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## Has Indonesia's Unique Progressivism in Mandating Corporate Social Responsibility Achieved Its Ends?

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**Abstract:** It has been a decade since Indonesia implemented its first mandatory CSR requirement through its company law and capital investment act. The time is ripe for the discussion: Has it successfully brought social and economic justice by enforcing this radical progressivism or utilitarianism? In other words, has Indonesia attained its ends by mandating companies publicly answer for environmental problems, insufficient attention to public welfare, development of local communities and growing cleavage between rich and poor? To begin to address these questions, this paper first examines Indonesia's unique features that strengthen CSR as a legal obligation and analysis the current regulatory frame of CSR. Then, it discusses whether these laws and regulations have actually worked as a practical tool to encourage and enforce companies to perform CSR activities. This research concludes that Indonesian company law can achieve its ends only on certain conditions despite its thoroughgoing failure so far due to a number of problems in and out of the positive law. It suggests how it can specifically structure the CSR regulations and seeks attention to the more structural reform from the longer-term goal of developing a national mechanism.

**Keywords:** Corporate Social Responsibility, Corporate Social and Environmental Responsibility, CSR, CSER, Indonesian Company Law.

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### INTRODUCTION

Has Indonesia attained its ends by mandating companies publicly answer for environmental problems, insufficient attention to public welfare, development of local communities and growing cleavage be-

tween rich and poor? Can Indonesia confidently say that its company law has successfully brought social and economic justice by enforcing this radical progressivism (or utilitarianism)?

To begin to address this question, let us first examine the situation in the United States, which has a long history of legal discussion about similar questions and is one of the main streams in the global community of corporate law scholars.

The community of corporate law scholars in the United States is largely divided into two main schools of thought. The first group, heavily influenced by the economic analysis of corporations, main-

tains the merits of the traditional “shareholder-centric model” of corporate law, while the second group, motivated by concerns for economic justice, proposes a “stakeholder governance model.” In 2007, Kent Greenfield and D. Gordon Smith from each of the two major schools explored a debate on the provocative and audacious question, “Can Corporate Law Save the World?”<sup>1</sup>

Professor Smith, a leading advocate of the traditional shareholder-centric model in the U.S, argued that changes in corporate law cannot eradicate poverty, clean air or water, or solve the labour question. He contends that the changes in the corporate law that could have a substantial effect on such issues would only make matters worse.

On the other hand, Professor Greenfield, a leading proponent of progressive stakeholder governance, asserted that corporate law affects issues like the environment, human rights, and labour questions. He argues that corporate law should be expanded to take advantage of the distinctive abilities of the corporation to create wealth while preventing it from imposing costly externalities on stakeholders and communities.

Now let us come back to Indonesian company law. Indonesian company law and the vast majority of scholars in Indonesia have already taken a firm stand for the latter view even before this debate, in sharp contrast to the tendency in the U.S. This contrast is evident given the 2007 Company Act No. 40 (“2007 Company Act”), which mandatorily obliges CSR funds for companies in the natural resources industry. Un-

like the absolute majority of state and model corporate laws in the U.S., the Indonesian 2007 Company Act obligates companies in the natural resource industry to allocate and spend funds implementing CSR and further stipulates sanctions against failure to comply with these obligations. Not only that, the 2007 Capital Investment Act No. 25 (*UU No. 25 Tahun 2007 tentang Penanaman Modal*, “2007 Capital Investment Act”) stipulates an investor’s obligation to implement corporate social responsibility for every company, irrespective of its business industry.

Indonesia has further added numerous regulatory layers over these two laws. The Central Government and related Ministries have adopted regulation and guidance while a number of local governments raced to issue their own provincial regulations, expanding CSR obligations to every company irrespective of their business field. Other laws and regulations in several fields have further created even more layers without directly mentioning the term CSR.

In other words, Indonesia does not hold a view that company is a group for shareholder’s interests or the nexus of numerous contracts as do some scholars in the U.S.<sup>2</sup>

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<sup>1</sup> Kent Greenfield and D. Gordon Smith, 2007, “Debate: Saving the World with Corporate Law?” *Emory Law Journal*, 57, p947.

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<sup>2</sup> “Nexus of contracts” or “contractarian theory of the firm” is a theory born in 1937 by R. H. Coase, 1937, ‘The Nature of the Firm’, 4 (16) *Economica* 386, and revived in 1990s by several scholars such as Frank Easterbrook & Dean Daniel Fischel (1991) *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge; and Oliver E. Williamson and Sidney G. Winter, 1991, *The Nature of the Firm*, Oxford University Press. The theory asserts that a company is a nexus of individual contracts among shareholders, creditors, workers, and management. Because the contractarian theory sees a corporation not as a separate entity but as an aggregate of contracts among each interest holders, it is not compatible with the concept of

Nor does it regard a company as a group that contributes a portion of retained earnings to society after earning some revenues, as required in India.<sup>3</sup> Indonesian regulatory frame of CSR regards a company as a group who must perform public functions, whether the company is a start-up company run by two university students with small capital, a large company that suffered huge losses or is a petty retail shop in financial difficulties.

Now, it has been a decade since it implemented its first mandatory CSR requirement. The time is ripe for the discussion: Has Indonesia attained the results it aims to by mandating companies publicly answer many questions?

## ANALYSIS AND DISCUSSION

### Indonesia's Unique Features that Strengthen CSR as A Legal Obligation

Although some foreign countries also started imposing CSR requirements recently, for several reasons Indonesia distinctively applies CSR requirements, through numerous laws and regulations. Why Indonesia mandates corporate social responsibility so strongly should be understood through historical, geographical, philosophical, and economic contexts.

In terms of its geographical and social anthropological setting, one of the main differences of Indonesia from other modern countries is its variety of indigenous societies spread over roughly 18,000 islands. Indonesia is centrally located along ancient

trading routes and has a complex cultural mixture, very different from other original indigenous societies. In modern history, no similar country could join the league of advanced economies. Unsurprisingly, a fundamental question has remained as to how a country can harmonize indigenous societies with modern culture, even though many modern companies have been already conducting business for the collection, refining, trade, and export of natural resources in these regions for more than a half century.

For example, is the application of modern laws to indigenous societies correct? Is it correct for a government to suddenly come in and divide the ownership of aboriginal regions in a jungle where the concept of private individual ownership of real property has never existed?<sup>4</sup>

Let us suppose that the government has intentionally left one aboriginal community alone, fully respecting the customary law of indigenous people there. In the meantime, there is a now a modern company who comes, industrializes, and develops the economy of a nearby region only a kilometer away from the aboriginal community. How can the government attract a company to develop the regional economy while leaving a nearby aboriginal region unattached to modern culture? This is not just a

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CSR, which a separate corporate entity must take a responsibility for society.

<sup>3</sup> The Indian Companies Act 2013 requires the board committee to ensure that the company spends at least 2 percent of the average net profits of the company made during the three immediately preceding financial years.

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<sup>4</sup> Because of this problem, Indonesia created a legal concept of "customary forest" for indigenous people. However, it was difficult to determine which forest was customary forest and which was not. Moreover, it was difficult to determine who legally owns the customary forest. The Indonesian Constitutional Court determined in No.35/PUU-X/2012 that Art. 1 Para. 6 of 1999 Forestry Law No. 41 is unconstitutional and must change to delete the word "state" from the sentence: "Customary forests are state forests located in indigenous peoples' territories."

supposition, but an actual dilemma that Indonesia has been facing.<sup>5</sup>

Under this setting, it is easy to 'pass the buck' for the government to the company, particularly when it has a short of funds to redress all the regional issues. An example of such passing is found in a dispute over regional land. If a state government issues a permit or license to a company for business on state-owned land, such a permit should mean that the government certifies and guarantees that the land is owned by the issuing state and, thus, not impeded by a third person's rights. This is fragmented because state-owned land is defined as "land existing on the land not impeded by another's land rights" (Art. 1 Para. 1 of No. 41 Year 1999 Forest Act), but more precisely because, from the license holder's perspective, the fundamental reason to obtain such a permit is to be protected and secured by holding it. From the context of investment and company management, Indonesian legal scholars and the Constitutional Court have the same understanding.<sup>6</sup> Neverthe-

less, the face of this land permit has an explicit clause, normally on the last page, stating "the issuer shall not be liable if the land is later found [to be] privately owned or if an individual has a right on it."

Naturally, even if the state wrongfully issued a permit resulting in someone's loss, the responsibility to remedy the loss is shifted on to the permit holder. The Indonesian Constitutional Court recognizes this problem as well.<sup>7</sup> Some believe that this is justified by the Indonesian Constitution, which gives priority to national interests, in the Benefit Principle that the responsibilities at the end of the day must be borne by the company who enjoys earnings by using the land.<sup>8</sup> In this case, anyway, if the com-

<sup>5</sup> A member of the Adat community made a speech in the U.N. "Before the plantation came in, our lifestyle was prosperous. If we needed fruits, we just went to the forest. It was the same if we needed medicines, we just went to the forest. But since this company came in and burned our forest, everything has gone. Our life became difficult. The forest fire has been a disaster for us." Ahsan Ullah, *Globalization and the Health of Indigenous Peoples*, Routledge, 2016, p7.

<sup>6</sup> "These rights are of little value if the guarantee from the government is weak. Aaron Barzel also maintained that the guarantee of land rights be in the form of regulations and be an apparatus for consistent implementation and fair trial or arbitration" Mahkamah Konstitusi RI, Risah Sidang Perkara Nomor 21/PUU-V/2007 Peihal Pengujian UU RI No.25 Tahun 2007 tentang Penanaman Modal Terhadap UUD 1945, Acara Mengengar Keterangan Ahli Dari Pemohon dan Pemerintah (IV): 68; See Suparji *Penanaman*

*Modal Asing Di Indonesia Insentif v. Pembatasan*, Universitas Al Azhar Indonesia, 2008, p265.

<sup>7</sup> "I would like to say, I wrote in my dissertation that land rights in Indonesia are less secure than [the actual stipulation of] laws governing the rights to land." Id. Mahkamah Konstitusi RI.

<sup>8</sup> Such a passing of the buck is not just made to private companies. Once a hard-to-solve dispute arises, the central, regional, and communal governments impute the blame and burden to one another. Art. 33 Para. 33 of the Indonesian Constitution declares the state "controls lands, waters, and natural riches," while Art. 3 of the 1960 Agrarian Law undercuts traditional communal property rights by stating "the implementation of communal property of *Adat* communities and rights similar to that of an *Adat* community, in so far as they exist, shall be adjusted as such as to fit to the national and state's interest based on the unity of the nation." Similarly, the 1967 Forest Act and its 1970 amendment give priority national interest over customary rights. Nevertheless, the 2016 Regulation (Procedures to Decide Communal Rights on Land of Customary Laws and Communities in Specific Area) again officially excluded a central government's direct control to determine regional issues, by absolutely leaving communal rights to the customs and rights of the community. Not surprisingly, all these laws do not state how far a regional customary law can be tolerated. In academia, many argue the

pany does not remedy the loss to the local people, it violates a corporate social responsibility, which the official elucidation of Art. 15 item b of the 2007 Capital Investment Act defines as the obligation to “keep balance and suitable to the local community’s neighbourhood, values, norms, and culture.”

Second, as a world treasure trove of natural wildlife, Indonesia also has a history of ineffectively regulating corporations, bringing up substantial external diseconomies, particularly environmental exploitation, pollution, and negative impacts on indigenous people.<sup>9</sup> Due to the geographic and physiographic setting of Indonesia, the importance of environmental protection, particularly against damage caused by companies, has become an issue that cannot be emphasized enough.

The 2007 Capital Investment Act sets forth the principle of environmentally sound investment (Art. 3 Para. 1 Sub. h). The 2007 Company Act mandates that a company conducting business related to natural resources must implement social and environmental responsibility policies under Art. 74.

Lastly, the historical catastrophes affecting the national economy in 1997 and 1998 have a significant impact on the development of CSR in Indonesia. The finan-

cial and economic crisis threatened national survival. Indonesia had the lowest foreign inbound investment among ASEAN countries after the Asian economic crisis of 1997–1998, collapsing from its previous rank of 5th.<sup>10</sup> This was the only net outflow among ASEAN countries.<sup>11</sup> Employees who did not receive their full retirement allowance violently protested, and by cutting off work to Indonesian companies, foreign project holders triggered a series of harsh demonstrations by Indonesian labourers. The notorious May 1998 riots of Indonesia, known as the 1998 Tragedy, brought on the resignation of President Suharto and the fall of the New Order government. The social climate heavily blamed transnational companies and foreign investors rather than reflecting upon its national failure. Indigenous movements targeting multinational companies also appeared at the beginning of the 2000s. They denounced transnational companies vehemently and demanded they take responsibilities in Indonesia.<sup>12</sup>

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inappropriateness of this buck-passing and even cast a doubt on the regional customary law itself.

<sup>9</sup> Regarding the detailed history of how political interests and the opening up foreign investment without effective regulations contributed to the external diseconomy, see O. P. Dwivedi, *Environmental Policies in The Third World: A Comparative Analysis*, Greenwood Press: 91–104; and Ronnie D. Lipschutz & Judith Mayer, 1996, *Global Civil Society and Global Environmental Governance*, SUNY Press, 1995, pp179–181.

<sup>10</sup> Indonesia recorded US \$2.985 billion of inflow in annual averages from 1991 to 1996 and US - \$1.296 billion outflow from 1998 to 2002. The latter is the only case of withdrawals of investment outweighing inflow of inbound investment among ASEAN countries. For details, see United Nations, 2003, *Conference on Trade and Development*, World Investment Report.

<sup>11</sup> The contrast between, on the one hand, Indonesia, and on the other Thailand and South Korea, the two other East Asian countries most severely affected by the Asian economic crisis, is evident. The latter two countries never experienced net FDI outflows in any one year after the crisis. Hence, Indonesia endured the worst experiences of any large country in the East Asian region during the Post-Asian economic crisis period. Thee Kian Wie, “Policies for Private Sector Development in Indonesia”, *ADB Institute Discussion Paper No. 46*, 2006, p1.

<sup>12</sup> “Indonesia has its own indigenous movement that targets transnational corporations. The

This phenomenon in Indonesia also coincided with the trend of progressive corporate law in the Western world. After the fall of Enron in 2002 and the collapse of Lehman Brothers in 2008 with the subsequent global recession, the power of neoliberalism has heavily declined and the global academic world of corporate law has ruminated over the role of the corporation in society. At the same time, the idea of CSR has risen to prominence to become, in the words of *The Economist*, “an industry in itself, with full-time staff, newsletters, professional associations and massed armies of consultants.”<sup>13</sup> A study describes this period as “embraced by corporations, touted by academics, and advanced by non-governmental organizations (NGOs) and policymakers as a potential mechanism for achieving social policy objectives and furthering economic development, CSR has become one of the flavours and hopes of the new Millennium.”<sup>14</sup> The U.K. responded this social climate with its Companies Act 2006 requiring directors to have regard to community and environmental issues when considering their duty to promote the success of their company and the disclosure to be included in the Business Review.

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Urban Christian Mission, for example, has provided a focus for labour education and foreign networking. This has largely been ignored by the foreign activists concerned with issues of corporate responsibility in Indonesia. This might perhaps reflect the propensity of CSR to stimulate a form of industrial colonialism." Melody Kemp, , 'Corporate Social Responsibility in Indonesia: Quixotic Dream or Confident Expectation?' 6 *Technology, Business, and Society Programme Paper*, 2001, p1.

<sup>13</sup> The Economist, 'Two-faced capitalism', 22 January, 2004.

<sup>14</sup> Paddy Irel and Renginee G. Pillay, "Corporate Social Responsibility in a Neoliberal Age," in *Corporate Social Responsibility and Regulatory Governance*, UNRISD, 2010, p77.

The global discourse on CSR and voluntary initiatives, largely Western-led, strongly inspired and animated Indonesia to mandate CSR. While management scholars have focused on the financial gains for the firm through CSR, the controversial issues in the legal context were how to regulate CSR. Should it be a legal norm, ethical norm, or something else? The question was further elaborated in Indonesia: should Indonesia regulate CSR in a voluntary way or as an obligation to companies?

Although it had not reached any notable social consensus in regard to the concept of CSR, the social climate and public demands made a substantial pressure to implement CSR anyhow. Under this mood, U.N. issued a foresighted research paper about the adaptation of CSR in Indonesia.<sup>15</sup> This insightful study written by Melody Kemp concludes as follows:

It is hard to consider something as abstract as CSR [...] At this point in Indonesian history, CSR itself can only remain an image projected onto a screen—an outline with little depth. While concepts such as governance and CSR are fashionable, generating a new language and teams of experts, Indonesia's difficulties are perhaps more basic and to do with simple national survival. [...] CSR only makes a difference to those few corporations targeted by consumers or who are already thinking ethically and responsibly. [...] Indonesia may be able to benefit from CSR, but it cannot rely on CSR to solve issues of exploitation, environmental devastation and poor labour standards [...] At this juncture in its development, Indonesia can indeed accommodate the tenets of Western CSR, as it has accommodated the tenets of human rights. But in reality, the inherent conflicts between CSR and, in particular, political culture may ensure that in Indonesia implementation of CSR is merely cosmetic. Indonesia's recent history is littered with examples of agencies advocating the latest trend and congratulating Indonesia for illusory change. It is pertinent to ask

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<sup>15</sup> Melody Kemp, *Note 12*.

whether CSR has anything more to offer Indonesia at this time than what could be offered by overall structural reform. [...] I contend that any effective implementation of CSR requires the machinery of an effective democratic government and civil society.

Although the above study foresaw that CSR would only make a difference to those few corporations targeted by consumers or who are already thinking ethically and responsibly, they turned out to not just be a few. Nor were they just corporations targeted by consumers. A research on CSR activities of top 50 Indonesian Listed Corporations from 2003–2007 revealed that Indonesian companies had been already aware of the increasing demands and provided CSR to stakeholders in the emerging economy prior to the establishment of legislation concerning CSR.<sup>16</sup>

Still, it was evident that Indonesia could not simply rely on CSR for national survival. The country needed an overall structural reform in national level and some effective machinery of a mature civil society because its difficulties were more basic. Indonesia desperately needed to revive its economy and bitterly perceived the need for encouraging foreign investment as a more stable source of foreign capital than regular short-term financial investment.<sup>17</sup> Natural-

ly, this scathing historical lesson resulted in a political climate that stressed foreign direct investment in the private sector. As a part of the overall structural reforms for national survival and to satisfy the rapid changes of the social climate and public mood, the 2007 Capital Investment Act bill was proposed to Parliament.<sup>18</sup> And, of course, it did not forget to include CSR provisions under Art. 15. At the same time, the Indonesian government proposed the 2007 Company Act bill to Parliament on 12 October 2005, which included Chapter V—Corporate Social and Environmental Responsibilities.

To implement mandatory provisions obliging CSR to private companies irrespective of its size was extremely rare from the global perspective at that juncture. India often proudly calls itself the first country to mandate CSR with its Companies Act 2013.<sup>19</sup> This is not true, albeit its CSR re-

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changes to promote FDI and increase investor confidence. UNCTD, 2003, p. 48. See also Je Seong Jeon, 2014, "The Changing Relation between Indonesian State and Foreign Capital: Focusing on the Formation of the International Business Chamber after Democratization, Korean Association of Southeast Asian Studies", *the Southeast Asian Review* p259; Thee Kian Wie, *supra* note 11, 20 (1), pp22–26.

<sup>16</sup> Juanita Oeyono, Martin Samy and Roberta Bampton, 2010, "An Examination of Corporate Social Responsibility and Financial Performance: A Study of the Top 50 Indonesian Listed Corporations", *Journal of Global Responsibility*, 2(1), p100. The study measured as per GRI indicates that five out of 45 companies (11 percent) completed a maximum of six Global Reporting Initiative (GRI) indicators, ten companies (22 percent) fulfilled five indicators and 16 companies (36 percent) complied with four indicators.

<sup>17</sup> After this sharp history lesson, Indonesia declared 2003 as the "Indonesia Investment Year," with a number of favorable policy

<sup>18</sup> The 2007 Capital Investment Act directly mentions that its legal authority is the Decree of the People's Consultative Assembly concerning Economic Policy in the Context of Economic Democracy, which was legislated in 1998 as a result of these events.

<sup>19</sup> India has recently enforced the Companies Act 2013 to mandate CSR at a very detailed level. It requires that one-third of a company's board comprise independent directors; at least one board member be a woman, and the companies to disclose executive salaries as a ratio to the average employee's salary. The striking requirement is "2 percent rule" the board committee must ensure that the company spends at least 2 percent of the average net profits of the

quirements are certainly much specific, sophisticated and more stringent than the CSR provisions in Indonesia. Anyhow, with 2007 Company Act and 2007 Capital Investment Act, Indonesia officially chose the untraditional view for a model of stakeholders and became a leading example of the triumph of progressive corporate law against proponents of the traditional shareholder-centric view.

Then, has this triumph of progressivism brought some meaningful results from the legal perspective? In other words, is this implementation of CSR something other than as Melody Kemp prophesizes: "At this point in Indonesian history, CSR itself can only remain an image projected onto a screen—an outline with little depth...But in reality, [...] in Indonesia implementation of CSR is merely a cosmetic".

### **The Current Regulatory Frame of CSR in Indonesia and Its Problems**

#### **The 2007 Company Act and the 2007 Capital Investment Act**

The 2007 Capital Investment Act obligates every company to implement a corporate social responsibility policy as follows:

Art. 15 of the 2007 Capital Investment Act  
Every investor has an obligation [...] to implement corporate social responsibility.

Elucidation of Art. 15 item b:  
"Corporate social responsibility" means a responsibility mounted in every investment company to keep creating a relationship which is in harmony, in balance and suitable to the local community's neighbourhood, values, norms, and culture.

These provisions remain vaporous and indefinite without either concrete obligation or sanction. Unsurprisingly, this lack of any practical utility is nothing different from

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company made during the three immediately preceding financial years.

other abstract principles or general statements stipulated in a dominant part of the 2007 Company Act. Not only this provision but also most of the provisions of the 2007 Company Act are covered in a rather brief and descriptive manner, being unsuccessful in bringing out any practical utility from each challenging subject.

Unlike the 2007 Capital Investment Act, adoption of the 2007 Company Act has invited strong reactions from various actors. The controversial CSR provisions of the 2007 Company Act are as follows:

Art. 1 of the 2007 Company Act  
Social and Environmental Responsibility means the commitment from a Company to participate in the sustainable economic development in order to increase the quality of life and the environment, which will be valuable for the company itself, the local community, and society in general.

Art. 74 of the 2007 Company Act

- (1) The Company having its business activities in the field of and/or related to natural resources shall perform its Social and Environmental Responsibility.
- (2) Social and Environmental Responsibility as referred to in Para. (1) shall constitute the obligation of the company which is budgeted and calculated as a cost of the company. Social and Environmental Responsibility shall be implemented with due observance of fairness and appropriateness.
- (3) A company which fails to perform its obligation stipulated in Para. (1) shall be imposed with sanctions in accordance with the provision of regulations.
- (4) Social and Environmental Responsibility shall be further specified by Government Regulation.

A few scholars welcome the adoption of the mandatory provisions, either those who criticized its vagueness<sup>20</sup> or those who

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<sup>20</sup> Patricia Rinwigati Waagstein, 2011, 'The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications', *Journal of Business Ethics*, 98 (3), p455.



thought the stipulation is neither excessive nor unsuitable.<sup>21</sup> Nonetheless, business interests represented by the Indonesian Chamber of Commerce (KADIN) and several companies instituted an unconstitutionality suit before the Constitutional Court. The applicants claimed that Art. 74 of 2007 Company Act is unconstitutional because (i) forcing CSR as a legal obligation comes into a head-on collision against the CSR movement's voluntary emphasis and thus is against the principle of legal certainty in Art. 28 D (1); (ii) the different treatment between the companies in natural resource industry and others are discriminative, against Art. 28 I (2); and (iii) it harms efficiency of economic justice, against Article 33(4).<sup>22</sup>

The Constitutional Court ruled that Art. 74 is correct, non-discriminative, and just, therefore not unconstitutional. In the Court's deliberations, the concept of CSR is flexible depending on country and thus mandatory nature of CSR in Art. 74 is compatible with the current social, economic, and legal circumstances in Indonesia and gives legal certainty given Indonesia's weak law enforcement. The Court also determined that Art. 74 are based on the potential risks posed by companies' behaviour to natural resources particularly and thus is not discriminative against certain companies.

Despite this determination, some scholars still denounce its concept of

<sup>21</sup> Yu Un Oppusunggu, 2011, 'Mandatory Corporate Social and Environmental Responsibilities in the New Indonesian Limited Liability Law', *Indonesia Law Review*, 1 (1), p71

<sup>22</sup> Constitutional Court Decision No.53/PUU-VI/2008, Lawsuit for Judicial Review of Act no.40 Year 2007 concerning Limited Liability Company against the 1945 Constitution, 15 April 2009.

CSR.<sup>23</sup> They assert that this mandatory provision clearly and substantially deviates from the voluntary nature of CSR, although it may meet the validity test under the Constitution. Their research concludes that this provision will have only unwanted side effects. It is certainly logical that the mandatory CSR burdens can reduce the total voluntary CSR activities. Also, if a company must bear unwelcome costs in a recession, it may attempt to compensate for them even in the recovery period. In other words, a mandatory nature of CSR can aggravate corporate ethics, frustrating the intent to mandate CSR. The vaguer the CSR laws and regulations are, the more CSR activities become biased and purely perfunctory as<sup>24</sup>

1. Camouflage: companies may carry out CSR simply to cover up unethical business practices
2. Generic: CSR programs may be too general without necessary rigor because such programs are forced by others
3. Directive: CSR policies and programs may be formulated through a top-down process based on the interest of company or shareholders only
4. Lip service: CSR may not be a part of the corporate strategy and policy
5. Kiss and run: CSR programs may be just ad-hoc and unsustainable.

This opinion contradicts others holding a view in favour of mandatory nature.<sup>25</sup> At

<sup>23</sup> Made Arjaya, Moch Bakri Sihabudin, and Bambang Winarno, 2014, 'Deviation Concept of CSR Regulation in Indonesia (Art. 74 of Law 40 of 2007 on Limited Liability Company)', *Journal of Law, Policy and Globalization*, 23, p1.

<sup>24</sup> Victor Imanuel Nalle, 2015, 'The Corporate Constitutionalism Approach in the Formulation of CSR', *Indonesia Law Review*, 5 (1), p1.

<sup>25</sup> Umar Hasan, 2014, "Kewajiban Corporate Social Responsibility Dilihat Dari Perspektif Hukum", *Forum Akademika*, 25 (1), p1.

least, the mandatory nature of this provision still remains controversial.

Although the Constitution Court has determined its legal certainty, the provision is not user-friendly, as it apparently lacks any specificity and practicality. For instance, it alone cannot answer several practical questions: how much must be budgeted and calculated as a cost of the company? What if a start-up company is only two university students developing smart-phone applications with very small capital? Should it still budget for CSR as much as other large companies do? What if a large company is currently suffering from significant financial difficulties and does not have sufficient funds to budget for CSR? What if it is a small retail shop in financial difficulties?

This unclear provision without any practical guidelines was harshly criticized by scholars and the media.<sup>26</sup> Some argue that the mandatory nature is even problematic in practice, as it not only requires a precise concept of interpretation of CSR and identification of the duty bearer and beneficiaries, but also an effective implementation mechanism and a means of verifying the impact.<sup>27</sup> It further notes that do not seriously jeopardize the efficacy of this mandatory component, Art. 74 require much more detailed consideration.

So far, Melody Kemp's prophecies seem to have come true: "At this point in Indonesian history, CSR itself can only re-

main an image projected onto a screen—an outline with little depth" and "In reality, [...] in Indonesia implementation of CSR is merely cosmetic."

These cosmetic outlines with little depth have been further elaborated in two ways: (i) direct CSR regulations mandated by central or local governments, and (ii) other laws and regulations obligating companies to perform some public functions.

### **Direct Regulations on CSR by Central or Local Government**

As Article 74 (4) of 2007 Company Act entrusts further specification to the Government Regulations, the Indonesian Government issued the specific Government Regulation No. 47 the Year 2012 concerning Corporate Social and Environmental Responsibility (2012 CSER Regulation).<sup>28</sup> The point of this regulation is surprisingly straightforward and simple. The board of directors in any company that utilizes or impact natural resources must consider the appropriateness and reasonableness in preparing and setting action plans and budgets. If a company conducting business in the field of or relating to natural resources does not carry out its social and environmental responsibilities, it will be penalized. If it does, it may be given an award by the authority.

This 2012 CSER Regulation merely gives burdens to individual directors without successfully specifying any criteria about what is appropriate or reasonable. In other words, this so-called specification of CSR miserably fails to answer the questions initially raised about the vague provisions of Art. 74 of the 2007 Company Act: How

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<sup>26</sup> B. Sujayadi and F. Kurniawan, 2011, *Mapping on Indonesian Company Law*, Mapping Paper, Sustainable Companies Project. Also, Armand Maris, 2014, 'Compulsory CSR: Indonesia takes a tough stance but clarity on definitions is lacking', *The International Public Relations Association*, 22 May.

<sup>27</sup> Patricia, *Note* 20.

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<sup>28</sup> The 20th Indonesian Government Regulation No. 47 on Corporate Social Responsibility.

much is “appropriate and reasonable” for the budget? How much is reasonable for a start-up company? What if a company has earned 1 billion rupiahs and yet has a very high risk of losing 10 billion rupiahs?

The 2012 CSER Regulation also seem to fail to further specify the concept of CSR: who are the precise stakeholders that a company should protect? What is the interest of stakeholder to which a company must contribute? One scholar claims that lack of these concrete specifications made the 2012 CSER Regulation as “not synchronized with the corporate paradigm.”<sup>29</sup> He indicates that its CSR implementation model is biased and purely perfunctory as “camouflage,” “generic,” “directive,” “lip services,” and “kiss and run.”

Several local governments also raced to issue their own local regulations. A study in 2014 describes 13 local regulations about CSR for example, the 2011 East Java Provincial Regulation No. 4 regarding Corporate Social Responsibility,<sup>30</sup> and the Regulation of the Governor of East Java, Regional Regulations in Malang.<sup>31</sup>

These regulations commonly do not distinguish different sizes or business field of the applicable company. For instance, 2012 No. 5 Local Regulation of Tulungagung concerning Corporate Social Responsibility mandates CSR to every company in

goods or services of production activities with an aim to earn profits.<sup>32</sup>

While some scholars argue that local regulations in Kota Malang are compatible with the CSR as stated in Art. 74 (4) of 2007 Company Act,<sup>33</sup> some scholars maintain that these Provincial Regulations and Governor Regulation destroy the system of regulating CSR.<sup>34</sup> According to this argument, Article 74 (4) of 2007 Company Act entrusts further specification about CSR to the Central Government regulations only and that the Central Government has never empowered any local government to further regulate CSR. In this view, these regional regulations are also oblivious of the purpose of CSR as not successfully protecting the interest of stakeholders as it made the involvement of stakeholder in this local ar-

<sup>29</sup> Victor, *Note 24*.

<sup>30</sup> East Java Provincial Regulation about Corporate Social Responsibility, 2011, Ld No.4.

<sup>31</sup> Riana Susmayanti, 2014, ‘Kosep Tanggung Jawab Sosial Dalam Peraturan Perundang-undangan di Indonesia’, *Arena Hukum* 7(3). p363. This study seems to abandon the 2012 Local Regulation No.5 of Tulungagung concerning Corporate Social Responsibility.

<sup>32</sup> Tulungagung Regional Regulation regarding Corporate Social Responsibility No. 5 the Year 2012.

Art. 1 Para. (5) “Corporate Social Responsibility, hereinafter abbreviated as CSR, is the responsibility attached to “every” company to keep creating harmonious and balanced relationships in accordance with the environment, values, norms, and culture of local communities.

Art. 1 Para. (6) a business actor, hereinafter referred to as a Company, is an organization or individual that is incorporated as a legal entity or non-legal entity conducting business activities by “collecting capital, engaging in goods and/or services of production activities with an aim to obtain profits”.

<sup>33</sup> One claims that the regulations in Kota Malang are at least compatible with CSR principal adopted by 2007 Company Act. Riana Susmayanti, *Note 30*.

<sup>34</sup> “Regulating CSR in Provincial Regulations and Governor Regulation actually destroys the systematics of regulating CSR. Based on the Limited Liability Company Law, the delegation of regulating CSR intended only in Government Regulation. While the Government Regulation on Environmental and Social Responsibility of Limited Liability Company does not further delegate the regulating of CSR into the Provincial Regulation.” Victor, *Note 24*, p10.

ea fell into merely an option, not a requirement.

Lastly, the Ministry of Environment issued the Guideline of CSR on Environment.<sup>35</sup> It provides guidelines how to implement CSR on the environment such as:

1. Identifying the negative impact of the environment on the business operational plan.
2. Identifying the potential impact on natural resources and environment of the community around business operational area
3. Identifying the needs and aspiration of the community towards the business operation
4. Drafting a corporate social and environmental activities plan

This procedure without strong binding effects needs the substance of CSR on Environment which should be regulated under central government regulations. Victor Imanuel Nalle asserts that the absence of any such regulation “shows that the government has no desire to regulate the orientation of CSR to stakeholders.”<sup>36</sup>

### CSR in Other Laws and Regulations

1. There are additional layers in the CSR regulatory framework laid by other laws and regulations in various industries and fields. The examples are as follows:
2. Art. 58 Para. 1 and 2 of Law No. 39 Year 2014 concerning plantations, which mandates any companies in plantation business to develop its surrounding community by at least 20% of the company's own plantation.
3. Art. 15 Para. (1) of Ministry Regulation No. 98 Year 2013 states that a company applying for a plantation business for an area of 250 hectares or more must fa-

cilitate the local community's development by providing the local community with the plantation area of at least 20% of the total area given to the company.

4. Art. 15 of Ministry Regulation No. 26 2007 concerning licensing guidance for plantation businesses requires applicants for plantation business licenses to prove their commitment to building plantations for communities and promote relationships.
5. Mining Law No. 4 Year 2009 specifically requires CSR and calls for a standard percentage of company's profits to be contributed to community welfare, although the amount of the percentage is not clarified.
6. Art. 88 of Law No. 19/2003 State-Owned Company Law requires allocation of funding of the net profits of the state-owned company for developing small- and medium-sized enterprises, cooperatives and the social environment.
7. Ministerial Regulations No. Kep.236/MBU/2003 concerning partnership and development program of state-owned companies with small and middle-sized enterprises, cooperative and the local communities.

Local customary laws in favor of local community that are not stipulated in a written form place an additional layer over these regulations. Although many of these regulations do not explicitly use the term CSR, the nature of these stipulations is apparently to enforce companies to perform social and public functions.

In addition, systematic ‘buck-passing’ often obliges companies to perform the public function as discussed earlier. The Government land permit over state-owned land with the stipulation that “the issuer shall not be liable if the land is later found [to be] privately owned or if an individual has a right on it” is an example. Even if the

<sup>35</sup> The 2011 Ministry Guidance concerning Corporate Social Responsibility.

<sup>36</sup> Victor, *Note 24*, p11.

state wrongfully issues a permit to a company resulting in a loss to someone or some entity, the responsibility to remedy the loss is shifted onto the permit holder.

These CSR regulations spread over all different levels (i.e., the local, regional, and national) and different Ministries with different substantive rules are heavily confusing in practice. Some further blame the systematic complexity that there are four coordinating Ministries and plenty of additional Ministries, each of which has its own CSR budget and regulations.<sup>37</sup> According to this opinion, these budgets highly differ per Ministry, as does their power to exercise authority, and this systematic inefficiency makes a general policy on CSR extremely difficult. It explains the background as these regulations are created to pool CSR funds for government-led programs, and legislative and executive bodies are dominated by politicians who want to use CSR funds as political resources.<sup>38</sup>

### Have CSR Laws and Regulations Saved Indonesia?

Could we still confidently say that adopting CSR with so many regulatory layers has actually paved the way for a new era for prosperity? I contend that it has not.

Although Indonesia started using the term CSR in 1990s and forming its regulatory framework in the 2000s, actual CSR activities in Indonesia have been practiced, nurtured and developed by Indonesian people since the 1970s.<sup>39</sup> A majority of the ini-

tial activities seem to focus on either developing local community where the company was located or giving a monetary charity to the local residents and small- and medium-sized enterprises.<sup>40</sup> Absent mandatory regulations, these voluntary CSR movements root within the Indonesian socio-cultural tradition, which emphasizes the importance of the moral value of collective life, such as unity, sustainability, public interest and social function.<sup>41</sup> From the managers' perspective, on the other hands, it is simply difficult or even impossible to operate in remote and rural areas without hospitality from the local community.<sup>42</sup>

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*dipersepsikan sebagai ideology yang bersifat amal (charity) dari pihak pengusaha kepada masyarakat di sekitar tempat beroperasinya perusahaan. Disamping itu masih banyak pihak yang mengidentikkan CSR dengan Community Development"* Dani Amran Hakim, 2016, 'Urgency of Implementation of Corporate Social Responsibility as an Effort to Ensure the Rights of Labor', *Fiat Justisia*, 10 (4), p605.

<sup>40</sup> For instance, Unilever Indonesia has incorporated the social contribution policies of developing local community into their strategic plans as early as the 1970s and 1980s. Regarding the details, see Sri Urip, 2010, *CSR Strategies Corporate Social Responsibility for a Competitive Edge in Emerging Markets*, John Wiley & Sons. In the meantime, some state-owned companies such as PT Krakatau Steel, PT Pertamina, and PT Telekomunikasi Indonesia began the charity for the community than strategic philanthropic activities. Fajar Nursahid, 2006, 'Praktik Kedermawanan Sosial BUMN: Analisis Terhadap Kedermaan PT. Krakatau Steel, PT. Pertamina dan PT. Telekomunikasi Indonesia' *Jurnal Galang*, 1 (2), p184.

<sup>41</sup> Lambooy, *CSR in Indonesia: Legislative Developments and Case Studies*, Jakarta: Konstitusi Press, 2013, pp14–20.

<sup>42</sup> "Trust is the main thing. If there is no trust between the company and local people, nothing good will come out. In the practice, CSR should make a resource measurably in "trust" based on the impact of CSR program, and conduct a procedural fairness in CSR program. Actually, the impact of CSR programs positively is the most important to get "trust" from the local

<sup>37</sup> MVO Nederland, 2016, "Country Scan CSR in Indonesia", *CSR Netherlands*, 12 July.

<sup>38</sup> Note 37, p9.

<sup>39</sup> "Konsep CSR di Indonesia sebenarnya bukan hal yang baru karena CSR sudah dikenal dan dipraktikkan di Indonesia sekitar tahun 1970an. Dalam pengertiannya yang klasik CSR masih

In the 2000s prior to the legislation of CSR as a mandatory legal obligation, the CSR activities of 50 listed companies were already active and showed their deep understanding of CSR.<sup>43</sup> Even unlisted companies appear to have already begun the social activities prior to the mandatory regulations.<sup>44</sup> A survey of 375 Jakarta companies in 2005 showed that 209 of the 375 companies or 55.75% were performing CSR activities in the form of kinship activities (116 companies), donations to religious institutions (50 companies), donations to social institutions (39 companies) and community development (4 companies).<sup>45</sup>

Evidentially, Indonesian companies have already contributed to their societies in a variety of forms, even when there were no mandatory legal obligations to do so. Has adoption of the laws and regulations of CSR then incentivized and encouraged companies to contribute to society more than before? It is seriously doubtful.

As discussed earlier, local companies in the natural resources industry are particu-

larly required to perform CSR activities, by the numerous layers of laws and regulations such as 2007 Company Act, 2007 Capital Investment Act, 2012 CSER Regulation, Provincial Regulation, Ministry Regulations, laws for the industry and customary laws. Nonetheless, there is no convincing evidence that these layers help the development of the local community more than the companies had previously done voluntarily. On the contrary, there is overwhelming data showing that these regulations are ambiguous, conflicting with one another, legislated with misguided attempts to use CSR funds, confuse good-faith practitioners, discourage voluntary CSR activities, have no effective enforcement and do not help monitor the companies.

The stipulations about CSR in 2007 Company Act and 2012 CSER Regulation remains “as an image projected onto a screen—an outline with little depth”: they lack justification to impose mandatory costs irrelevant to size or profit of companies as well as fail to define appropriateness and reasonability. The implementation of CSR spread over all different levels with different substance is “merely cosmetic,” as the incoherent regulations fail to bring out practical utility out of a challenging theme. Systematic inefficiency with a number of Ministries having different powers complicates the problems. Poor monitoring capacity and legal enforcement system is a bigger challenge.<sup>46</sup> This challenge is Indonesia's never-ending quest.<sup>47</sup>

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community.” Andi Erwin Syarif and Tsuyoshi Hatori, 2017, ‘Corporate Social Responsibility for Regional Sustainability After Mine Closure: A Case Study of Mining Company in Indonesia’, 71 *IOP Conference Series: Earth and Environmental*. Science 1; empirical research by interviewing a number of managers in Indonesia indicates the same. Simon Hendeberg, and Lindgren Fredrik, 2009 “CSR in Indonesia: A Qualitative Study from a Managerial Perspective Regarding Views and Other Important Aspects of CSR in Indonesia”, *BA thesis, Högskolan Gotland, Sweden* 40.

<sup>43</sup> Martin Samy, *Note* 16.

<sup>44</sup> Simon Hendeberg, *Note* 42, pp40–41. Also, see CSR Activities disclosed by Korindo Group available at <https://www.korindo.co.id/sustainability/?lang=id>, retrieved 2 May 2018.

<sup>45</sup> Suprpto and Siti Adipringadi Adiwoso, 2006 “Pola Tanggung Jawab Sosial Perusahaan Lokal di Jakarta”, 1 (2) *Majalah Galang*, p205.

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<sup>46</sup> “As a form of corporate responsibility in the case of coal mining is implemented through a program known as Corporate Social Responsibility (CSR). This program is constrained by the lack of supervision and activities within the CSR program. [...] Only a small number of companies implementing CSR

Under the totality of circumstances, it is extremely difficult to expect that laws and regulations can be satisfactorily applied to relevant parties in an effective way as a national system must work. All these had been already foreknown before adopting them. Melody Kemp (2001) indicates that it was premature to speak of CSR in Indonesia when the tools of civil society were structurally and legislatively weak. Probably the current tools are structurally much better than the ones in 2001, and yet they are not as satisfactory as they should be.

Let us take an example one of the top CSR-performing companies. The following are excerpts from CSR Activities disclosed by Korindo Group, an Indonesian unlisted companies group, who won the Best CSR Award from the Ministry of Environment and Forest in 2013, the Investment Coordinating Board in 2015 and Governor of Pupa Province in 2015 and 2016.<sup>48</sup>

1. Built and operate 28 schools, 10 vocational schools, practice facilities and 36 school buses; 20 clinics for free medical checks and medication for local community including a polyclinic having 115 beds with 85 medics and paramedics; 10 markets 200 stores and supermarkets for local community; 3 sport halls and 30 soccer fields, badminton

and volley fields with their sports teams; 30 village offices and meeting halls; and the operation of breeding farms for local community with capacity of 7,000 chickens, 100 cows, 50 pigs and 10,000 fishes.

2. Planted 221,600 productive trees in Bogor, West Java, Wonogiri, Central Java, Boven Digoel, Papua and Timor Leste
3. Built and maintained 551 km road and 80 bridges; and provided 8 MW of electricity and clean water to 13,350 people in East & Central Kalimantan, Maluku, and Papua.

None of these activities are mandatorily required for a company by laws or regulations. Simply, there are no such laws or regulations obligating a company to build a market, school, hospital, medical centre or soccer field. In other words, these activities are not direct products of the laws and regulations, and the best CSR performing companies appear not to have been created simply by the laws and regulations.

That is not different from other regular companies. Seeing the CSR activities of several companies including PT. Blora Patra Energi and PT. Banyubang Blora Energi,<sup>49</sup> several researchers conclude that major companies engaged in the oil and gas sector in Central Java do not correctly understand the meaning of CSR as the law requires and the actual CSR program is still running in the form of giving and generosity.<sup>50</sup> In other words, launching numerous laws and regulations itself does not significantly incentivize the CSR activities to these companies.

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programs H. Joni, 2017, 'Corporate Responsibility for Impacts of Mining Coal in Kalimantan', *Journal of Law, Policy and Globalization*, 67, p47.

<sup>47</sup> "When you step into an airplane in New York to fly to Jakarta, what you are leaving behind is not the high-tech world of fax machines and ice makers, televisions and antibiotics; many people in the Third World also have those. What you are leaving behind is the world of enforceable legal representation." Hernando de Soto, "Why Capitalism Works in the West but Not Elsewhere", *International Herald Tribune*, 5 January 2001.

<sup>48</sup> Korindo Group, *Note* 44.

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<sup>49</sup> Monica Puspa Dewi, FX Adji Samekto and Yusriyadi, 2017, "Testing the Implementation of Corporate Responsibility in Realizing Social Justice (A Case Study in Central Java, Indonesia)", *International Journal of Business, Economics, and Law*, 13, p113.

<sup>50</sup> Monica Puspa Dewi, et.al., *Note* 49.

Then, why do they practice CSR irrespective of effective regulations? Is it because these companies are targeted by consumers or who are thinking ethically and responsibly as Melody Kemp predicted? Some may say yes.<sup>51</sup>

Some may say that it is because of Indonesian socio-cultural tradition, which emphasizes the value of the social function, public interest, and surrounding communities as mentioned earlier. Certainly, a number of scholars maintain that cultural characters affect CSR implementation.<sup>52</sup>

The more conclusive reason may be because managing and operating a business in remote areas is significantly difficult without credibility from the local community.<sup>53</sup> Indonesia's unique geographical and anthropological setting composed of indig-

enous societies spread over roughly 18,000 islands accounts for this explanation. A survey of 87 practitioners in Indonesia concludes that CSR in Indonesia is to gain a social reputation as part of public relations.<sup>54</sup>

It may be partially because CSR has a significant effect on the company's financial performance- stock price.<sup>55</sup> This may not be entirely true for all the companies. A research conducted with 40 manufacturing companies listed on the Indonesia Stock Exchange in 2008 to 2010 shows those lucrative companies with high profits are resistant against openly disclosing their CSR activities despite their high level of social contribution. This tendency is explained as the directors may try to report their earning as much as possible by not disclosing their costs incurred for CSR activities, and the company also may not feel a necessity to disclose information that can potentially disturb itself under the regulations.<sup>56</sup> In other words, it is not always wise to reveal their activities openly as part of public relations.

<sup>51</sup> "CSR in Indonesia also represents the consumers' needs to provide properly and accurately information about its products to its customers; respecting consumer rights beyond the legal requirements; focusing on Ethical consumerism, namely to raise consumers' concern on environment and ethical issues." Rachmat Kriyantono, 2015, "Public relations and corporate social responsibility in mandatory approach era in Indonesia", *Procedia-Social and Behavioral Science*, 211, p320.

<sup>52</sup> S.A Morrow, *Guanxi and Legitimacy: Understanding corporate social responsibility and public relations in China and the U.S.*, the University of Alabama Tuscaloosa, Alabama, 2014; Muthuri, J. & Gilbert, V., 2011, 'An institutional analysis of Corporate Social Responsibility in Kenya', *Journal of Business Ethics*, 98, p.467; Prajarto, N., 2012, 'CSR Indonesia: Sinergi pemerintah, perusahaan, dan publik (CSR: Indonesia: Synergy of Government, Company and Public)', *Yogyakarta: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Gadjah Mada*, p.279; and Wong, L., 2009, 'Corporate Social Responsibility in China: Between the Market and the Search for a Sustainable Growth Development', *Asian Business & Management*, 2 (8), p129.

<sup>53</sup> Erwin, et al., *Note 42*; and Hendeborg, et al., *Note 42*.

<sup>54</sup> "This research proved that the majority of companies assume that CSR is public relations concern. Therefore, CSR is seen as a part of communication management between the organization and its public to create goodwill, to serve the public interest, and to maintain good morals and manners. It is not surprising because based on these functions, it can be said that public relations practitioners have the proper knowledge to plan and direct CSR programs to be appropriate action to ensure mutually beneficial relationships and to gain social legitimacy." Rachmat, *Note 51*.

<sup>55</sup> Saffana Afiff and Samuel PD Anantadjaya, 2013, 'CSR & Performance: Any Evidence from Indonesian LQ45?', *Review of Integrative Business & Economics Research*, 2 (1), p.85.

<sup>56</sup> Istianingsih, 2015, 'Impact of Firm Characteristics on CSR Disclosure: Evidence from Indonesia Stock Exchange', *IJABEL*, 13 (6), p4265.



Either likely because of socio-cultural traditions, managerial utility, public relationships, financial performance or a combination of any of these factors, an effective legal frame and enforcement is not forthcoming.

## CONCLUSION

Corporate law can change the world, Professor Greenfield said.<sup>57</sup> I also believe that this may be the overstatement, but more correct than false.

From the perspective of progressive corporation law that Greenfield and I hold, CSR is an important theme. So it is as well to the majority of Indonesian scholars and practitioners of company law. Although many experts believe that the mandatory CSR requirement to every company, irrespective of its size or profitability is unreasonable,<sup>58</sup> the trend of mandating CSR itself seems already irreversible in Indonesia. Given the historical, geographical and social anthropological setting, socio-cultural tradition, determination of Indonesian Constitution Court, a majority view of Indonesian scholars and the global trends, Indonesia is not likely to exclude CSR in future amendments to the 2007 Company Act as well.

Nonetheless, the current irregular, un-systematic and vague regulatory frame of CSR, there can never be a good answer the audacious question: Can Indonesian company laws successfully bring social and economic justice by enforcing this radical progressivism (or utilitarianism)? What Indonesia needs to publicly answer for many

social problems is not a race to make another piecemeal regulation with little depth but a reform to a reasonable and specific substance with an effective monitoring system.

First, the substance of CSR needs to be carved out to answer what is “reasonable” and “appropriate.” For instance, a size of company can be a good standard to measure the appropriateness of CSR funds. If a large share of corporate earnings does not flow to households, with few people put on their payrolls and only the pockets of their investors fattened, the government must encourage companies to spend the money on higher wages and new investments to aid the flagging local and national economy. Nevertheless, it will be the injustice to be sure, if a law forces construction of social infrastructure to a petty company managing a very small farm.

Therefore, profit can be alternative criteria. Forcing heavy CSR funds to a company having significant financial difficulties even to pay salaries to its own employees is unacceptable from both a utilitarian justice and economic perspective. Here, it is important to reinforce the nature of a business using the famous Milton Friedman quote: “The business of business is business.”<sup>59</sup> The ‘two per cent rule’ in Indian Companies Law 2013 will be a good example of solving this problem; this law requires the board committee in the company to spend at least 2 per cent of the average net profits of the company made during the three immediately preceding financial years on society.

Imposing a tax on cash reserves of a local company who does not spend on the

<sup>57</sup> Kent Greenfield, et al., *Note 1*, p2.

<sup>58</sup> Choi June-Sun, December 2005, ‘Corporate Social Responsibility’, *SungKyunKwan Law Review*, 17 (2), p471.

<sup>59</sup> Friedman Milton, “The social responsibility of business is to increase its profit” *The New York Times Magazine*, 13 September. 1970.

community in proportion to earnings may be an example of an appropriate sanction. In 2014, South Korea proposed to impose a 'cash reserve tax' to companies having too much money.<sup>60</sup> The bottom line was that the proposal to levy a tax on excess cash reserves would be an incentive for companies to use a certain amount of future profits on salaries, dividend payments or investments and thus would gain momentum, as investments remained at historical lows while corporations were making record profits. Advocates justify this saying that rising wages could chip away at the income inequality that has undermined household confidence, and boost consumer spending.<sup>61</sup>

Whether these examples are fitted to Indonesia or not, the kernel is that Indonesia must confront this Catch-22 by galvanizing a legal discussion in detail on how it should specifically structure the CSR regulations. As Patricia Rinwigati Waagstein asserts, the current stipulation can seriously jeopardize the efficacy of the mandatory component without being sufficiently carved out.<sup>62</sup> Victor Imanuel Nalle further indicates that the current biased and purely perfunctory CSR implementation model may animate companies to engage in camouflage, lip service, and kiss and run.<sup>63</sup>

At this juncture in its development, nevertheless, what Indonesia needs more than a precise concept or interpretation of CSR and identification of the duty bearer and beneficiaries is an effective implementation mechanism and a means of verifying the law's impact. To attain this success, Indonesia needs the incremental reform of more fundamental factors—the rule of law by eliminating corruption, reform of education, political ethics and the replacement of feudal structures. If existing basic laws such as criminal or environment law are not effectively enforceable, what is the use of making another law?

Attention needs to shift to the more structural reform from the longer-term goal of developing a national mechanism. The one who forces social justice to companies itself must practice what it preaches. The concept of CSR is not passing the buck of public functions to private companies. Nor is it the exclusive responsibility of companies.

So, can Indonesian company law bring social and economic justice by enforcing? Yes, it can but only when it has systematic and specific substance with an effective monitoring system and the government practices what it preaches.

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<sup>60</sup> William Pesek, 2014, 'Can Korea's economy tax itself to prosperity?' *Bloomberg*, 27 August.

<sup>61</sup> However, this proposal is highly controversial. The business community refused to make any concrete commitments to scaling down their bulging cash reserves. They indicated that taxing cash reserves, much of them being retained earnings, would mean double taxation, with the earnings being after-tax profits. Besides, the companies, in recovering from global financial crises, have put aside some earnings for rainy days and they are not excessive by any means.

<sup>62</sup> Patricia, *Note 20*.

<sup>63</sup> Victor, *Note 24*.

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