

The Urgency of Sanctions for Violators of Corporate Social Responsibility (CSR) for Improving of The Welfare of Society

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Abstract- The Imposing of sanctions to companies that do not implement CSR is still only a threat. Legal instruments are still too weak in facing business corporations. The implementation of CSR is not only useful for sustainable environmental sustainability, it also has a positive impact on improving community welfare, therefore is important to know connection between the sanction and CSR implementation for improving of the welfare of society. In Indonesia, the implementaton of CSR in Limited Company based on Article 74 The Law No. 40 of 2007 regarding Limited Liability Company, this article obliges companies whose activities related to natural resource management to implement Corporate Social Responsibility (CSR). This is the starting point of mandatory CSR program in Indonesia. CSR is a commitment to improve community well-being through discretionary business practices and contributions of the company's resources. The method of this research is empiric/nondoctrinal. Based on the result of this research that CSR in Indonesia can essentially be directed at strengthening the people's economy is based on small and medium enterprises as well as improving the quality of human resources through improved public education facilities and infrastructure. The problem is the absence of sanction. The existence of legal substance of CSR will not succeed if there is no legal sanctions. The Law and Government regulation on CSR are not set on sanctions for the corporation that non-performance in CSR implementation. Many companies will ignore the CSR implementation when there are no rules forcing them.

Keywords- *Sanction, CSR, Implementation, Welvare Of Society*

I. INTRODUCTION

The enactment of Law No. 19 of 2003 about State-Owned Enterprise (State-Owned Enterprise Law), Law No. 25 of 2007 about Investment (Investment Law) and Law No. 40 of 2007 about Limited Incorporation (Limited Inc. Law) has changed the moral obligation in the implementation of Corporate Social Responsibility (CSR) in Indonesia into legal responsibility, meaning that the implementation of CSR is an obligation to a company. As one of legal subject, the company has legal right and obligation, just like *natuurlijke persoon*, to which civil right and obligation inherent; as the legal subject the company is called *recht persoon*. Civil obligation is a legal responsibility that should be complied with and fulfilled. As the legal subject, it of course has some

unquestioned legal responsibilities; the more important thing is to address the following questions: does the company has moral responsibility as well? In order to have moral responsibility, the company should have moral status or in other words moral behavior. Moral actor (moral agent) can do some action qualified as ethical or unethical [1]. The presence of Limited Inc. Law and Investment Law is actually the bridge of moral/ethical responsibility and legal responsibility. Although there has been a bridge between the legal and moral responsibilities, the implementation of CSR has not been maximal in Indonesia.

For example, in Kutai Barat (Kubar) regency, East Borneo, out of hundreds companies in Kubar affiliated with mining, plantation, and wood. In reality, many companies still ignore CSR implementation. Meanwhile, there has been an agreement that the companies are willing to report any CSR activity to Kutai Barat Regency Government, through CSR forum of Kutai Barat. However, that has not been implemented completely [2]. Similarly, Serang Regency, Banten Province, has had Local Regulation Number 12 of 2011 about Corporate Social Responsibility. But the limited sanction leads to the less maximum implementation. Many companies in Serang Regency underestimate or even ignore CSR implementation. Out of hundreds companies, many companies do not implement CSR [3]. It is also similar to Muko-Muko Regency, Bengkulu Regency. In the regency categorized into retarded one, there are some Sawit companies, but the implementation of CSR has not contributed yet to the improvement of public welfare. For the companies, business is business, like a usual [4]. CSR is still considered as another part of company management, so that its existence is considered to contribute positively to the company's sustainability. Meanwhile, according to the existing law, the presence of CSR is inherent to company management, so that the activities in CSR are still under company's management control. So is it in Ponorogo Regency, East Java Province. Some companies implement CSR only as the element implemented minimally, without coordinated program with sustainable target [5].

State-Owned Enterprise Law, Investment Law and Limited Incorporation Law have pertained to CSR, but the regulation of sanction concerning those not implement CSR is governed firmly only in Article 34 of Investment Law, in the form of sanction administration that should be complied with when no CSR activity is implemented. Considering this, it can be seen that the regulation of CSR in Indonesia is less obvious. Meanwhile, CSR is the parameter of company's commitment to support creating the sustainable development. In the main regulation, Article 15 clause (1) of Law No.12 of 2011 about Legislation Development confirms that law should include the provision of sanction within it.

II. RESEARCH METHOD

This paper was based on empirical/sociological legal research. We studied the regulations and principle by using the approach of law and social sciences. Approaching the legal issues is in accordance with the fact in social life. The characteristic of research was descriptive evaluative providing a systematic overview of the object to be examined. The primary data was taken from interview with Khoiril Huda, the Regent of Muko-Muko District, Bengkulu. Secondary data was obtained from the review of literatures pertaining to the material. Secondary data consisted of legal materials such as regulations, books, papers, and other references. Technique of collecting data used was in-depth interview and document study. This paper intended to provide an overview of existing condition, rules and implementation of CSR, especially discussing the urgency of sanction for CSR violators to improve the society welfare.

III. FINDINGS AND DISCUSSION

Many factors becoming the reason of why CSR is so important in organization setting are [6]:

- 1) Consumer and investor as the primary public of profit organization needing representation about organization's responsibility for its social and environment issues;
- 2) As the part of organizational ethics, and organizational responsibility is required to manage the organization well;
- 3) The public in some states considers that organization has fulfilled the standard organizational ethics, when the organization cares about environmental and social issues;
- 4) Social responsibility at least can reduce the crisis potentially occurring in the organization;
- 5) Social responsibility is considered as improving the organization reputation.

1. *The Urgency of Sanction in CSR*

The fundamental difference between law and moral is: that law is a compelling order, a norm order attempting to realize certain behavior by giving organized compelling action socially to the opposite behavior, while moral is a

social order not having such the sanction. The sanction of moral order is only agreement for the behavior consistent with the norm and disagreement to the behavior in contradiction with norm, and no compelling action applied as sanction [7]. Corporation plays important roles in a state's growth [8], such as improving and creating job opportunity, in this case making the people prosperous as well. Corporation should participate and maintain the people's economic welfare and safeguard environment from damage resulting from corporation activity. Corporation has an obligation in the attempt of preventing living environment pollution from occurring due to corporation activity. Therefore, there should be a policy in managing living environment by corporation over the activities it does. Preventive and managerial attempt requires the participation of all stakeholders including corporation, government and society (community). In order to create a balanced and harmonious relationship, there should be a good relationship between society and corporation. One of activities that can improve the relationship between the corporation and the public without conflict is to implement CSR; so in the presence of CSR, the corporation can involve the community in CSR activity. Here CSR is defined as the corporation's commitment to contributing to a sustainable economic development by considering corporate social responsibility emphasizing on economic, social, and environment aspects.

Corporation not implementing CSR will impact on the surrounding society and environment. In addition, when the corporate does not implement CSR, it means that the corporation breaks the rule obliging the corporation to implement CSR. Corporation takes some attempts to maximize economic benefits. However, the objective of corporation is not only to get profit but also to have moral commitment to build local community, because the community can require the corporation to socially responsible [9]. The importance of penal sanction regulation in relation to the corporation not implementing CSR is viewed from the corporation's evil, the corporation's greed in getting as much as possible profit regardless CSR aspects including economic, social and environmental ones. In addition, the corporation's evil can be seen from its greed in recruiting local people. Therefore, it can be seen as a return to local people as the corporation has run its business around the people's settlement, so that the corporation should fulfill three aspects of CSR.

2. *The urgency of sanction for law certainty and harmony in the implementation of CSR*

CSR is a mechanism for the corporation to integrate voluntarily the attention to environment and *social* aspect into its operation and interaction with stakeholders, exceeding the organization's responsibility in law area. According the World Business Council for Sustainable Development (WBCSD), Corporate Social Responsibility is revealed in the report called Sustainability Reporting.

Sustainability reporting is the one concerning economic, environmental and social responsibility, effect and sustainability (sustainable development). Sustainability reporting includes the reporting on economic, environment and social effect on the organizational performance. The report should be a high-level strategic document putting issue, challenge, and opportunity of Sustainable Development bringing it toward its core business and industrial sector. The problem is that not all companies see and implement CSR as business and social investment for the sake of sustainable development/business, so that many companies does not or still implements CSR reluctantly.

The government regulation can change voluntariness into obligation. The legal obligation can be implemented effectively when other legal subsystems not accommodated well. Considering Lawrence Friedman's theory, there are three legal subsystems that can ensure whether or not a rule can be implemented effectively: legal substance, structure, and culture.

According to John Austin's legal theory [11], law is the instruction of the state ruler. The essence of law lies on the element of instruction. The law is considered as a permanent, logical and closed system. Some laws derive from God and some others are made by human beings. The man-made law is divided into: actual and non-actual laws. The actual (positive) law has four elements: instruction, obligation, sanction, and sovereignty. The non-actual law is the one not fulfilling the requirement to be law; therefore the law without sanction is not-actual one. Hans Kelsen's Pure Law Theory [12] concentrates themselves to the law only and attempts to free the science from foreign sciences' intervention such as psychology and ethics. Justice should be identical with legality, justice as the legal objective should be escorted in written manner in normative regulation. Normative regulation constituting the law substance can be implemented well when it contains law certainty substantially. Law certainty can be seen from two perspectives: the certainty in the law itself and the certainty due to law (law-induced certainty). The certainty in law is defined as a legal norm that should be formulated with the sentences containing different interpretation. In the implementation of law, different interpretations lead to law uncertainty. Meanwhile, law-induced certainty is defined as the certainty is due to the law itself. Law ensures the acquisition of a certain right or the loss of a certain right.

Law certainty is identical with legality principle. In civil law system tradition, according to Roelof H. Haveman, there are four legality aspects applied tightly: *Lex Scripta/statutory/law*, *Lex Certa/bestimmtheitsgebot*, *Non retroactivity and analogy* [13]. Nevertheless, the writer does not agree with the emergence of analogy as the precondition, because analogy can generate different interpretation. *Lex Scripta* means that without the law governing the prohibited action, the action cannot be said

as the crime. *Lex Certa* means that the legislators should define clearly without vagueness (*nullum crimen sine lege stricta*), so that there is no ambiguous formulation. The word non-retroactive means that legislation formulating the crime cannot be enacted retroactively.

From the explanation above, the weakness of substance in CSR regulation is the lack of sanction, so that before the regulation is implemented, it has generated apathy. As a result, the data obtained from this research shows that the companies in various Indonesian areas have implemented CSR less maximally, even in some areas, many companies have not implemented it. To them, CSR is cost, thereby reducing net/profit.

3. *An effective model of legal sanction regulation for the corporations violating the CSR: Imposition of Penal Sanctions and/or Financial Penalties*

Regulations of CSR in Indonesia have fundamental flaws [14], and it lacks of levying penalties on corporations that fail to implement CSR. The existence of law, as an instrument, is desirable and inherent to every society's social life. The law is needed to realize, to restore, and or to maintain the harmonious mutual life order. The harmonious condition is created when the organized society is established. Legal norm contains command and prohibition aiming to make individual members of society maintaining the harmonious mutual life or vice versa. When the commanded action is not implemented or the prohibition is broken, sanction can be the guardian to restore the orderliness or harmony in the social societal life. In the implementation of CSR, the command of CSR implementation has been clear, but the sanction is very limited because of limited command parameter. There is no standard on sanction parameter imposed. There are some models of sanction regulation procedure: the CSR audit reinforcement and the clarity of Legal Sanction Imposition Model for CSR offender.

4. *The reinforcement of CSR audit*

The implementation of CSR is no longer a voluntary moral calling for the company. The regulation in Indonesia has obliged the companies to implement CSR. However, the parameter has not been determined. Such the parameter should be started with determining standard audit reporting of social performance/CSR implementation to the company. Martin Freedman stated that there are three approaches in social performance reporting: Social audit; Social report; and Social disclosure in Annual Report [15].

The problem is who is authorized to make audit. Audit should be conducted by independent institution obtaining license from the government to supervise and to audit the implementation of CSR by corporations. To prevent the moral hazard from occurring, a tight and measurable rule/standard should be developed to get license from government and this institution should always be controlled and evaluated periodically by government. This

audit institution should determine instrument and proportion of CSR obligation based on 2 (two) categories: based on the proportion of corporation's profit and the proportion of CSR budget and based on the CSR's objective: to promote or to empower the community.

5. *Administrative sanction has not been effective*

In the legislations such as Limited Inc. Law, State-Owned Enterprise Law, Investment Law, Government Regulation No.47 of 2012 about Social and Environmental Responsibility (PP TJSL), State-Owned Enterprise Minister's Decree No. 236/MBU 2003 about Partnership and Environmental Building Program (KEPMEN BUMN PKBL) and Minister Regulation No.05/MBU/2007 about Partnership and Environmental Building Program (KEPMEN BUMN PKBL) discussing about CSR, it is mentioned the sanction imposed to those not implementing the activity. However, the sanction imposed to those not implementing CSR is delegated to the corresponding legislation, the rule concerning the sanction is fragmented so that further regulation should be considered in the legislation. The sanction existing is still administrative in nature, enacted to the corporations not implementing CSR. For example, Investment Law mentions that CSR is the Corporate Social Responsibility. When the provision of CSR is not implemented, administrative sanction will be imposed, consisting of written warning, business activity limitation, suspension, or retraction of business license and/or investment facility.

Administrative sanction results from the relationship between government and citizen, and stipulated by previous ruler, but can be implemented directly by the administration. The difference of Administrative sanction and Criminal Sanction is that Administrative sanction is intended to the prohibited action; this sanction is reparation-dondemnoir in nature and the procedure is implemented directly by the State Administration Officials directly without judicature. Meanwhile, Criminal Sanction is intended to the perpetrator of crime; it is condemnatoir in nature, and it should be managed through judicature process.

The application of administrative sanction in addition to be highly dependent on the authorized officials also has weaknesses in which it is very vulnerable to lawsuit through State Administration Court. As a result of potential lawsuit filed to the State Administration Court, many officials that should imposed sanction to the corporations violating the implementation of CSR do not impose it bravely. The imposition of administrative sanction still reduces less optimally the number of corporations not implementing CSR well. Most administrative sanction has inadequate compulsive power.

6. *Breakthrough in Criminal Sanction: Criminal Sanction has compulsive power*

CSR that can be provided by corporation has been governed widely in legislations, such as Law No. 19 of 2003 about State-Owned Enterprise (State-Owned Enterprise Law), Law No. 25 of 2007 about Investment (Investment Law) and Law No.40 of 2007 about Limited Incorporation (Limited Inc. Law). Those laws explain the corporation's obligation to implement social responsibility. These laws govern sanction, but the sanction has not been govern clearly in State-Owned Enterprise Law and Limited Inc. Law. Meanwhile, the Investment Law has imposed administrative sanction for the corporations not implementing CSR, but the administrative sanction applied is considered as less effective to make the corporation aware of the importance of CSR implementation for the balance or harmony between corporation and society so that the criminal sanction as *ultimum-remidium* is necessary to create the law certainty. The importance of imposing criminal sanction to those not implementing CSR is viewed from the strategic function or role to corporation as the legal subject of CSR executor. Corporation has strategic role in implementing or not implementing CSR. When CSR is not implemented, the environment harmony is disrupted by irreversible exploitation made the corporation. Just like social harmony, the existence of CSR as the part of society welfare improvement will not be brought into reality. CSR is a means of maintaining the environmental and social harmony. Considering the criminal sanction governed in the article 10 of Indonesian regulation, Penal Code (KUHP), it can be said that the basic punishments that can be imposed are: death sentence, imprisonment, jailing, and fine. However, the punishment that can be imposed to corporations, based on Article 10 of KUHP, is only fine.

IV. CONCLUSION

CSR is a form of care and responsibility of the company's ethics to the environment and the surrounding community. Even in the Law concerning limited liability companies and the technical rules of the Ministry of State-Owned Enterprises, CSR is an obligation. CSR can help the realization of sustainable development in at least two aspects. First is the sustainability of the preservation and the future of the existence of the environment, so that it can be passed on to the next generation. Second, sustainable economic development for the surrounding community by generating growth in the Small Medium Enterprises. But various regulatory problems, structures and cultures must be overcome. Regulatory problems are the absence of sanctions for companies that do not implement CSR, or simply carry out without clear accountability. The problem of structure is the weak supervision and law enforcement. The problem of culture is the culture of CSR implementation which is seen as a "cost" not as an investment, concern and responsibility.

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