



Reconstruction of corporate social responsibility regulations for companies based on fairness and legal certainty

Vicky Rizky Marvil¹, Anjar Sri Ciptorukmi Nugraheni²

¹ Faculty of Law, Sebelas Maret University, Surakarta, Indonesia

² Lecturer, Faculty of Law, Business of Law, Sebelas Maret University, Surakarta, Indonesia

Abstract

Arrangements for Corporate Social and Environmental Responsibility are regulated in Law Number 40 of 2007 concerning Limited Liability Companies and Government Regulation Number 47 of 2012 concerning Social and Environmental Responsibility of Limited Liability Companies. The two regulations mandate that the implementation of CSR is the obligation of the company, then there are sanctions if it is not implemented, but in the Minister of BUMN Regulation PER-01/MBU/03/2023 regarding the BUMN Social and Environmental Responsibility Program does not include sanctions related to CSR so that the value of justice and legal certainty fades, based on that in this study examines the differences in the provisions of sanctions in the two implementing regulations above and seeks to reconstruct the CSR regulations for companies that are fair and have legal certainty. This research is normative legal research. The data used is secondary data consisting of primary legal sources and secondary legal materials. The approach method used is a statutory and conceptual approach. The data collection technique in this study was a literature study. Based on the data obtained then analyzed with a perspective qualitative analysis approach. The results of the study show that the value of justice has not been fulfilled, because no phrase of sanction is explicitly stated in the Minister of BUMN Regulation regarding the implementation of CSR within the scope of state companies. This can be caused by Article 88 paragraph (1) of the BUMN Law uses the phrase "can", not the phrase "obligation", and the arrangements for Social and Environmental Responsibility in a company must apply to all companies, and at least must regulate several things including a broad legal basis, specific implementing subjects, limits on the allocation and management of the remaining over budget, patterns of implementation, sanctions, supervisors and assessors of implementation CSR, and new division CSR apart the business process.

Keywords: State owned enterprise, regulation, company, sanction, corporate social and environmental responsibility

Introduction

John Elkington in the book *Cannibals With Forks: The Triple Bottom Line in 21st Century Business* explains that a good company does not only pursue economic profit but also pays attention to environmental sustainability and community welfare, if the environment and society do not support it, the company will never grow up.^[1] This thought has also become the basic essence of the presence of Corporate Social Responsibility (CSR) in the world. In addition, CSR can also be manifested into the form of corporate involvement in sustainable development by developing corporate awareness programs for the surrounding community.^[2]

In Indonesia, CSR also known as Social and Environmental Responsibility (TJSL), and based on Article 1 number 3 of Law Number 40 of 2007 Limited Liability Company (Limited Liability Company Law) states TJSL is the Company's commitment to participate in sustainable economic development in order to increase quality of life and beneficial environment, both for the Company itself, the local community, and society in general.

TJSL regulation in Indonesia implemented for the first time in Article 15 letter b of Law Number 25 of 2007 concerning Investment (Investment Law) which states that every investor is obliged to carry out corporate social responsibility, and on Article 34 paragraph (1) of the Investment Law regulates administrative sanctions for

business entities or companies that do not carry out corporate social responsibility.

Furthermore, Article 74 paragraph (1) of the Limited Liability Company Law, mandates the companies that carry out their business activities in the field of and/or related to natural resources are required to carry out Social and Environmental Responsibility. In Article 74 paragraph (3) only states that there are sanctions if the Company does not carry out TJSL obligations, followed by Government Regulation Number 47 of 2012 concerning Social and Environmental Responsibility of Limited Liability Companies (PP TJSLPT) as a reference for companies in implementing TJSL, but still not clearly state the sanctions to be applied. In other words, the regulation does not explicitly regulate the form of sanctions imposed, so it does not provide legal certainty.

The regulation of TJSL within BUMN is regulated in the Minister of BUMN Regulation Number PER-01/MBU/03/2023 concerning BUMN Social and Environmental Responsibility Programs (PermenBUMN TJSL Program 2023), which is activities that are the company's commitment to sustainable development by providing benefits to economic, social, environmental as well as law and governance with principles that are more integrated, directed, measurable and accountable and are part of the company's business approach, but these rules do not regulate sanctions if TJSL is not implemented even though Article 4 of the Limited Liability Company Law

expressly states This Law, the articles of association of the Company, and other provisions of laws and regulations apply to the Company.

Therefore there is a gap in legal incompleteness in the regulation regarding TJSL that has not fulfilled the values of justice and legal certainty, so this article will examine the differences in the provisions of sanctions in the two implementing regulations above and attempt to formulate a reconstruction of social and environmental responsibility arrangements for companies that are just and have legal certainty.

Research Method

This research is normative legal research with a prescriptive nature and uses secondary data consisting of primary legal source and secondary legal materials, analyzed using qualitative techniques and deduction methods. The approach method used is legislation by analyzing rules and regulations related to these legal issues, as well as looking at several cases that are relevant to the issues, and a conceptual approach that departs from various views and doctrines that have developed in the study of law. Researchers to find ideas that reveal legal understanding, legal concepts, and legal principles that are relevant to the issue latest.^[3]

Discussion

1. Differences in Sanctions for the Implementation of Social and Environmental Responsibility between Private Companies and State Companies

Article 7 PP of Social and Environmental Responsibilities of Limited Liability Companies states that companies as referred to in Article 3 that do not carry out social and environmental responsibilities are subject to sanctions in accordance with the provisions of laws and regulations. According to an explanation, what is meant by being subject to sanctions in accordance with the provisions of the legislation is subject to all forms of sanctions regulated in the relevant laws and regulations. Meanwhile in PER-1/MBU/03/2023 concerning Special Assignments and BUMN Social and Environmental Responsibility Programs, which serves as a guideline for all BUMN companies to implement TJSL does not regulate sanctions or punishment, but only makes the implementation of TJSL as one of the performance indicators.

Based on the data above, it is known that there are quite striking differences between the two general implementing regulations, namely the absence of phrases or provisions regarding sanctions for state companies that do not implement TJSL. As for the provisions of Article 36 of the 2023 TJSL Program Permen BUMN states that measurement of the performance of the BUMN TJSL Program is part of the priority performance indicators for BUMN Directors in accordance with statutory provisions, so those who will receive a reprimand are not corporations but only the board of directors.

In addition, the Permen BUMN 2023 TJSL Program also does not make the Limited Liability Company Law and PP Social and Environmental Responsibility of Limited Liability Companies a consideration in regulating TJSL within BUMN, moreover, Article 12 states that BUMN are required to implement the TJSL program by fulfilling the provisions stipulated in this Ministerial Regulation, it further implies that the position of a state company is not part of the Limited Liability Company Law even though the

provisions of Article 4 of the Limited Liability Company Law state that this Law applies to companies, the company's articles of association, and other statutory provisions.

On the other hand, there are still BUMNs that have not or do not implementing TJSL properly, or TJSL issues not being felt by the surrounding community, including PT Semen Tonasa being demonstrated by residents because the 2011 CSR program was not transparent,^[4] and PT Perkebunan Nusantara VI in West Pasaman Regency, Province West Sumatra in 2018,^[5]

especially in 2019 PT Sucofindo as a BUMN with a business line of inspection services stated "...from the available data when looking at companies that have won awards in CSR implementation competitions, it turns out that private companies are still quite dominating in implementation of CSR in Indonesia..."^[6]

This is not in line with the Pancasila concept of justice as stated in the fifth precept, namely fair, the word fair can be interpreted as impartial, giving what is not a right, taking rights, and being fair to oneself and others,^[7] as well as the theory of pure procedural justice which states regulations are considered fair if they procedurally allow everyone to receive equal justice (perfect procedural justice) does not materialize.^[8]

2. Reconstruction of Social and Environmental Responsibility Arrangements for Companies with Equity and Legal Certainty

Legal certainty is one of the fundamental principles in carrying out TJSL obligations by companies without exception. Without legal certainty, humans will not know what to do so it can create chaos, but being too rigid in carrying out legal certainty can raise a feeling of injustice.^[9] Jan Michiel Otto defines legal certainty as the possibility that arises from certain situations, including the characteristics of having rules that are clear, easy to obtain, consistent, and issued and recognized because of the power of the state, and government agencies applying legal rules consistently and the community is subject to and obedient to these rules.^[10] The creation of legal certainty in statutory regulations requires conditions as well as the internal structure of these legal norms,^[11] including:

- a. concept clarity in the form of a description of a certain behavior, then put together in a certain concept as well;
- b. clarity of hierarchy of authority regarding legality or not and whether statutory regulations are binding or not as well as providing direction to the institutions forming statutory regulations; and
- c. Consistency of statutory legal norms related to one particular subject, and do not conflict with one another.

Therefore it is necessary to formulate a TJSL arrangement with an omnibus concept or covering all subjects (private companies and state companies) in line with the times as stipulated in Article 64 paragraph (1b) of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation, namely:

"...is a method of drafting Legislation with:

- a. containing new material;
- b. change content material that has legal relevance and/or needs as stipulated in various Laws and Regulations that are similar and have the same hierarchy; and/or

- c. repeal laws and regulations of the same type and hierarchy,

By combining them into one Legislation to achieve certain goals”.

The things that must be regulated in detail in the ideal concept of TJSL arrangements must include several things, including:

a. Widely Legal Basis

Incorporate relevant laws into consideration of TJSL regulations to reinforce the scope of these regulations, as well as a basis for unifying the view that Corporate Social Responsibility (TJSP) and Corporate Social and Environmental Responsibility (TJSLBU) are the same as TJSL, including:

1. Law Number 19 of 2003 concerning State Owned Enterprises;
2. Law Number 25 of 2007 concerning Investment;
3. Law Number 40 of 2007 concerning Limited Liability Companies;
4. Law Number 11 of 2009 concerning Social Welfare;
5. Government Regulation Number 47 of 2012 concerning the Social and Environmental Responsibility of Limited Liability Companies;
6. Presidential Regulation Number 111 of 2022 concerning the Implementation of the Achievement of Sustainable Development Goals;
7. Regulation of the Minister of Social Affairs Number 9 of 2020 concerning Social Responsibility and Business Entities.

b. TJSL Executing Subject

Emphasizing that TJSL obligations are not only for companies related to the natural resource sector, but must be able to reach all companies, both private and state, in all lines of business, namely: Limited Liability Companies, Public Companies, State-Owned Enterprises, Companies with part or all of the capital originating from foreign investment and/or domestic investment as stipulated in Article 5 paragraph of the Investment Law.

c. TJSL Limits on Allocation and Management of Budget Surpluses

Adopt the provisions of Article 8 paragraph (4) of the Minister of BUMN Regulation Number: PER-03/MBU/12/2016 concerning Amendments to the Regulation of the Minister of State-Owned Enterprises Number PER-09/MBU/07/2015 concerning Partnership Programs and Community Development Programs for Business Entities State-Owned, namely the amount of partnership program funds and environmental development program funds originating from net profit and/or costs as referred to in paragraph (1), a maximum of 4% (four percent) of the previous year's projected net profit, which is definitively determined at the time of annual report approval. If a BUMN does not earn a profit, the provisions in paragraph (5) state that the amount of PKBL funds is determined to be at most the same as the amount of the partnership program funds and community development funds in the previous year. Regarding the management of the excess TJSL budget, it should be arranged by adding the excess TJSL budget in the following year, so that it becomes bigger. It is hoped that TJSL's obligations will not become a

burden to the company and the community will continue to receive TJSL benefits even though the company is in a state of loss.

d .TJSL Implementations Pattern

In the following, several TJSL implementation concepts can be applied as alternatives to those already regulated in the 2023 TJSL Program BUMN Regulation and the TJSLBU Ministry of Social Affairs, namely:

1. Self -Implementation

The Company has full authority in determining the parties or programs that will be given benefits after being determined in the GMS or incidentally.

2. Joint Implementation of Non-Profit Legal Entities

The company cooperates with legal entities that serve the community by financing the proposed program using the TJSL budget.

3. Combination Implementation

The company manages 50% (fifty percent) of the TJSL allocation independently to be given to the community around the company and hands over the next 50% (fifty percent) to a second party, either the local government or a non-profit legal entity.

4. Implementation With Local Government

The company both individually and jointly with other companies proactively coordinates with the local government to implement TJSL based on programs or databases that have been prepared by the government, so that the company's obligations to TJSL are aligned and support government programs that cannot be executed due to budget constraints, including the aim of improving social welfare.

5. Implementation by Local Government

The Company fully submits the current year's TJSL budget to the local Government, namely at the national level to the Minister of National Development Planning/Head of the National Development Planning Agency as the Implementing Coordinator of the National Steering Committee in Article 9 paragraph (2) of the TBP Presidential Regulation, and at the regional level to the Regional Head Cq The Head of the Regional Development Planning Agency as the command line of the National Development Planning Agency, the company's TJSL is fully oriented towards the 2030 TPB global goals and objectives as well as the national development goals in the TBP Presidential Decree.

e. TJSL Implementation Compliance Sanctions

Effective implementation of laws and regulations is impossible without law enforcement which can be carried out in various forms including the application of sanctions, which can be in the form of criminal sanctions, civil sanctions, or administrative sanctions. Inappropriate sanctions will result in an ineffective rule. This is in line with the principle of usability and effectiveness, namely that every statutory regulation is made because it is really needed and useful in regulating the life of society, nation, and state. ^[12]

either through the court or non-court channels, namely by administrative officials. According to Faure, administrative sanctions will be cheaper to implement and provide a deterrent effect compared to criminal sanctions.^[13]

Administrative sanctions regulated in laws and regulations are dominated by licensing issues and are carried out by administrative officials (agencies) authorized to issue said permits.^[12a] The following is the formulation of sanctions involving the financing sector and related agencies to become:

- a. Written warning;
- b. Limitation of business activities;
- c. Restrictions on corporate actions;
- d. Freezing of business activities and/or capital facilities;
- e. Freezing of activities on the stock exchange;
- f. Revocation of business activities and/or capital facilities.

f. TJSL Supervisor and Implementation Evaluator

The concept of the composition of supervision and evaluation of the implementation of TJSL regarding Article 9 paragraph (2) of the TBP Presidential Regulation, namely: Supervisor at the National Level by the Minister of National Development Planning/Head of the National Development Planning Agency as the Implementing Coordinator of the National Steering Committee also acts as supervisor of compliance with the implementation of TJSL, while The Regional/District/City level is carried out by the Head of the Regional Development Planning Agency as the command line of the National Development Planning Agency.

The National Level Appraiser is on the Coordinating Minister for the Economy as Deputy Chair I of the National Steering Committee, and the Regional/District/City Level is held by the Regional Head.

g. Specific Structure of TJSL in the Company

Special and sustainable TJSL administration is needed so that it doesn't just budget and deliver, but also ensures that the TJSL provided is able to leverage community welfare as stipulated in Article 34 of the 2023 TJSL Program Permen BUMN which instructs the Directors to form a BUMN TJSL Committee to:

1. Coordinate between units/directors to formulate goals and guidelines for the implementation of BUMN TJSL;
2. Mapping and compiling the BUMN TJSL Program;
3. Assisting the Board of Directors in evaluating the implementation of BUMN programs.

Conclusion

The value of justice has not been fulfilled, because no sanction phrase is explicitly stated in the BUMN Ministerial Regulation regarding the implementation of TJSL within BUMN. This could be due to Article 88 paragraph (1) of the BUMN Law using the phrase "can", not the phrase "obligation" as in Article 74 paragraph (3) of the Limited Liability Company Law and its derivative regulations. Likewise, to fulfill the value of legal certainty, TJSL arrangements in a company, the government should immediately update them by at least regulating several things, including a broad legal basis, specific implementing subjects, allocation limits and management of excess budget, implementation patterns, sanctions, supervisors and assessors of TJSL implementation, and a special structure in

the field of CSR, so that it will provide benefits to the community and achieve sustainable development goals.

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