruch. 1961. *Einfuhrung in die Rechtswissenschaft*, Stuttgart: K.F. Koehler, p. 36, cited from Satjipto Rahardjo. 1996. *Ilmu Hukum*, Citra Aditya Bakti, Bandung, p. 19.

[13] Soetandyo Wignjosoebroto. 2002. *Hukum, Paradigma, Metode dan Dinamika Masalahnya*, Elsam & Huma, Jakarta, p. 96.

[14] J. Bentham. 1970. *Of Laws in General*, (ed. H.L. Hart) Athlone Press, London, ch. 1, para 1, quoted from *Ibid.*, p. 14.

[15] John Stuart Mill. 1962. *Utilitarianism on Liberty Essay on Bentham*, New York, USA, The World Publishing Company, p. 14.

> *... namely whether a whole given system of law is a good system. In one sense. I have a duty to obey only so far as utility allows, that is, that is as far as the law; in another sense I have a duty of obedience as soon as a law with sanctions exist at all. The poin, then, of Bentham's codification proposals would be to ensure that only those laws which I have a duty to obey in the first sense should impose on me a duty of obedience...*[16]

According to Bentham, humans are subject to the law are because subject to the law they feel the need or benefit (utility). People follow the law not because the laws of nature. This view is evident in the following statement:

> *Rejecting natural law, then Bentham defined laws as commands backed up by sanctions, some of which would and some of which would not conform to the dictates of morality, the test here being the test of utility. Rejecting the original contract, he saw both the origin of the laws and the obligation to obey them as derivable from the principle of utility.*[17]

Bentham's view is that the law as commands backed by sanctions is very influential to his student, Austin, stating that the law is the command of the sovereign political power of a country. In one of his works, Austin said: *"The matter of jurisprudence is positive law: law simply and strictly so called: or law set by political superiors to political inferiors"*.[18]

H.L.A. Hart build his thesis on positivism by explicitly separating the relationship between law and morals. [19] Same with Austin, he argued that the law is a man who has a command of power, because it shall be obeyed. Hart explicitly states: "*The most prominent general feature of law at all times and places is that its existence means that certains kinds of human conduct are no longer optional, but in some sense obligatory*".[20]

Despite there is a distinction between positivist legal thought with naturalist, actually there is a relation to each other. Thoughts from naturalist law is still widely used by positivist thinkers. It can thus be infused from McLeod statement as follows:

> *First, iti is important not to misrepresent postivism. Positivist do not ignore the question of whether a particular law is desirable on moral or other grounds. Their argument is simply that the question of identifying what law is a logical prescondition to considering whether or not it is desirable. Second, it is not necessary to belong whole-heartedly to one camp or another. Thus Hart, a leading twentieth-century positivist, was prepared to acknowledge what he called the minimum content of natural law, which*

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16 *Ibid*., p. 161.
17 *Ibid*., p. 14.
18 J. Austin. 1955. *The Province of Jurisprudence Determined*, Weidenfeld & Nicholson, London, h.9, quoted from *Ibid.*, p.1.
19 *Ibid*, p. 55.
20 H.L.A. Hart. 1972. *The Concept of Law*, Clarendon Press, , Oxford, p.6 quoted from Hilaire McCoubrey dan Nigel D. White. 1993. *Textbook on Jurisprudence*, Blackstone Press Limited, Great Britain, p. 32.

validates certain basic law as those prohibiting murder, rape, theft and so on.[21]

As a positivist are determined to fight the codification of the law of England, Jeremy Bentham is actually a greater right to hold the title "*the father of English law*". But in reality, John Austin (1790-1859) that no other students who get the title. [22] Bentham, together with John Stuart Mill (1806-1873) and Rudolph von Jhering (1818-1889) even better known as a character stream Utilitarianism. [23]

The establishing of the law in the form of legislation as Jeremy Bentham and John Austin can not be separated from the existence of a state. Even John Austin explicitly states that that law is the command of the sovereign political power of a country. This means that in the economic development expressed in the legislation are also very much depends on the state. Of course, with a diversity of cultures and different historical backgrounds, state involvement in economic activity is not the same. There are countries that are involved in minimalism, the maximalist and measurable. [24]

Adherents of the flow a minimalist state involvement in economic activity is based on the premise that an individual activity or activities of business units should be given the freedom to take care of its own interests and improve its position in the field of economics. [25] Economic activity in free competition would be far more beneficial to society as a whole than if everything was regulated by the state. They are Adam Smith, David Ricardo, Thomas Robert Malthus and others.

Providing the broadest freedom to individuals and business units turned out in practice to improve the quality of life for the people's welfare. Precisely arise exploitation a strong group (in the case of mini-entrepreneurs) to vulnerable groups (in this case labor). Starting from this fact, they argued that the state should maximalist involvement in economic activities. This view is based on the premise that freedom without the intervention of the state will lead to capitalist liberalism in which the people, especially the workers have been squeezed in all-out in the cycle of the production process. Country ought to govern all aspects of the economic life of the country.[26]

These two views are contradictory sparked the birth of the views that are at the midpoint of them. The cornerstone of the adherents of this school of thinking is the principle of balance. In their view, the involvement of the state in economic activity should be measurable. Measurable parameters that demands the involvement of the state is based on the balance of the balance of market power,

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[21] Ian McLeod. 1996. *Legal Method*, Second Edition, Macmillan Press Ltd., London, p. 7.

[22] Satjipto Rahardjo. 2000. *Ilmu Hukum (*, Citra Aditya Bakti, Bandung, p.269, quoted from R.W.M. Dias. 1976. *Jurisprudence*, Butterwoths, London, p. 457.

[23] *Ibid.*

[24] Gunarto Suhardi, 2002. *Peranan Hukum Dalam Pembangunan Ekonomi*, University of Atma Jaya, Yogyakarta, p. 12.

[25] *Ibid*., p. 13.

[26] *Ibid.*

especially on the aggregate demand. Some prominent adherents of this thought are Kaynes and Samuelson.

In this perspective, W. Friedman introduce the concept of mixed-economy. This concept includes a variety of ways in which state power is used to control or monitor the country's economic system, even though the economy is run by private companies. According to Friedman, there are four functions of the state in the mixed-economy system. [27]

First, the function of the state as a Provider. This function is related to the concept of the welfare state. In this capacity the state is responsible to provide and deliver social services to guarantee minimum living standards and make allowances or economic power freedoms.

Second, the function of the state as Regulator. In this function, the state uses a variety of influences in particular control the power to regulate investment in the construction industry, the volume and type of export and import, through means such as exchange controls and import controls and industrial licensing.

Third, the function of the state as Entrepreneur. This function is an important function in a mixed economy. Activities of the state in economic activities can be conducted through semi-autonomous government department or through corporations owned by the state. State involvement in the entrepreneurial function may take the form of public or private.

Fourth, the state functions as the Umpire. State can function as a referee because the state has the legislative, administrative and judicial. In this case, the state must develop a standard of justice as the general economy by state firms. Therefore, the state must distinguish between its function as a referee to function as entrepreneurs.

Thought "*mixed-economy*" is actually heavily influenced by Hegel and Karl Marx. Friedman sought to put on a position diametrically presents the concept of the backup function. [28] He put the country both as a centralized state, which is the result of a balance between economic and social interests that conflict and as the embodiment of the ideals of justice and the public interest which includes society as a whole. In Friedman's view, in a democracy that's four state functions can be implemented.

B. ANALYSIS

CSR was not born suddenly in the modern era. But it is growing and developing in a very long time dimension. Code of Hammurabi created around the year 1700 BC and contains about 282 law also includes penalties for employers

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[27] W. Friedman, 1971. *The State and The Rule of Law in Mix Economy*, Steven & Son, London, p. 3.

[28] According to Hegel, the state is a manifestation of power. The state is not only an organization or focus of power, but it is the highest manifestation of the human individual and social aspirations. Meanwhile, according to Karl Marx, the state is the engine of administrative, executive and legal where the ruling class controlled the means of production and the exploitation of the working class. The state is a pressure instrument.

who fail to keep the citizens or the cause of death for its customers. Code of Hammurabi states that the death penalty is given to those who abuse drink sales permit, poor service and the construction of the building under the standard, which causes the death of another person.

The setting shows that people at that time already had an awareness of the potential for adverse effects of any business activity. Therefore necessary measures to minimize adverse effects to any business activity that does not cause harm to the health and safety of people and as well as foster a love of the business.

Furthermore, the term Community Development in the United Kingdom in 1948. Comdev is alnernatif development of a comprehensive and community-based to involve government, private, or non-non-governmental organizations with a specific purpose. Generally, the approach include: (1) a community approach, (2) problem-solving approach, (3) the experimental approach, (4) approaches the power conflict, (5) management of natural resources, and (6) improvement of the community urban.

Of the six approaches, a community approach seems to be the most commonly used approach. This approach emphasizes the interest of almost all citizens. The advantage of this approach is the active participation of all citizens and all related parties in all the pengabilan decisions, good planning, implementation, evaluation, and enjoy the results together with the community.

In its development, not only Comdev demand by the public, but also the company. The company is no longer an institution that truly independently of society. In order to maintain its existence, the company not only relies on the interests of the company internally, but also pay attention to the interests of the community in which it resides. Its existence also must be able to provide benefits to the community.

Departing from the phenomenon exists in which businesses in policy must align with the goals and values that exist in the community, Howard R. Bowen introduced a new term, the Social Responsibility of the Businessman. According to him, SRB is : *"... obligation of businessman to pursue those policies, to make those decision or to follow those line of action which are desirable in term of the objectives and values of our society"*.

The development of CSR can not be released at this time simply by the presence of SRB concept was introduced by Bowen. SRB concept which requires the business to align its policies with the interests of the community is the main foundation of the emergence of the concept of CSR. In other words, the concept of ARB can be regarded as the forerunner of the modern CSR as a concept developed at this time.

Relationship with the community is becoming more popular, especially after the birth of the concept of John Elkington thought that packaged into three principal components, namely: Profit, Planet and People. [29] The 3P concept provides insights that a company is said to be good if the company is not just

[29] Elkington, John, 1998. *Cannibals With Forks : The Triple Bottom Line in 21st Century Business.*

chasing a mere profit, but also a concern for environmental sustainability and social welfare.

On the basis of John Elkington's CSR concept, several international institutions provide a definition of CSR. The World Business Council for Sustainable Development in its publication Making Good Business Sense by Lord Holme and Richards Watts, used the following definition: *"Corporate Social Responsibility is the Continuing commitment by business to behave ethically and Contribute to economic development while improving the quality of live the workforce and their families as well as of the local community and society at large "*.[30] Under this point of Viewm, the CSR rests on the fundamental pillars of both the economic growth and the quality of life as an engine for "sustainable" development,

Similar views expressed by Business for Social Responsibility stating *"Operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business"*.[31]

The European Commission with the Green Paper "Promoting a European Framework for Corporate Social Responsibility" better defines the concept of / CSR as

> *"a concept whereby companies decide voluntarily to Contribute to a better society and a cleaner environment. A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing "more" into human capital, the environment and the relations with stakeholders ".* [32]

The word "more" shows that the European Commission wants to emphasize the lack of consideration for the different cooperating actors highlighting, for the future, the urgency of a severe increase of of the sensibility and the investment in social responsibility as a vehicle for the best competitiveness and enlargement.

The Canadian Centre for philanthropy states: *"CSR is a set of management practices Ensure that the company minimizes the negative Impacts of its operations on society while maximizing its positive Impacts"*. This definition therefore provides the link between the decisions tied to the social responsibility and the business derived from the respect of the lawyer instruments, the population, the communities, and the environment.

From all the above definition, CSR is in principle *"is about how companies manage the business processes to produce an overall positive impact on society"*.

In the perspective of development, along with the economic globalization and trade are moving fast today, the relationship between the company and the

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[30] Mallen Baker, *Corporate Social Responsibility*, download at http://www.mallenbaker.net/csr/ definition.php

[31] *Ibid.*

[32] *Ibid.*

community and the environment is increasingly gaining the attention of the international community. This is understandable because, in reality, many business activities conducted by major companies caused harm to human health and safety. Generally, the losses caused by the activity of the company is not felt directly in the short term, but in the long run. Even sometimes, the negative impact caused by the activities of the company in the form of environmental destruction is not only felt directly by the local communities where the company is located, but the outside of the enterprise in question were also felt. Leaking nuclear reactors and ozone holes are potentially perceived by the human race on earth.

Therefore, as a form of concern about the phenomenon of environmental degradation in the implementation of development in many countries, the United Nations held a High Level Conference (Summit) on "Environment and Development" (United Nations Conference on Environment and Development) in Rio Janeiro - Brazil in 1992. The summit resulted in several agreements including "Rio Declaration" and the "Agenda 21" which contains principles regarding environmental management and development. In addition, the summit also gave birth to a concept of "Sustainable Development". Sustainable development is based on environmental protection, economic and social development as outlined in 3 (three) documents that are legally binding and 3 (three) documents that are non-legally binding.

Legally binding documents consists of 3 (three) conventions, namely the Convention on Biological Diversity, the United Nations Convention on Climate Change and the Convention to Combat Desertification. While the non-legally binding documents consist of 3 (three) agreement, namely the Rio Declaration, Forest Principle (Authoritative Statement of Principles for a Global Concencus on Management, Conservation, and Sustainable Development of all Types of Forest stating the importance of the forest for economic development, absorbing atmospheric carbon, biodiversity protection and watershed management. Agenda 21 (a comprehensive plan on an ongoing program when entering the 21st century).

Based on the results of the summit, the implementation of the development is not solely oriented to promote economic growth through gains in the short term, but also oriented to sustainable development itself. Development should be of great benefit and improved quality of life and life to the community and the environment, both in the present and future dimensions. The maintenance/ preservation of the environment and quality of life in the context of sustainable development is not only a duty and responsibility of the state, but also the duties and responsibilities of the company.

Furthermore, the United Nations held a High Level Conference on Sustainable Development (World Summit on Sustainable Development) in Johannesburg, South Africa on 26 August to 6 September 2002. The conference, known as Rio + 10 Conference Johannesburg Declaration which resulted largely confirms that sustainable development has three pillars, namely economic, environmental and social. Sustainable development is economic development

should be environmentally friendly and strive for equality as fair as possible. Therefore, the construction should be done in a holistic manner so that the synergy.

The concept of social responsibility is the result of this summit is actually a complement sustainable development paradigm. UN Global Compact in Geneva-Switzerland in 2007 emphasized corporate necessity to carry out the implementation and execution of their responsibilities and conduct sound business, known as Corporate Social Responsibility. [33] In the concept of CSR, companies are no longer faced with the responsibility which rests only on single bottle lines, namely the corporate value which reflected the financial condition, corporate responsibility should be based on the triple bottom lines, namely: financial, social, and the environment. Financial condition alone is not enough to guarantee the value of the company to grow and develop in a sustainable manner. Corporate sustainability will be ensured if the corporation participated also consider the social and environmental dimensions.

From the brief description of the existence of CSR in the dynamics of the development above, it is the increased interaction of international organizations like the United Nations in the business activities carried on by the corporation. It is fleeting impression that the United Nations had entered the private area. But when examined more deeply, a such involvement is the rational thing to do.

As previously described, the UN involvement in the dynamics of development of a nation, which in turn gave birth to the paradigm of Sustainable Development is actually a form of expression of concern over the emergence of environmental destruction on the earth. The phenomenon of environmental degradation is increasing as economic globalization and trade drove without control. Presence of Multinational Corporations (MNCs) or Transnational Corporations (TNCs) which operates mostly in developing countries adds to the onset of a long line of environmental damage.

Although in fact the business activity undertaken by MNCs/TNCs are causing environmental damage and harm to the local community, but the law can not touch them. TNCs/MNCs have the money, power, technology, and influence that has higher bargaining position than the public. In addition, the mobility and operational complexity also makes it difficult for the country they are related to file a claim for losses incurred. This can be understood because the parent company is usually identified with a single country. The TNC does not need to be linked to particular State in which the parent company has in headquarters and, it maybe operated under a hierarchical or decentralized system of management. As Robert Reich states: *"Today, corporation's decision … are driven by the dictates of global competition , not by national allegiance"*.[34]

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[33] The Compact was announced by the then UN Secretary-General Kofi Annan in an address to The World Economic Forum on January 31, 1999, and was officially launched at UN Headquarters in New York on July 26, 2000. The Global Compact is the world's largest corporate citizenship initiative with two objectives: "Mainstream the ten principles in business activities around the world" and "Catalyse actions in support of broader UN goals, such as the Millennium Development Goals (MDGs)".

[34] R. Reich, 1991. "*Who is them*?", in Harvard Business Review, no. 69, p. 77.

What is done by the United Nations to introduce Sustainable Development paradigm to be followed not only by governments, but by corporations, solely oriented development undertaken in order to improve the quality of life and welfare of the people and respect for human rights. This is consistent with the opening of the UN Charter which states:

> *"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and ... to promote social progress and better standards of life in larger freedom".*

Underlying spirit is further stated in Article 1 of the Principles and Objectives, in which one of the goals the establishment of the United Nations is:

> *"To Achieve international co-operation in solving international problems of an economic, social and cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental Freedoms for all without distinction, as to race, sex, language, or religion; and".*

A rational thing when MNCs / TNCs as a corporation do all it can to gain an advantage. However, the way to earn profits must not cause harm to the public. Its operations are carried out should still pay tribute to the dignity of human beings and the environment. It can be said that when a corporation is in violation of human rights in the quest for profits, the corporation essentially have done is immoral, and therefore profits can be qualified as immoral profits.

The issue of human rights is not merely a matter of a particular country. It is the issue of the international community. Therefore, to accommodate the United Nations in the international legal instruments that have international legitimacy. The Universal Declaration of Human Rights (UDHR) states in its preamble that *"every individual and every organ of society, keeping (the) Declaration constantly in mind, shall strive (...) to promote respect for these rights and freedoms and (...) to secure their universal and effective recognition and observance".* Thereafter, the Declaration specifically states in Article 29 (1) that everyone has duties to the community. The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) state in their preamble that the individuals and to the Community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

The UN has sought through international legal instruments to require the individual to respect human rights. Unfortunately until now there is no international mechanism to do when MNCs / TNCs in their business activities in violation of human rights. This does not mean nothing at all international legal instruments in order to reduce the negative impact caused by the business activities of MNCs / TNCs. Some of these include are OECD Guidelines for Multinational Entreprises, which are part of the Declaration on Investment and Multinational Entreprises dan UN Global Compact. The Global Compact itself is a principle-based framework for businesses, stating ten principles in the areas of human

rights, labor, the environment and anti-corruption. Under the Compact, companies are brought together with UN agencies, labor groups and civil society.

The business ethics movements led by the United Nations with all the dynamics that is about 4 (four) decades ago eventually led to codes of conduct and social responsibility of MNCs/ TNCs. This can be understood as MNCs/TNCs are new actors in the global era that deal with the protection of human rights. Setting such a way through guidelines or standards of business ethics to be followed by MNCs/TNCs is basically an effort to improve the quality of life and well-being of people and the environment and at the same time rescue efforts to the next generation.

Indonesia as an integral part of the international community and a member of the United Nations, both moral and legal, are bound to implement what is already an international commitment in order to provide protection and respect for human rights. Several international instruments have been ratified, acceded to or adopted into national legislation include: (1) Act No. 39 of 1999 on Human Rights (State Gazette of Year 1999 No.165), (2) Act No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights) (State Gazette of Year 2005 No. 119 / No.4558), (3) Act No. 11 Th. 2005 on the Ratification of the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights) (State Gazette of Year 2005 No.118 / No.4557).

In this context also, Indonesia accommodate the concept of social responsibility and sustainable development paradigm into Act No. 40 of 2007 on Limited Liability Company (State Gazette of Year 2007 No. 158 / No. 5336). The law replaces a similar law, the Law no. 1 of 1995 on Limited Liability Companies are considered to be not in accordance with the development of the law and the needs of today's society due to the progress of science and technology, particularly Information and Communication Technology.

Article 74 of the LC Law clearly states:

(1) Company runs its business activities in the field and / or related to the natural resources required to run the Social and Environmental Responsibility.

(2) Social and Environmental Responsibility as referred to in paragraph (1) an obligation of the Company which are budgeted and accounted for as an expense of the Company whose implementation is carried out with respect to decency and fairness.

(3) the Company does not perform its obligation as referred to in subsection (1) subject to sanctions in accordance with the provisions of the legislation.

Explanation of the article asserts that the term *"Company runs its business activities in the field of natural resources"* is the business activities of the Company to manage and utilize natural resources. While the definition of *"company that runs its business activities relating to natural resources"* is a company that does not

manage and utilize natural resources, but its operations have an impact on the function of the ability of natural resources.

The presence of the provisions of Article 74 of the LC Law above has a goal to create the relationship of the Company remain harmonious, balanced, and in accordance with the environment, values, norms, and culture. Therefore, the Company did not carry out the CSR above sanctioned in accordance with the legislation in force. The meaning of *"subject to sanctions in accordance with the provisions of laws and regulations"* is subject to any form of sanctions set out in the legislation concerned.

Provisions of Article 74 of the LC Law by mandatory is inviting polemics many people, especially from businesses. Polemic continues until the Constitutional Court, the application for the Material Testing to Article 74 paragraph (1), (2), and (3) and their explanations of the LC Law, Article 28D paragraph (1), Article 28 paragraph (2) of 1945 Constitution issued by Mohamad Sulaiman Hidayat (Chairman of the Chamber of Commerce and Industry (Kadin) Indonesia during 2004-2009 which is also Treasurer of Golkar Party), Erwin Aksa (BPP Chairman of the Indonesian Young Entrepreneurs Association (HIPMI) who is also CEO Bosowa Group), and Fahrina Fahmi Idris (Industry Minister Fahmi Idris's daughter who is also Chairman of the Indonesian Association of Women Entrepreneurs) on December 3, 2008 with Registration Case No.. 53/PUU-VI/2008.

Norma proposed to be tested is 1 (one) norm of material that resides in Article 74 paragraph (1), paragraph (2), and paragraph (3) LC Law as mentioned above. While norms are used as test equipment is 3 (three) norms set out in Article 28D paragraph (1), Article 28 paragraph (2), and Article 33 paragraph (4) of the 1945 Constitution, as follows:

> *Article 28D paragraph (1) : Every person has the right to recognition, security, protection, and fair legal certainty and equal treatment before the law.*
>
> *Article 28 paragraph (2): Everyone has the right to freedom from discriminatory treatment on any grounds and are entitled to protection against discriminatory treatment.*
>
> *Article 33 paragraph (4) : Organized a national economy based on economic democracy with the principles of solidarity, equitable efficiency, sustainability, environment, independence, and balancing economic progress and national unity.*

It is interesting to observe is whether the concept of regulatory the CSR by mandatory is a form of state intervention in the private sphere. If you look at the dynamics of the development of CSR as previously described in the LC Law, actually the regulation of CSR is not a form of state intervention in the private sphere. On the contrary, setting the CSR by mandatory is a form of commitment and responsibility of the state in order to provide legal protection to the general public in the form of appreciation and respect for human rights. Legal protection is given not only be felt in the current dimension (short term), but also in the

dimension of the upcoming (long term). The existence of a nation is not only hung on the existence of the current generation, but also hung on the generations to come. Hence also, the utilization of natural resources within the framework of development should be oriented towards maintaining environmental sustainability efforts. Paradigm of Sustainable Development initiated at the international level should be a necessity in the development work in Indonesia.

Legislature realized that the level of awareness and or domiciled corporations operating in Indonesia is still lacking in terms of the social aspects and the environment. Setting mandatory CSR by providing legal sanctions for corporations that do not comply with the law is a breakthrough right and should be supported by all parties. The setting is very possible will provide a deterrent effect for the corporation. In addition, the setting which provides a legal duty to the corporation to carry out social and environmental responsibility will provide great benefits for social life and environment, current and future.

Orientation of the benefits is consistent with the view of Jeremy Bentham, which states: *"the greatest happiness to the greatest number"*. The establishment of the law should be oriented towards usability, providing maximum happiness for many people.

The function played by the state in setting the CSR by mandatory is no more as a facilitator that facilitates the needs of the international community on the one hand and local communities on the other side to improve the quality of life better. It is hope that it can be achieved through efforts to control the negative impact of the implementation of the development. Legal obligation for corporations to implement the CSR is integrated in the budget of corporate is a strategic step in order to improve social welfare. This function is consistent with the function of Provider in view of W. Friedman. In this function, the state is responsible to provide and deliver social services to guarantee minimum living standards and make allowances or economic power freedoms.

In addition, it is in along with the Economical Democracy as stipulated in Article 33 of 1945 Constitution expressly states that:

(1) The economy is structured as a joint venture based on the principle of the family;

(2) The branches of production which are important for the country and serving the people should be controlled by the state;

(3) The Earth's water and the natural riches contained therein shall be controlled by the State and used for the welfare of the people;

(4) The national economy shall be conducted in accordance with the principle of economic democracy, equitable efficiency, sustainability, environment, independence, and balancing economic progress and national unity;

(5) Further provisions on the implementation of this Article shall be regulated by law.

Conditions on the main ideas associated with IV Preamble of the 1945 Constitution provides that an affirmation of national economic development should

be oriented towards the protection for the entire Indonesian nation and increase social welfare. Prosperity is not intended individual prosperity, but prosperity for all the people of Indonesia. Sri Edi Swasono explicitly states: "*The national economy maintained and managed as Indonesia must originate on joint efforts and lead to social welfare, which is a common prosperity (not the prosperity of individuals).”*

In the context of the establishment of national law, the law must be able to create an atmosphere conducive to the realization of national development goals (including the Economic Development Agency), which is *"to protect all the people of Indonesia and the entire country of Indonesia, promote the general welfare and the intellectual life of the nation ...".*

In accordance with the provisions set forth in paragraph (2) and (3) of Article 33 of the 1945 Constitution, the state has the right to control over strategic areas related to the livelihood of the people of Indonesia. Economic activity related to strategic areas can not be left entirely to the market mechanism. The state must play a role in the management of areas of strategic importance to the nation and serving the people of Indonesia.

Setting mandatory CSR in Article 74 of the Company Law considered unequal treatment before the law and also has a tendency to be qualified as an act discriminatory. The view is based on the argument that the company is required to implement CSR is a company engaged in natural resources. In the perspective of free trade, giving different treatment is considered a violation of the principle of non-discrimination.

As we know that Indonesia is one country which has signed the General Agreement on tarrifs and Trade (GATT) in 1994 and the agreement forming the World Trade Organization (WTO) in Marrakesh, Morocco on 15 April-1994. In addition, Indonesia is also one of the countries that have ratified the treaty signatories Marrakesh through Act 7 of 1994 on Ratification of the Agreement on Establishing the World Trade Organization (the Agreement Establishing the World Trade Organization). This means that the entanglement of Indonesia to implement the principles of free trade, as accommodated in the GATT/WTO is not only morally bound, but bound by law.

GATT/WTO to accommodate some of the free trade principles. In terms of CSR problematic settings in Company Law, the principle of which is related to the principle of non-discrimination. This principle in WTO law actualized within 2 (two) principles, namely the principle of Most Favored Nation Treatment (MFN Treatment) and the principle Nation Treatment (NT).

The principle of MFN Treatment contains an understanding that trade should be made without any distinction. Import tariff relief given on the product of a particular country should be given also to products imported from other Member States trading partners. Each member state should immediately and unconditionally, giving equal treatment for any merchandise other members, no less than the treatment given to the eye trademarks or product suppliers of any other country. MFN Treatment is a key principle in the GATT governing trade in

goods. MFN Treatment is also a priority in the GATS (Article 2) and TRIPS (Article 4). GATT, GATS and TRIPS are the three main areas set out in the WTO.

While the principle of National Treatment contains an understanding that if a product has been allowed to enter the domestic market of a country, then the product should get the same treatment as domestic products. This principle is contained in Article 3 of GATT, Article 17 of GATS and TRIPS Article 3. The imposition of import duties on imported goods is not a violation of the principle of National Treatment.

Determination of a legal obligation to implement CSR for corporations engaged in natural resources can not be said to be a form of differential treatment in WTO law perspective. In Company Law does not limit whether it is foreign or domestic corporation, for the corporation that is engaged in the natural resource corporation taxable obligations as mandated by the Company Law. In addition, the Company Law also does not distinguish whether the corporation from country X or country Y, all are treated equally. As long as he is engaged in natural resources, the corporation should implement CSR in accordance with the Company Law.

The distinction adopted in the Company Law based solely on consideration of the risk of business activities. The business activities of the corporation in the field of natural resources has the potential to cause environmental damage than corporations operating in other sectors. This does not mean other sectors there is absolutely no loss caused by business activities. Only, consequences caused by corporations engaged in natural resources and the impact is much greater length to the sustainability and sustainable development. Natural resources is essential for human survival. Loss or reduction in the availability of natural resources it will impact the survival of mankind on this earth. Therefore, the fundamental issues related to the management of natural resources is how to manage natural resources in order to produce maximum benefits for humans and not compromising the sustainability of nature itself.

Finally, regulatory the CSR mandatory as stated in Article 74 of the LC Law to make Indonesia as the only country in the world to make a moral obligation to legal liability. This situation should be a pride for the people of Indonesia. This shows that Indonesia is the only country in the world that have the strong commitment and the responsibility to provide for the protection of the environmental damage that could occur at any time. This is not another in efforts to achieve prosperity for all the people of Indonesia. Therefore, the existence of mandatory CSR regulation that has got the strengthening of the Indonesian Constitutional Court must be supported by all parties. Of course, not limited to members only moral support, but also to monitor on the technical level that a good faith from the legislators to save the country from environmental damage can actually be realized.

Furthermore, as the further implementation of CSR regulation, the government issued Government Regulation No. 47/2012 on Environmental and Social Responsibility Company Limited (State Gazette of Year 2012 Number 89 / No. 5305). Ideally, GR of 47/2012 present to answer or clarify the ambiguity of the

concept of mandatory CSR and reinforce concepts expressed in Article 74 paragraph (1) and (2) Law no. 40/2007 and is also certified by the Constitutional Court.

Unfortunately, a such government makes the nature of CSR mandatory became increasingly imprecise. In fact, none of the sentences in the GR which ordered the company to include funds in the budget cost of the company's CSR. A such government provides full internal autonomy to the company's budget.

As stated in Article 4 paragraph (1) of GR 47/2012, CSR undertaken by the company's board of directors based on the annual work plan after obtaining approval of the board of commissioners or the General Meeting of Shareholders (AGM). It means that Article 4 paragraph (1) of GR handed fully to the internal corporate (board or AGM) whether a corporation perform CSR by compulsory or not. It also stripped entirely state power to force a company which does not include CSR budget item in the list costs

Conclusion

Based on the above analysis, it can be concluded that mandatory CSR regulation as stipulated in the Company Law is not a form of intervention of government/state in the private sphere. In addition, a mandatory regulation is not contrary to the principles of free trade within the framework of the GATT / WTO.

It is recommended to the government to do a dissemination or education for people about the importance of setting the CSR by mandatory within the framework of Sustainable Development to all companies and stakeholders. In addition, it is expected to the actor of the law to enforce the law indiscriminately to companies that do not implement CSR as specified in the LC Law.

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