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## **Legal Analysis of the Meaning of Fidelity and Fairness in Article 74 (2) of the Act of Number of 40 of 2007 on the Limited Company Against Implementation for the Company's Environment and Social Responsibility in Sustainable Development of Indonesia**

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### ***Abstract:***

*There is a reality of the existence of a company which has not had a significant impact on the welfare of society in Indonesia. It tends to damage the environment, whereas the obligation of the corporate social responsibility and environment has been regulated in The Act of Number of 40 of 2007 On the Limited Company. It is very important to perform a legal research comprehensively in particular with regard to the Meaning of Fidelity and Fairness in Article 74 (2) of The Act of Number of 40 of 2007 On the Limited Company against implementation for The Company's Environment and Social Responsibility in Sustainable Development of Indonesia. This research is a type of normative legal research focused on studying the rules in positive law with the approach of legislation, while the analysis used is the analysis of legal materials. The result of research shows that the meaning of fidelity and fairness for the fund to be budgeted the company if there is no benchmark how much the standard of payment, it means the such legal norms is ambiguous norms, and it does not guarantee legal certainty in implementation for The Company's Environment And Social Responsibility In Sustainable Development Of Indonesia, so there will be no certainty law that can ensure the company's objectives in creating a harmonious, balanced corporate relationship, in accordance with the values environment, culture and wisdom of the local community. It will be very difficult to achieve in a sustainable development in Indonesia.*

***Keywords:*** *The Limited Company, Fidelity and Fairness, legal certainty*

### **1. Introduction**

The existence of a company in the country, of course, will bring consequences for society, environment, and government. Both positive and negative. It is positive that the company will make a profitable contribution by increasing tax revenue, providing employment, increasing for the economy of the people, providing goods for the needs of the community, empowering the potential of natural resources. While it is negative that the existence of the company will actually cause harm to society and the environment, such as: damage to environment function, social problems, income gaps, the transition of land functions to the industry, and there are some people do not receive the benefit of the company. The positive thing about the company is a situation that is expected, but the negative company actually harm society and the environment, so this is an issue which is crucial and important to be solved.

Based on that argument, it is very important for company to have concerns on social and environmental issues, so company needs to have social responsibility. It means that the concept of the corporate social responsibility-CSR. The CSR of Indonesia, it is legally regulated in Article 1 of The Act of Number of 40 of 2007 On the Limited Company. In Indonesia legal system, The CSR is legally regulated in the article of 1 (3) of the Act of Number of 40 of 2007 On the Limited Company. This regulation does provide a commitment for the company to do role of sustainable economy development in Indonesia. It is very important to improve the quality of life and the environment, both for the Company and the local community.

In the fact, some companies think that the CSR will be implemented if the company has gained profit in the company's activity. This is a problem. It can lead conflict between company and local community which lives around the mining industry. The local community have felt direct impact of environmental damage, but the company has not yet contributed for the welfare of the community. Company's reason has not gained profit in the company's activity. On the other hand, the local community has also realized that their responsibility for every company against the community's economy of life. So that, every company is required to spend some of its fund for the purpose of community empowerment programs and environmental function preservation. Sometimes it becomes a 'weapon' for the community to pressure the company, under the pretext of pollution and environmental damage. Fundamentally, between the company and society is a unity of mutual need. (Bambang Rudito and Melia Famiola, 2013: v).

The reality of the existence of a company that has not had significant impact on the welfare of the community and tends to undermine the environmental function, while the obligation on corporate social and environmental responsibility has been regulated in The Act of Number of 40 of 2007 On The Limited Company, especially in respect of the meaning of fidelity and fairness, as regulated in Article 74 (2) of The Act of Number of 40 of 2007 On The Limited Company, is associated with the implementation of CSR.

## 2. Method of Research

This research uses normative legal research which is to examine basic norms in Indonesia's positive legal (Johny Ibrahim, 2008). This research, also uses regulation and conceptual approach (Peter Mahmud Marzuki, 2007). Regulation conceptual is useful for Indonesia regulation which concerned with legal issues of CSR, while the conceptual approach is used to analyze the meaning of fidelity and fairness In Article 74 (2) of The Act of Number of 40 of 2007 On the Limited Company against implementation for The Company's Environment and Social Responsibility in Sustainable Development of Indonesia. Therefore, the conceptual approach is based on jurists' opinion and legal experts' view. This research uses written legal materials as analysis instrument, containing primer legal materials such as Indonesia Regulations on CSR, and secondary legal materials such as text books, law journal, law article, and scientific paper on law. Authors analyse this topic research using interpretation of legal material substance based on legal theory and legal principle, in order to explain the Meaning of Fidelity and Fairness in Article 74 (2) of The Act of Number of 40 of 2007 On the Limited Company against implementation for The Company's Environment and Social Responsibility in Sustainable Development of Indonesia. Based on that argumentation, this writing's analyses in using of legal conceptual. The analytical technique in this research, uses qualitative argumentative analysis with normative point of view.

## 3. Result and Discussion

Result of research shows that Article 74 (2) of The Act of Number of 40 of 2007 On the Limited Company against implementation for The Company's Environment and Social Responsibility in Sustainable Development of Indonesia, it still does become a crucial problem. Authors can describe, as follows:

1. The Company which carries on business activities related to natural resources, shall carry out the CSR as obligation
2. CSR in the Article of 1 of The Act of Number of 40 of 2007, it does provide the obligation for the company. This obligation will be done in the perspective of fidelity and fairness.
3. The company which does not perform obligation in the Article of 1 of The Act of Number of 40 of 2007, will be subject to sanction in accordance with the provision of legislation of Indonesia.
4. Further provision on CSR, it is regulated by Government Regulation of Indonesia.

In the Article 74 (2) of The Act of Number of 40 of 2007 says that "*The Company which carries out its business activities in the field and/or related to natural resources is obliged to carry out the Social and Environmental Responsibility. The obligation to implementation of the CSR for each company, is to create harmonious, balanced, and matching relationships with the local environment, values, and the local culture*". Besides that, this article is clearly states that the company has obligation in CSR, especially business activities related to natural resources. Meanwhile, the company which performs its business activities related to natural resources, is a company which does not manage and utilize natural resources, but its business activity has an impact on the function of natural resource. Although it has been written in the Explanatory Section of Article 74 paragraph (1) that the purpose in the creating of harmonious, balanced and matching corporate which in relationship with the environment, values, culture of the local community. However, there are still some companies who feel to discriminate by Article 74 of The Act of Number of 40 of 2007, since it is deemed that CSR is only required for companies whose business activities are in the related to natural resources. These companies do material test towards Article 74 of The Act of Number of 40 of 2007 to the Indonesia Constitutional Court. The Article 74 is conducted against the spirit of Indonesia's 1945 Constitution.

In the Indonesia Constitutional Court's Decision of Number of 53/PUU-VI/2008, in its consideration, says that the destruction of natural resources and the environment in Indonesia, has reached a very alarming level for both present and future generation. Therefore, the role of the state by controlling the earth, water and natural resources, including to regulate in cultivating maintaining and controlling, is intended to build a sustainable environment (sustainable development). This is aimed at all stakeholders that should not be ignored.

In the Act of Number of 32 of 2009 on The Protection and Performance for The Environment, provides definition of sustainable development, namely the development which could provide the needs for present generation without diminishing the needs of future generation. Based on that definition, the concept of sustainable does integrate the social problem, economy, and environment. The concept of sustainable development, first published by The World Conservation Strategy (WCS) in 1980 located in Gland, Switzerland and became the center of thought for development and the environment. In WCS, sustainable development is defined as: maintenance of essential ecological processes and life support systems, the preservation of genetic diversity, and the sustainable utilization of species and ecosystems. The concept of sustainable development was then popularized through the report of the Bruntland Commission and the World Commission on Environment and Development (WCED) entitled Our Common Future. The report defines sustainable development as a development that meets the needs of the present generation without diminishing the needs of future generation to meet their own needs (World Commission on Environment and Development:1987).

In that concept, there are two important ideas. First, the notion of need, especially the essential needs of the world's poor, should be given top priority. Secondly, the idea of limitation, which stems from technological conditions and social organization on the ability of the environment to meet current and future needs. Thus, the purpose of economic and social development, should be realized in the idea of sustainability in all countries, both developed and developing countries. One of the factors that must be faced to achieve

sustainable development is to improve the environmental destruction without sacrificing the need for economic development and social justice, because economically, socially, and environment are the three pillars of interdependence in a concept of sustainable development (Totok Mardikanto, 2014: 15).

Budimanta (2005) states that sustainable development is a systematic and planned way of view of activity in the framework of improving the welfare, quality of life and environment of humankind without diminishing access and opportunity to future generation to enjoy and utilize it. In the process of sustainable development, there is a planned process of change, in which there is resource exploitation, investment direction, technological development orientation, all institutional change in aligned condition, and for the improvement of the present and future potential to meet the needs and aspirations of society.

Sustainable development not only concentrates on environmental issues, but also sustainable development encompasses three policies, namely: economic development, social development, and environmental protection (three sustainable pillars). UN document, especially the World Summit 2005 document, mentions the three pillars which interrelated for sustainable development. Ideally, these three can work together and become a spirit in sustainable development.

In the Article of 74 (2) of The Act of Number of 40 of 2007, states that: Social and Environmental Responsibility as referred to in this Article, shall constitute the Company's liability which is budgeted and calculated as the expense of the Company, whose implementation is conducted with due consideration to the properness and reasonableness. The provision of Article 74 (2) is further examined, it is undeniably a legal provision that "breaks" the principle of legal certainty and legal obligation established in this article. The phrase that the company's obligation is budgeted and calculated as the expenses of the company whose implementation is conducted with due regard to decency and fairness, has disqualified or undermined the spirit and goodwill of each company to provide real funds and CSR program. This argument, it raises a crucial discussion about whether the company's CSR is a legal obligation or merely a voluntary matter of any company.

Theoretically, the concept of responsibility relating to the existence of the company, it will be faced with two meanings of responsibility, namely first, responsibility in the sense of responsibility or moral or ethical responsibility; and the second is the responsibility in the meaning of liability or legal responsibility (Isa Wahyudi and Busyra Azheri, 2008: 97). The principle of responsibility in the sense of responsibility is more emphasis on an act which must be done consciously and ready to bear all risks or any consequences of actions based on moral. That is, responsibility is a responsibility in the narrow sense. It is only accompanied by moral sanctions. So, if the legislator makes the meaning of the principle of responsibility narrowly, of course, will affect the understanding of some companies that CSR is only limited moral responsibility which they embodied in the form of philanthropy and charity.

Different, if the meaning of liability, means the concept of responsibility within the legal context, which is usually manifested in the form of civic responsibility. According to Pinto, liability refers to the consequences of failure to meet certain standard, while the form of liability is manifested in the form of compensation and recovery as a result of damage or loss (Juanda, 2004: 105). In Indonesia civil law, the principles of responsibility can be described as follows: The principle of liability based on the element of error (liability based on fault); Principles of responsibility based on presumption of liability; Absolute liability or strict liability principle.

Thus, if the concept of CSR in the legal system of Indonesia, is not based on the principle of liability, but is merely the transfer of the language in the term Corporate Social Responsibility (CSR), the legal certainty to guarantee CSR the company, will be very difficult to realize, namely to create a harmonious corporate relationship, balanced, and in accordance with the cultural values of local community.

It is very difficult to determine a definite and accurate benchmark without being influenced by the element of subjectivity in the meaning of the word ... *paying attention to fidelity and fairness for the funds to be budgeted by the company* ... in article of 74, given the magnitude of the social impacts and environmental impacts caused by the utilization of natural resources. In fact, corporate activity tends to damage environmental function. Such legal norm is a form of ambiguous norm or does not guarantee legal certainty in its implementation.

According to Van Apeldoorn (1990: 24-25), legal certainty can be interpreted that a person will be able to obtain something to be expected under certain circumstances. Legal certainty is defined as clarity of the norm, so that it can be used as guidance for society that is subject to regulation. The definition of legal certainty can be defined that there is clarity and firmness towards the enactment of law in society. This is so as not to cause much misinterpretation. Legal certainty, is a behavioral scenario that is public and binding on all citizens including its legal consequences.

According to Sudikno Mertokusumo, legal certainty is legal guarantees which can be implemented, and who are legally entitled to obtain their rights, so that the legal decision can be implemented. Law with one another, should not be contradictory which not to be a source of doubt. Legal certainty can be a legal instrument of a state that contains clarity, does not create multiple interpretations, is not contradictory, and can be implemented, which is able to guarantee the rights and obligations of every citizen in accordance with the culture of society.

In a statutory legislation, it is necessary to have a strong language which is not multi-interpretive, thus becoming a blurred norm. Arief Sidharta called the blurred norm (*Vage Normen*) as "a vague sense". A vague understanding is the notion whose contents cannot be fixed precisely, so the scope is not clear (Arief Sidharta, 1999: 61).

According to authors, the meaning of "*Fidelity and Fairness*" In Article 74 (2) of The Act of Number of 40 of 2007 On the Limited Company, will displace the meaning of the uncertainty of the legal provision CSR, it will essentially obscure the subject, its object, and the scope of such responsibility. However, it is not to provide assurance of legal certainty in CSR realization.

#### 4. Closing

The concept of CSR in the legal system of Indonesia, tends to use the principle of responsibility not the principle of liability, so that the CSR does not become a legal obligation in the true sense, moreover the legislator of Indonesia puts the concept of the CSR as a form of voluntary.

The meaning of the word ... *paying attention to fidelity and fairness for the funds to be budgeted by the company* ... in article of 74, if there is no certainty of the standard, of course, it can become a legal norm that is ambiguous or does not guarantee legal certainty in implementation, so it cannot guarantee the legal certainty of the company's goal, that is to create a harmonious, balanced and suitable company relationship with the environment and values. cultural values of local communities in the context of the realization of a sustainable development order. Authors recommend to immediately revise Article 74 (2) of The Act of Number 40 of 2007 On the Limited Company, becoming a norm that can guarantee legal certainty for every company in implementing CSR.

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