

# ***Corporate Social Responsibility: A Constitutional Perspective***

**Muchamad Ali Safa'at**

Dosen Fakultas Hukum Universitas Brawijaya Malang,  
Jalan MT. Haryono No. 169 Malang, Jawa Timur – Indonesia,  
sakuntalla@gmail.com

Naskah diterima: 30/01/2014 revisi: 30/02/2014 disetujui: 30/03/2014

## ***Abstract***

*Originally, the concept of CSR was come from business ethic values that impose corporation's ethical responsibly to their social and natural environment. That development of ethical business was part of social consciousness on the degradation of environment as impact of corporation activities. This reality also raised the deep environmental ethic or deep ecology which challenge anthropocentrism economical development and urged ecocentrism development. In Indonesia, this phenomenon was marked by the enactment of Act 4/1982 on Environmental Management.*

*The constitutional debate on CSR just began when the Indonesian Constitutional Court heard and decided the judicial review case of Act 40/2007 on Limited Liability Company which stipulate CSR mandatory law for corporation that have activity in natural resources areas. In its decision, Constitutional Court refused the petition. This means that the court affirmed that CSR mandatory law is not contrary to the Constitution. However, the legal argumentation of the court was not shifted from economical and environmental perspectives. The constitutional basis of the decision is Article 33 (4) concerning national economic principles and Article 33 (3) concerning state power on land, water, and natural resources. The Constitutional Court did not use the human rights concept as the source of CSR mandatory law.*

*In constitutional law perspective, we can justify the CSR mandatory law from human rights guarantee on the constitution. CSR is one of the obligations to respect, to protect, to fulfill, and to promote human rights. Those obligations are not only bind over the government, but also corporation and all citizens. In that perspective, CSR should be mandatory law not only for the corporation which manage or correlate with natural resource, but for all corporations that operate in the middle of the society.*

***Keywords:*** *Corporate Social Responsibility, Constitutional Law, Human Rights*

## Abstrak

Konsep Tanggung Jawab Sosial Perusahaan atau *Corporate Social Responsibility* (CSR) berasal dari nilai dalam etika bisnis yang membebaskan tanggungjawab etik perusahaan terhadap lingkungan ala dan sosial. Perkembangan etika bisnis tersebut merupakan bagian dari munculnya kesadaran sosial terhadap perusakan lingkungan karena kegiatan perusahaan. Kenyataan ini juga melahirkan paradigma “*deep environmental ethic*” yang menantang paradigma pembangunan ekonomi yang berpusat pada manusia (*anthroposentris*). Di Indonesia, pergeseran ini ditandai dengan pembentukan UU Nomor 4 Tahun 1982 tentang Pengelolaan Lingkungan Hidup.

Dalam perkembangan selanjutnya, CSR masih tetap dalam wilayah etika bisnis. Pembeneran CSR ada pada teori ekonomi, manajemen, dan lingkungan. Debat konstitusional tentang CSR baru mengemuka saat Mahkamah Konstitusi (MK) memeriksa dan memutus pengujian UU Nomo 40 Tahun 2007 tentang Perseroan Terbatas yang mengatur CSR bersifat wajib bagi perusahaan yang bergerak di bidang sumber daya alam. MK memutuskan menolak permohonan, yang berarti MK menyatakan CSR yang bersifat wajib tidak bertentangan dengan konstitusi. Namun demikian argumentasi hukum yang menjadi dasar putusan MK belum bergeser dari perspektif ekonomi dan lingkungan. MK tidak menggunakan hak asasi manusia sebagai dasar CSR yang bersifat mandatory.

Dalam perspektif konstitusional, CSR yang bersifat wajib dapat dibenarkan dari jaminan hak asasi manusia dalam konstitusi. CSR adalah salah satu bentuk kewajiban menghormati, melindungi, memenuhi, dan memajukan hak asasi manusia. Kewajiban tersebut tidak hanya mengikat negara, tetapi juga semua warga negara termasuk perusahaan. Berdasarkan perspektif tersebut CSR harus bersifat wajib tidak hanya bagi perusahaan yang bergerak di bidang sumber daya alam, tetapi juga untuk semua perusahaan yang beroperasi dalam masyarakat.

**Kata Kunci:** *Tanggungjawab Sosial Perusahaan, Hukum Konstitusi, Hak Asasi Manusia*

## INTRODUCTION

Corporate Social Responsibility (CSR) is a new issue in legal perspective, especially since the promulgation of Act 19/2003 on State-Owned Enterprise, Act 25/2007 on Investment, and Act 40/2007 on Limited Liability Companies. The legal research of CSR at that time was also limited on corporate law. The Constitutional law perspective on CSR just rise when some corporations and privat enterprises associations submitted petition to Constitutional Court to review the constitutionality of CSR regulation, especially Article 74 of Act 40/2007 that

impose mandatory CSR for corporation that run business on or corelate with natural resources.<sup>1</sup>

However, the isu of CSR in Indonesia actually has developed for a long time since the rise of environmental conciousness that influent the concept of business ethics. Theoretically, the first concept of the economical development was anthropocentrism, that mean human is the centre of all consideration. That concept has already shifted by ecocentrism, that put the environment as centre of the development and human is part of the environment. In Indonesia, the first law that recognized ecocentrim was GBHN 1976 that adopt sustainable development as one of the national development principles. The Sustainable Development principle was the implementation of the Stockholm Declaration 1972. In the next stage, Indonesia enacted the first Act on Environment Management, Act 4/1982.

This paper analyze CSR from constitutional law perspective, especially human rights aspect. The first part will explain the CSR as part of the business ethic aspect. The second part will describe the development of the CSR on the light of constitutional law, mainly in corelation with the decision of Constitutional Court No. 53/PUU-VI/2008. The last part will explore the CSR from constitutional perspective, especially human rights aspect, in internasional level and national level, that tend to shift from ethical commitment become legal obligation.

## CSR AS PART OF BUSINESS ETHICS

Based on many definition of CSR, we can clearly understand that CSR is part of bussines ethics. In broadest sense, the term “corporate social responsibility” is used to describe corporate conduct which is ethical and has regard to social and environmental interest as well as financial consideration. The World Business Council for Sustainable Development defines CSR as the comitment of business to contribute to sustainable development, working wih employees, their families, the local community and society at large to improve their quality of life.<sup>2</sup> The European Commission has previously defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on voluntary basis.”<sup>3</sup>

<sup>1</sup> Case Number 53/PUU-VI/2008, decided on April, 15<sup>th</sup>, 2009.

<sup>2</sup> Philip Lynch, *Human Rights and Corporate Social Responsibility*, Submission to the Corporation Markets Advisory Committee Inquiry into Corporate Social Responsibility, Melbourne: Human Rights Law Resources Centre, 2006, h. 10.

<sup>3</sup> European Commission, *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions, A renewed EU strategy 2011 – 14 for Corporate Social Responsibility*, Brussel; European Com-

Furthermore, Article 1 para 3 Limited Liability Companies Act defines Social and Environmental Responsibility as a corporation commitment to participate on sustainable economic development to increase the quality of life and usefull environment, for the corporation, local community, as well as the whole society. This definition has similarity with the World Business Council for Sustainable Development above.

Based on definitions above, the concept of CSR at least consist of 3 components, i.e (1) as guidelines for corporation conduct, (2) that conduct based on ethical judgment consideration in corelation with the relation between corporation, society, and environment, and (3) that conduct is voluntary depend on the corporation commitment. The 3 constitutional justices who deliver dissenting opinion on decision number 53/PUU-VI/2008 gave legal argumentation based on the CSR concept as part of bussines ethic. Article 1 para 3 Limited Liability Companies Act was used as legal basis that CSR should not be mandatory. Even CSR is regulated by the law, it should not mandatory and should not replace state responsibility.

The emergence of CSR as part of bussines ethic is a result of economic paradigm shift. The old economic paradigm, as Milton Friedman said, is that the one and only goal of the corporation is to generate profit. The new paradigm is that the corporation should balance between three aspects, profit, environment (planet), and society (people). This paradigm is formulated by John Elkington as manifestation of the awareness toward the social and environmental impact of corporation activities.<sup>4</sup>

## **CSR ON CONSTITUTIONAL COURT DECISION**

Voluntary perspective of the CSR as part of the bussines ethic was the main basis conception of the corporations when they submitted judicial review case to the Constitutional Court. Several privat corporations and association of corporation owners challenge Article 74 of Limited Liability Companies Act that regulate CSR as mandatory for corporation. In their opinion, mandatory CSR will create legal uncertainty, discriminative, and inconsistent with the just and efficient economic democracy principle which stated on Article 33 Para 4 of the Constitution.

---

mission, 2011, h. 3.

<sup>4</sup> Edi Suharto, "Corporate Social Responsibility: What is and Benefits for Corporate", Presented Paper on Conference "CSR: Strategy, Management and Leadership", Jakarta 13-14 February 2008, h. 1.

Constitutional Court decided that CSR as Mandatory for the privat corporation is not contravene to the constitution. In that decision, Constitutional Court has six main legal argumentation. *First*, CSR is state legal policy to regulate common responsibility and cooperation between state, privat corporation, and society. The regulation of CSR is a affirmative regulation which based on natural law perspective not only should be obeyed by each subject but also demand a cooperation between stakeholders.

*Second*, CSR as stated in Article 74 of Limited Liability Companies Act is a *malum in se*, not just a *malum prohibitum*.<sup>5</sup> CSR activities have direct and high impact to the healthy and safety of the society that insist moral obedience and spirit to cooperate. State, society, and corporation that operate in natural resources exploitation must be morally and legally responsible to the negative impact to the environment.

*Third*, regulation of CSR as legal obligation is a legal policy of the law maker by imposing sanction. That regulations is formulated based on the worse past social and environment conditions due to corporation activities that did not aware to the social and environment aspects which lead to degradation of the social and environmental life. Between morality or ethics and law has graduall relation. Law is formalization or legalization of the moral values. Voluntary moral and ethic values which recognized as important values could be gradually transformed in to the law for the sake of bindingness. Regulating CSR as legal obligation has more legal certainty than voluntary CSR. Mandatory CSR regulation will avoid differentiation of interpretation by corporation and make that regulation has more power to enforce and to support corporation to perform their CSR activities. On the other hand, voluntary CSR does not have sufficient enforcement power. By increasing bindingness of the CSR from voluntary to mandatory the court hope the increasing of the corporation role to increase social welfare.

*Fourth*, the CSR formulation on Article 74 of Limited Liability Companies Act is a social justice manifestation. John Rawls corelate the concept of justice and 2 fundamental values of social order, that are freedom and equality.<sup>6</sup> Every person has the equal right of the basic freedom guarantee. If there are defferences based on social economic defferenciation on the free market competition society, state

<sup>5</sup> *"malum in se"* is an act or conduct that has evil in nature (evil in itself). *"malum prohibitum"* is and act or conduct become evil because prohibited by the law. Jimly Asshiddiqe and Muchamad Ali Safa'at, *Teori Hans Kelsen Tentang Hukum*, Jakarta: Konstitusi Press, 2012, h. 47.

<sup>6</sup> John Rawls, *A Theory of Justice*, Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971, h. 60 – 65.

policy should be put the least advantage as a priority. CSR is and instrument to create and give justice to the next generation.

*Fifth*, unequal treatment towards CSR obligations only apply to the company that runs its business activities in the field of or relating to natural resources, while the other company that is not related to the natural resources are not subject to the obligation of CSR is not discriminatory. The distinction was due to the Corporation that manage natural resources relating to Article 33 paragraph (3) of the 1945 Constitution that states have the right to set differently.

*Sixth*, changing in the nature of moral responsibility of CSR becomes a legal obligation in accordance with the basic principles of economy in Indonesia, namely people oriented economy. CSR arrangement with a legal obligation of the government is a way to encourage companies to participate in the economic development of society. Thus CSR regulation as legal obligations is not contrary to Article 33 paragraph (4) of the 1945 Constitution, especially in the fair efficiency phrase.

If we look at the legal reasoning in the decision of the Court, mandatory CSR regulation on the perspective of constitutional law based on the basic constitutional principle of social justice, control of the State over natural resources, and the principle of people oriented economy. Such decisions have not considered the constitutional provisions on human rights. This is in contrast to developments in the international CSR conception that has many human rights approach.

## **THE DEVELOPMENT OF CSR IN THE CONSTITUTIONAL LAW PERSPECTIVE**

One of the major issues in constitutional law is human rights, which in the national context become constitutional rights. Protection of human rights is the basic aspect of law making, including the regulation of economic activities carried out by the corporation.

However, it has been argued that human rights and international economic arrangements, in particular free trade regime, can not be met. They have always been strained due to assumptions and goals are contradictory. Delphine Rabet said that:

*“These two international regimes have developed without entering any real dialogue until very recently, although they are both claiming to serve the interests of humanity. The true goals of each of these movements, I argue, are contradictory and cannot be resolved – least of all by a movement such as corporate social responsibility (CSR), which originates in the corporate sector. Even though the human rights regime and the global economic regime had a similar normative ambition of advancing human welfare, rights and opportunities, the paradox of this ambition was that the structure of the global economic order made the achievement of these rights impossible. Whereas the primary responsibility for the enforcement of human rights standards lies with national governments, there is a growing acceptance that corporations also have an important role to play. Instruments of the human rights regime attempt to share or complement states responsibilities with private actors’ responsibility. Indeed, the human rights regime affirms explicitly the prevalence of the human right to fair remuneration over wealth creation, rationale of the free trade regime. The contradiction is apparent and the human right to fair remuneration highlights the incompatibility of the two regimes.”<sup>7</sup>*

Contrary to the Rabet’s opinion, various international organizations, especially the UN and the EU, has compiled documents that encourage human rights approach to the CSR. Antonio Tajani, affirm that Human rights are increasingly relevant to enterprises, and enterprises can have a strong influence on human rights, both positively and negatively.<sup>8</sup> Corporations can make important positive contributions to creating a global environment in which everyone can enjoy their universal human rights. They have an enormous capacity to create wealth, jobs and income, to finance public goods, and to generate innovation and development in many areas relevant to human rights and environmental protection. However, it holds equally true that corporations can have significant negative impacts on human rights and the environment in their global operations. Corporate conduct can impact on the full range of human rights, including civil and political rights, economic, social and cultural rights, and labour rights.<sup>9</sup>

<sup>7</sup> Delphine Rabet, “Human rights and Globalization: The Myth of Corporate Social Responsibility?”, *Journal of Alternative Perspectives in the Social Sciences*, 2009, Vol. 1, No. 2, h. 463.

<sup>8</sup> Daniel Augenstein, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, The University of Edinburgh, Foreword by Antonio Tajani, Vice President of the European Commission, [http://www.academia.edu/1366068/ Study\\_of\\_the\\_Legal\\_Framework\\_on\\_Human\\_Rights\\_and\\_the\\_Environment\\_applicable\\_to\\_European\\_Enterprises\\_operating\\_outside\\_the\\_European\\_Union\\_Study\\_for\\_the\\_European\\_Commission\\_ENTR\\_09\\_045\\_2010\\_](http://www.academia.edu/1366068/Study_of_the_Legal_Framework_on_Human_Rights_and_the_Environment_applicable_to_European_Enterprises_operating_outside_the_European_Union_Study_for_the_European_Commission_ENTR_09_045_2010_), accessed 3/5/2013.

<sup>9</sup> *Ibid.*

UN Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) developed the 'Protect, Respect, and Remedy' Framework for better managing business and human rights challenges (UN Framework) that builds on three pillars (i) the State duty to protect human rights against abuses by third parties, including corporations, through appropriate policies, regulation, adjudication and enforcement measures; (ii) the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others; and (iii) greater access by victims to effective remedies, both judicial and non-judicial, for corporate-related human rights abuses.<sup>10</sup>

The adoption of human rights approach based on four key reasons. *First*, the human rights framework is universal and founded on a set of agreed core minimum standards with respect to the conduct of governments, enterprises and individuals. The human rights approach offers an explicit normative framework that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies.<sup>11</sup>

*Second*, the human rights framework focuses attention on basic enabling conditions, the realization of which are necessary for people to live with human dignity and to participate in and contribute to civil, political, economic, social and cultural life. The framework also focuses attention on the various civil, political, economic, social and cultural impacts and spheres of influence of corporations.<sup>12</sup>

*Third*, as well as enshrining rights, the international human rights framework also imposes responsibilities and obligations of realization in relation to those rights. Implementation obligations imposed by the human rights framework on both ratifying governments and, arguably, corporations operating within their jurisdictions, include obligations to respect human rights (that is, refrain from interfering, directly or indirectly, with enjoyment of human rights), protect human rights (that is, prevent third parties, such as business partners or suppliers, from interfering in any way with the enjoyment of human rights) and fulfil human rights

---

<sup>10</sup> *ibid*

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*



(in this context, take positive steps to promote and support the realisation of human rights within the relevant corporate spheres of activity and influence).<sup>13</sup>

*Fourth*, in addition to providing an important and useful framework to identify corporate impacts and impose obligations relating to the realisation of the civil, political, economic, social and cultural determinants of individual and community wellbeing, the human rights framework also enshrines important principles of human rights-based corporate management, stakeholder engagement and conduct, requiring that corporate programs and services be:<sup>14</sup>

- 1) fair and non-discriminatory: this requires that corporations and business enterprises ensure equality of opportunity and treatment;
- 2) consultative, participatory and empowering: this requires that corporations consult with, and enable the participation of, stakeholders and individuals and communities affected by their business affairs and conduct; and
- 3) transparent and accountable: this requires that corporations measure, report on and account for their social and environmental activities and impacts.

The European Commission has identified a number of factors that will help to further increase the impact of its CSR policy, including the need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR.<sup>15</sup> The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms)*, developed and approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003, are the most comprehensive, clear and complete standards developed in relation to socially responsible corporate behaviour. The *Draft Norms* enshrine, and impose obligations of realisation on corporations in relation to relevant human rights, including: the right to equal opportunity and non-discriminatory treatment; the right to security of persons; the rights of workers and their families; consumer rights and protections; and environmental rights and standards. The *Draft Norms* also require corporations to recognise and respect the public interest, development objectives and principles of transparency and accountability. Article 1 of the *Draft Norms* provides that:

---

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> European Commission, *op cit*, h. 5.

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.

While at this stage the *Draft Norms* are not legally binding yet, they envisage a range of operationalisation and enforcement mechanisms. These include:<sup>16</sup>

- 1) Corporations developing and implementing operating procedures that are compliant with the *Draft Norms*;
- 2) Corporations consulting with stakeholders and communities about their activities, influence and impact;
- 3) Corporations engaging in business only with other corporations, entities and natural persons that comply with the *Draft Norms*;
- 4) Corporations applying and incorporating the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons;
- 5) Corporations periodically (at least annually) reporting on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts; and
- 6) Monitoring by the United Nations and relevant international and national mechanisms in relation to implementation and application.

The other arguments to adopt human rights approach are the low rate of corporation that implement CSR and the permissive legislation concerning CSR. In Australia, less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.<sup>17</sup> The Human Rights Law Centre concludes that current frameworks do not promote, and in some instances, constitute obstacles to, corporate social responsibility. Given the capacity of corporations and corporate conduct to either promote or derogate human rights and social, environmental and community interests. Human Rights Law Centre proposes a range of legislative and policy initiatives including in relation to directors duties, reporting and disclosure requirements, and government procurement to ensure that corporations consider the interests, values and rights of stakeholders and the broader community.<sup>18</sup>

The Study of Philip Lynch concluded that there are three patterns of human rights and environmental abuses allegedly committed by European corporations

<sup>16</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 15, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>17</sup> Lynch, *op cit*, 1

<sup>18</sup> *Ibid.*

operating outside the European Union.<sup>19</sup> *First*, the vast majority of alleged corporate human rights and environmental abuses examined were committed by subsidiaries or contractors of European corporations that are domiciled or resident in the country where the violation occurred, and are governed by the domestic regulatory and enforcement regime of that country. This is particularly problematic when subsidiaries and contractors operate in countries with legal regimes that provide lower levels of human rights and environmental protection than the 'home' State of the European corporation.

*Secondly*, where subsidiaries or contractors of European corporations violate human rights and environmental law outside the European Union, third-country victims can encounter significant obstacles in obtaining effective redress both in the third country and in the European Union. *Thirdly*, the States in which subsidiaries and contractors of European corporations operate and/or EU Member States from which European corporations operate are often at least indirectly involved in corporate abuses of human rights and the environment.<sup>20</sup>

In term of voluntary basis, some corporation do not implement CSR as ethical commitment and as human rights responsibility. The bias of CSR practice include:

- 1) Camouflage. The Company conduct CSR did not based commitments, but simply cover business practices that rise "ethical questions".
- 2) Generic. CSR programs are too general and lack of focus because it was developed based on a template or CSR programs of other party.
- 3) Directive. CSR policies and programs formulated top down and solely based on the mission and interests of the company (shareholders). CSR programs are not according to the participatory stakeholder engagement principles.
- 4) Lip Service. CSR is not a part of the corporate strategy and policy. Typically, CSR programs are not preceded by a needs assessment and is given only by mercy (charity).
- 5) Kiss and Run. CSR programs are ad-hoc and unsustainable. People are given the "kiss" in the form of goods, services or training, then abandoned. The program developed generally myopic, short-term and do not pay attention to the meaning of empowerment and social investment.<sup>21</sup>

<sup>19</sup> Augenstein, *op cit.*

<sup>20</sup> *ibid.*

<sup>21</sup> Suharto, *op cit.*, h. 8.

In the international context, Augenstein said that one of the CSR challenges is that international human rights law and international environmental law generally do not directly impose obligations on MNCs to protect human rights and the environment. While they often require States to regulate corporate activities harmful to human rights and the environment, and to enforce these regulations in case of corporate violations, they do not directly bind corporate actors. At the same time, those areas of law that are most relevant to the activities of corporations, including trade and investment law, corporate law, and private international law, primarily pursue different and conflicting objectives to the protection of human rights and the environment – which can lead to what the SRSR has termed ‘horizontal policy incoherence’. As a consequence, targeted or detailed human rights and environmental protection through these areas of law constitutes the exception rather than the norm.<sup>22</sup>

Based on the weaknesses above, the Human Rights Law Resources Center recommend The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* should be legislatively enacted. Consistently with the *Draft Norms*, the legislation should:

- 1) enshrine, and impose obligations of realisation on corporations in relation to, relevant human rights, including: the right to equal opportunity and non-discriminatory treatment; the right to security of persons; the rights of workers and their families; consumer rights and protections; and environmental rights and standards;
- 2) require corporations to recognize and respect the public interest, development objectives and principles of transparency and accountability;
- 3) require corporations, within their respective spheres of activity and influence, to promote, secure the fulfilment of, respect, ensure respect for and protect human rights;
- 4) require corporations to develop and implement operating procedures that are compliant with the *Draft Norms*;
- 5) encourage corporations to consult with stakeholders and communities about their activities, influence and impact;
- 6) encourage corporations to engage in business only with other corporations, entities and natural persons that comply with the *Draft Norms*;

---

<sup>22</sup> Augenstein, *op cit.*

- 7) encourage corporations to apply and incorporate the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons; and
- 8) require corporations to report at least annually on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts.

Constitutional approach, especially human rights, has direct influence to the corporate regulation which for a long periode was perceived as private area based on shareholder contract. The constitution, as the highest law of the land, has legitimacy to give direction as the politic of the corporation regulation. Thoughts on the importance of the constitutional aspects, in the sense of attention to the public interest, in corporate law put forward by Stephen Bottomley in the book "The Constitutional Corporation" which is called by Angus Corbett and Peta Spender as a "corporate constitutionalism". Corporate constitutionalism presupposes that there are values and ideas in our public political life that provide useful insights when considering the legal regulation of corporate governance and decision-making. The application of constitutionalism to corporations is germane because corporations are both social actors and polities in themselves.<sup>23</sup>

Corporate constitutionalism provides a normative framework through which we can assess the legitimacy of corporate decision-making. It relies on three principles (i) Accountability, corporate decision-making processes should be characterised by a separation of decision-making powers; (ii) Deliberation, corporate decisions should be subject to deliberation; (iii) Contestability, corporate decisions which do not track the interests of members should be readily contestable. A system of corporate *accountability* must provide a framework that protects against the improper exercise of power and makes corporate decision-making power subject to a 'plurality of checks and balances'. This can be achieved through a division and separation of powers. The separation of powers concept is used in a broader and looser sense than the institutional separation of powers to which lawyers are accustomed. Since the concept is being applied in the private sector, one would expect that the taxonomies of power require different separations than the standard legal doctrine.<sup>24</sup>

<sup>23</sup> Angus Corbett and Peta Spender, "Corporate Conatitutionalism", 2009, 31 *Sydney Law Review* h. 147.

<sup>24</sup> *ibid.*

The principle of *deliberation* requires us to determine the legitimacy of corporate decisions by assessing the extent to which the processes are subject to deliberative input, meaning that, as far as possible, there should be processes that are open, genuine and represent a collective judgment about the issue at hand. Individual interests are subject to competing perspectives that are debated and transformed into a collective judgment about the corporate interest.<sup>25</sup>

Finally, concept of *contestability* mean that a decision that does not track the interests of the members can be effectively contested. However, he argues that contestability options are not confined to the courtroom, and a system of corporate contestability could encourage shareholders to consider non-judicial options such as questioning directors and requisitioning a general meeting.<sup>26</sup>

The above description shows that the international context of CSR has undergone rapid development, especially in the perspective of human rights and the constitution in general. These developments can be a reference for the development of the CSR legal framework in Indonesia.

In the Indonesian constitutional law perspective, the obligation of CSR for companies has 4 arguments related to human rights. First, the purpose of the state that defined in the Preamble of the 1945 Constitution is to realize social justice for all the people of Indonesia. We need protection, respect, fulfillment, and the promotion of human rights to achieve social justice. Achievement of the objectives of the state and the protection of human rights, of course binding not only on the state, but also the private sector and the citizens who exist and active in the Indonesian territory. Therefore, Section 28J (1) of the 1945 Constitution states "Each person has the obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state." Of course everyone should be interpreted not only the individual, but also institutions, organizations, and corporations. This is consistent with principles that adopted by the UN.

Secondly, Article 28 I (4) states that "Protecting, promoting, upholding, and the full realization of human rights are the responsibilities of the state, foremost of the government." That state responsibility is a consequence of the social contract, in which the state has the power especially and mainly to protect and fulfill the rights of sovereignty owners. However, along with the social development,

---

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

protection and fulfillment are not only depend on the positive role of the state. The state has the power to make a regulation that requires the other party, especially a corporation, which is as it should be responsible for the protection and fulfillment of human rights, without decrease the role of the state.

Third, it has been described that corporate activity has a positive impact to human life. On the other hand it has been recognized also that a lot of the negative impact of corporate activity on the social life and the environment. In the 1945 there are various rights that could be threatened by the activities of the company, among other things:

1. the right to live and the right to defend his life and existence.
2. the rights of the child to live, grow up, and develop as well as the right to protection from violence or discrimination.
3. the right to self-realization through the fulfillment of his basic needs, the right to education and to partake in the benefits of science and technology, art and culture, so as to improve the quality of his life and the well-being of mankind.
4. the right to self-improvement by way of a collective struggle for his rights with a view to developing society, the nation, and the country.
5. the right to an occupation as well as to get income and a fair and proper treatment in labor relations.
6. the right to choose occupation.
7. the right to freely associate, assemble, and express his opinions.
8. the right to communication and to acquiring information for his own and his social environment's development, as well as the right to seek, obtain, possess, store, process, and spread information via all kinds of channels available. \*\*
9. the right of protection of self, his family, honor, dignity, the property he owns, and has the right to feel secure and to be protected against threats from fear to do or not to do something that is part of basic rights.
10. the right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.
11. the right to facilities and special treatment to get the same opportunities and advantages in order to reach equality and justice.
12. the right to own private property and such ownership shall not be appropriated arbitrarily by whomsoever.

13. the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment.
14. the cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization.

The rights that are vulnerable to the impact of corporations activities consist of civil and political rights as well as economic, social and cultural rights. Therefore, in accordance with the character of each of these rights, the role of the corporation is not only negative, in the sense of not doing activities that violate human rights, but also has a positive obligation, namely to take actions in order fulfillment and promotion of human rights.

#### Conclusion

The development of CSR regulation in the constitutional law perspective has a very solid foundation. CSR is one of the efforts to achieve social Justices as one of the basis of the state. Second, CSR is a form of corporate constitutional obligation to respect and promote human rights. Third, CSR mandatory regulation can be justified because the state holds the primary responsibility for the protection and fulfillment of human rights, including establishing a rule that imposes a CSR duty to the corporation. Fourth, there is a potential violation of human rights guaranteed by the 1945 Constitution both civil and political rights as well as economic, social, and cultural. This requires the company's role in the protection and promotion of human rights.

Based on conclusions above, CSR is one form of the corporation's obligation to respect, to protect, to fulfill, and to promote human rights. In that perspective, CSR should be mandatory law not only for the corporation which manage or correlate with natural resource, but also for all corporations that operate in the middle of the society.

## BIBLIOGRAPHY

Augenstein, Daniel, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, The University of Edinburgh. [http://www.academia.edu/1366068/Study\\_of\\_the\\_Legal\\_Framework\\_on\\_Human\\_Rights\\_and\\_the\\_Environment\\_applicable\\_to\\_European\\_Enterprises\\_operating\\_outside\\_the\\_European\\_Union\\_Study\\_for\\_the\\_European\\_Commission\\_ENTR\\_09\\_045\\_2010\\_](http://www.academia.edu/1366068/Study_of_the_Legal_Framework_on_Human_Rights_and_the_Environment_applicable_to_European_Enterprises_operating_outside_the_European_Union_Study_for_the_European_Commission_ENTR_09_045_2010_), accessed 3/5/2013.



- Corbett, Angus and Peta Spender, 2009, *Corporate Constitutionalism*.. 31, Sydney Law Review.
- Edi Suharto, 2008, *Corporate Social Responsibility: What is and Benefits for Corporate*, Presented Paper on Conference “CSR: Strategy, Management and Leadership”, Jakarta 13-14 February.
- European Commission, 2011, *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions, A renewed EU strategy 2011 – 14 for Corporate Social Responsibility*, Brussel; European Commission.
- Jimly Asshiddiqie and Muchamad Ali Safa’at, 2012, *Teori Hans Kelsen Tentang Hukum*, Jakarta: Konstitusi Press.
- Lynch, Philip, 2006, *Human Rights and Corporate Social Responsibility, Submission to the Corporation Markets Advisory Committee Inquiry into Corporate Social Responsibility*, Melbourne: Human Rights Law Resources Centre.
- Rabet, Delphine, 2009, *Human rights and Globalization: The Myth of Corporate Social Responsibility?*, *Journal of Alternative Perspectives in the Social Sciences*, Volume 1, Nomor 2.
- Rawls, John, 1971, *A Theory of Justice*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press.
- United Nation, 2003, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 15, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.