The Significance of Good Corporate Governance Principles in The Company Law of 2007

IRWAN SUGIARTO

Sekolah Tinggi Hukum Bandung, Jalan Cihampelas No. 8 Bandung
email: irwansugiarto8@gmail.com

Abstract.The purpose of this research was to identified the principles of Good Corporate Governance (GCG) which have not been significantly regulated in the Act Number 40 of 2007 on Limited Company. The research characteristic was qualitative descriptive. The data that used were secondary data with primary, secondary, and tertiary legal materials which were collected through a literature study. The result show that GCG principles which have not been significantly regulated in the Act Number 40 of 2007 on Limited Company were transparency principles; the requirement of direction and commissioner council, not all companies must be audited, and empowerment of the company secretary role. Accountability principles: requirement and duty of the independent commissioner, duty of audit committee, nomination, remuneration. Responsibility principle: not all companies should do the social and environmental responsibility. Independence principle: the stockholder domination. Fairness principles: the protection of minority stockholders, and CSR.

Keywords: Significance, Good Corporate Governance, Limited Company.

Introduction

Community development is a mandate of the 1945 Constitution of Indonesia, so it must become the concern and responsibility of the government, business world (private and cooperative), and community (Rasyid; Saleh; Cangara; Priatna, 2015:507). The business world today is facing the strict and opened global competition with the rapid changes dynamics. To keep exist and develop properly, then the companies in various forms have to make changes by implementing good corporate governance which is commonly known as GCG.

According to Zarkasyi (2008:36) in Lestari, Pratiwi, and Ulfah (2015:222), GCG is a system and a set of rules that regulates the relations between the various stakeholders, especially the relationship between stockholders, the board of commissioners, and board of directors to achieving the corporate objectives.

GCG was first introduced in Indonesia by IMF (International Monetary Funds) in the context of economic recovery after the crisis (Effendi, 2016:7). The economic crisis which first happened in Asia region in the mid of 1997 caused a great impact for Indonesia, especially in August 1997 which Indonesian Rupiah loss in value of 27% (twenty-seven percent) over US dollars and the lowest point occurred in 1998. The crisis was having a devastating impact business activities in Indonesia (Tabalujan, 2002:143, in Khairandy and Malik, 2007:8).

The table below is a comparison of the GCG principles implementation in Asia in 2010 until 2014 *(http://www.acga-asia.org/public/files/CG_Watch_2014_Key_ Chart_Extract.pdf,* downloaded April 26th, 2016):

Table 1
Market Ranking & Scores, 2014

%	2010	2012	2014
1. Hongkong	65	66	65
2. Singapore	67	69	64

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3. Japan	57	55	60
4. Thailand	55	58	58
5. Malaysia	52	55	58
6. Taiwan	55	53	56
7. India	48	54	54
8. Korea	45	49	49
9. China	49	45	45
10. Philippines	67	40	40
11. Indonesia	40	37	39

Source: *Asian Corporate Governance Association (CG Watch, 2014)*

According to the table 1 above, it can be seen that the implementation of corporate governance (CG) in Indonesia decreased by 3% from 2010 to 2012, but further research in 2014 explained that the implementation of CG in Indonesia increased by 2%, however, Indonesia is still at the lowest position than the other countries. With the increased implementation of CG, it means CG practice encouraging a healthy competition and conducive business climate. To support economic stability and sustainable stability, then companies in Indonesia should be encouraged in the implementation of GCG.

Implementation of GCG can be driven by two sides, they are ethics and regulations. Ethical driven comes from the consciousness of individuals business to run a business practice that promotes the companies survival, the stakeholders importance and avoid the ways to create a quick profit. On the other hand, the regulatory driven "force" the company to comply the legislation. Both approaches have their strengths and weaknesses and should complement each other to create a healthy business environment (Daniri, 2006: ii).

The GCG principles are very important to be loaded as a legal requirement in the Act Number 40 of 2007, due to the legal framework staple which used as a basis to set up a business entity of Limited Company is Act Number 40 of 2007 on Limited Companies (Khairandy and Malik, 2007:133), which covers aspects of organization, business, and corporate culture (Fuady, 2008:39).

Observing the survey result as in Table 1 above, it turns out that Indonesia occupies the lowest rank of the eleven countries in terms of GCG implementation, it can be assumed that there are several principles of GCG that have not been significantly regulated in the Act Number 40 of 2007 on Limited Company (Company Law of 2007). To ensure that the principles of GCG are applied or contained in the articles of the Company Law of 2007, further assessments need to be done carefully.

The purpose of this research was to identified the principles of GCG which have not been significantly regulated in the Act Number 40 of 2007 on Limited Company.

Good Corporate Governance

Company or business entity has many meanings in the literature of economics, so, there are many concepts of CG in the literature. However, due to the focus that the CG is a company, then it requires a proper understanding of the meaning of the company. In order to explain the CG, then there are two main theories about the company, namely transaction cost economics theory and communitarian theory.

Transaction cost economics assumes that a company exists to minimize transaction costs in the market (Coase,1937). Coase indicates that the transactions in the market are expensive because there is the cost of the price mechanism and the cost for negotiating and also the closing costs for each transaction contract which agreed upon. Therefore, the company and the market is treated as an alternative means of 'governance'. Transaction cost economics, putting the contract issue, further developed into agency theory and incomplete contracting theory.

Based on agency theory, the company is a legal fiction that plays an important role in the process of directing different individual goals to balance within the framework of a contractual relationship (Jensen and Meckling,1976). Agency theory is based on the concept of separation between owners and management companies. Either the owner or the management is trying to maximize its own interests. Therefore, Jensen and Meckling (1976) state that management, as an agent of the fund's owner (principal), did not always act to maximize the interests of the fund's owner. This is what causes the agency problem. This agency problem would be incurring costs, the so-called agency costs.

Agency theory looked at the essence that the company is a contractual relationship with its all stakeholders: employees, creditors, customers and others. Therefore, Jensen and Meckling (1976) define the company as follows: "The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationship and

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which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals." This means that according to the agency theory, the company is not an individual, but a legal fiction which acts as the central process whereby the different objectives of the individual completed within a framework of contractual relations.

Agency theory is based on the separation between ownership and control. Fama (1980) states that the separation between ownership and control can be an efficient form of the company in terms of "a series of contracts" perspective. The company is a series of contracts that includes the way which inputs are processed to generate the output and the way which the results of the output is divided between inputs. In the perspective of 'nexus of contracts', the company ownership is an irrelevant concept and the management function is oversee the contracts among these factors and ensure the company sustainability (Wulandari, 2011:16-18).

From the explanation above, it can be concluded that according to the contracting theory, the company is a 'nexus of contracts' which negotiated between the parties concerned. To harmonize the interests of management and owners, contracting theory basing itself on a voluntary contract and market forces.

Meanwhile, according to the communitarian theory, the company is a 'legal entity' with social implications, political, historical and economic (Bradley, et al., 2000). This means that the company is an entity that has the right and responsibility as human beings who have the ability to perform activities of both good and bad. Therefore, these activities must be legally defensible.

The communitarian theory emphasizes justice and cooperation among community members. This theory argues that the rule of law is important to restrict the behavior of the manager. Without the law constraints, there is a possibility that management will not be responsible for both the shareholders and the society. Communitarians put more attention on the negative effects that arise when stakeholders do not have a chance to negotiate with the company in the form of a contract. Therefore, this theory emphasizes that companies should be responsive to all stakeholders. When contracting theory seeing the law as a way to ensure the independence and efficiency of the contract, communitarian theory seeing the law as a tool to ensure the justice distribution and the results obtained from the contract. The communitarian theory makes management accountable to the stakeholders of the company (Etty Retno Wulandari, 2011:19).

Based on the explanation above, it needs a good governance system in a company called GCG. CG term introduced by the Cadbury Committee in 1992 in a report which known as Cadbury Report. The report is seen as a turning point that determines the CG practice in the world (Tjager, 2003: 24). Cadbury Committee defines corporate governance as: "A set of rules that define the relationship between shareholder, managers, creditors, the government, employees and other internal and external stakeholders in respect to their rights and responsibilities" (Tjager, 2003: 26).

Corporate Governance Forum in Indonesia defines CG as: "a set of rules governing the relationship between shareholders, management (manager) of the company, creditors, government, employees, and other internal and external stakeholders which relating to the rights and obligations, or in other words, a system that controls the company. CG term arises because there is agency theory, in which the management of a company separate from the ownership" (Effendi, 2016:2).

Various definitions of CG above, have the same meaning which emphasis on how to regulate the relationship between all the parties concerned with a company that is embodied in the control system of the company.

The main purpose of GCG is adding the essential value for all stakeholders. These parties are internal parties which include commissioners, directors, employees and external parties which include investors, creditors, governments, communities and other parties concerned (stakeholders). CG in practice is different in every country and company, as it relates to the economic system, legal, ownership structure, social and cultural. This difference practice makes several versions which regarding the principles of CG, but basically have a lot in common.

Each company must ensure that the principle of GCG applied to every aspect of business and the entire company. GCG principles required to achieve sustainability of the company with regard stakeholders (KNKG, 2006:5).

The principles of corporate governance usually known by its acronym namely TARIF, Transparency, Accountability, Responsibility, Independence, and Fairness. Here's a brief description of each of the corporate governance principles: 1.Transparency Principle. Transparency requires the existence of an information which open, on time, and clear, and can be compared to the financial situation, the management of the company, operational performance, and ownership of the company; 2.Accountability Principle. Accountability is intended as a principle of governing the management roles and responsibilities in order to manage the company accountable and to ensure the balancer of management interests and shareholders, as overseen by the commissioners. Commissioners, in this case, give a control toward management about the performance and the target achievement for the shareholders; 3.Responsibility Principle. The company ensures the management to comply with the laws and regulations as a corporate responsibility and a good corporate citizen. The company is always seeking partnerships with all stakeholders within the limits of legislation and business ethics; 4.Independence principle. The company believes that independence is a necessity so that the company can do well and be able to make a good decision for the company. Each organ of the company will carry out their duties in accordance with the provisions of the applicable law and the principles of GCG. In addition to the company organ, there should not be any parties that could interfere with the company's management; 5.Fairness Principle. Fairness implies that there is an equal treatment for all shareholders, including foreign investors and minority shareholders, that all shareholders of the same class should receive the same treatment as well (Effendi, 2016:11-15).

Limited Company in the Perspective of Act Number 40 The year 2007 regarding Limited Company

Act Number 40 The year 2007 regarding Limited Company which replaced Legislation Number 1 of 1995 on Limited Company, approved by the Government on August 16th, 2007. The existence of the Company Law is expected to guarantee a conducive business climate because the limited company as one of the economic development pillars needs to be given a legal basis to spur national development.

Limited Company (LC) is an important business entity and there are many in the world, including in Indonesia. It is a legal entity that has the different properties and characteristics from other business forms (Surya and Yustiavandana, 2006:1-2). One characteristic that distinguishes LC with other business entities can be seen from the doctrine of separate legal personality which is the separation between the owner's wealth or investors (shareholders) with a legal entity wealth itself. The term "Company" refers to the capital which consists of holdings (shares), while the word "limited" refers to the responsibility of shareholders which does not exceed the nominal value of shares owned. In carrying out its activities, a company represented by the directors (agents) that appointed by the shareholders (principals). According to the agency theory, the agent must act rationally in the interests of his principal. The agent should use the expertise, wisdom, good faith, and behavior that are reasonable and fair in leading the company (Surya and Yustiavandana, 2006:2).

The company, in the Company Law of 2007 expressed as a legal entity which is a capital alliance, established under the agreement, engage in business with a capital base that is entirely divided into shares, and meet the requirements that set in this law and its implementing regulations to obtain the quick service.

Company Law of 2007 regulates the procedure of: application submission and granting legal status validation; application submission and granting the approval of changes in the constitution; delivery notification and receipt notification of changes in the constitution and/or notification and receipt notification of the other data changes, which is done through an information technology of legal administration system by electronic in addition to still possible using manual systems in certain circumstances.

Research Methods

This research was a normative law. The method used the legislation approach. The data source used the primary legal materials which consisted of legislations related to the research problems and secondary legal materials which consisted of materials that explained the primary legal materials

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consisting of books and literature relating to the corporate governance and the Company Law. The data collected by the study of literature. The data analysis in this study was a descriptive qualitative, the legal materials obtained then conducted into the discussions, inspection, and grouping into specific parts to be processed into information data, and then the conclusions made for answering the issues of research deductively that was general to the things that were specific.

Results and Discussion

Based on the research data, it is known that corporate governance principles that have not been significantly regulated in Company Law of 2007, as follows:

First, the transparency principle. Terms of directors and commissioners. In the Article 93 and Article 110 states that those who can appoint as directors and commissioners are those who are legally competent, but there are no other special requirements such as educational qualifications. While in Indonesia's Code of 2006, the board of directors and commissioners should be a professional, namely integrity, experience and skills required to carry out their duties. While the CG framework should ensure the disclosure timely and accurately for any material issues relating to the company, for example, information about financial statements should be prepared based on the financial accounting standards. Before the annual report submitted to the General Meeting of Shareholders, it shall be reviewed by the board of directors, then better knowledge of accounting must be owned by directors and commissioners to be able to read financial statements properly, because if the board of directors and commissioners are less able to read financial statements, then it will harm the investors and other stakeholders. Then about not all companies must be audited. Article 68 in the Company Law of 2007 stating that directors must submit a financial report to the public accountant to be audited, if: The company's business activity is collecting and/or managing public funds; The company issuing debt instruments to the public; The company is an open company; The company is state-owned; The company has assets and/ or the amount of circulation of business with a total value at least Rp.50.000.000.000,00 (fifty billion rupiah); or required by legislation. Likewise, the Article 121 did not require an audit committee establishment. Observing Article 68 and Article 121 of these, not all of the limited companies must be audited. Therefore, the financial statements that have been prepared by the board of directors and reviewed by the board of commissioners can be said to be doubted, whether it is in accordance with the financial accounting standards or not. Coupled with no obligation of forming an audit committee, while the task of the audit committee is vital in assisting the board of directors. The Audit Committee assists the Board of Commissioners to ensure that: the financial statements are fairly stated in accordance with accounting principles generally accepted; internal control structure is implemented properly; internal and external audit conducted in accordance with applicable auditing standards; and follow-up audit findings by management. Moreover, in implementing the principles of GCG requires full commitment from management that would involve the Board of Directors and Board of Commissioners. In addition to the board, there is still a role that is not less important, the empowerment of company secretary (corporate secretary), as stated in the Code of Indonesia in 2006 that the directors should ensure smooth communication between the company and its stakeholders by empowering the function of the corporate secretary for ensuring smooth communication between the company and its stakeholders. For a company whose shares are listed on the stock exchange, state enterprises, regional companies, companies that raise and manage public funds, a company whose products or services are widely used by the public, and companies which have an influence on the environment, must have a company secretary whose function may include investor relations. Then, in case the company does not have a working unit compliance separately, the function to ensure compliance with the laws and regulations made by the company secretary. The company secretary or executive functions of the corporate secretary is responsible to the board of directors, the company secretary duties implementation report is also presented to the board of commissioners. But on the substance of the Company Law of 2007, there are no norms governing the empowering role of the company secretary. Indeed by empowering the company secretary, continuity of a company can be assured and make it easier for every stakeholder to communicate with the company. In the absence of norms that governing educational qualifications, not all of the limited companies have to be audited, and the lack of the company secretary empowerment, then it indicates that the transparency principle is not significant enough stipulated in the Company Law of 2007.

Second, the accountability principle. Terms and duties of independent commissioners. Independent commissioner is the board of commissioners which come from the outside of the company (it has no affiliation with the company), selected in a transparent and independent, has integrity and sufficient competence, free from the influence that related to personal interests or others, and to act objectively and independently which guided by the principles of good corporate governance (Alijoyo and Zaini, 2004: 54). Indonesia's Code of 2006, which regulates the independent commissioners, is the commissioner who does not originate from an affiliated party and the presence of independent directors must ensure that the monitoring mechanism works effectively and in accordance with the legislation. One of the independent directors should have a background in accounting or finance. Article 120 in the Company Law of 2007 set and lifted independent commissioners, but the terms and duties of independent commissioners are not clearly defined in the Company Law of 2007. The existence of an independent commissioner is very important, because in practice often found a conflict of interest transaction which ignores the interests of minority shareholders and other stakeholders. Consideration of the independent commissioner existence is a perspective or settlement issues with the exclusion of personal interests and conflicts of interest. Independent commissioner based on rational considerations and prudence deserve the right to express opinions that are different from other board members which shall be recorded in the Minutes of the Board of Commissioners Meeting and different opinions that are material shall be included in the annual report. The following which has not been regulated in the Company Law of 2007 are the duties of the audit committee, nomination, and remuneration which is not clear. Indonesia's Code of 2006 sets a clear task and role of the audit committee, nomination, and remuneration. The task of the audit committee is to assist the board of commissioner in ensuring that: the financial statements are presented fairly in accordance with generally accepted accounting principles, internal control structure is implemented, the implementation of internal and external audit conducted in accordance with auditing standards applicable, and follow-up finding results of the audit carried out by management. Meanwhile, the role and duties of the nomination and remuneration committee are forming a board of commissioners in setting the criteria for selection of candidates for commissioners and directors and their remuneration system, helping the commissioners prepare the candidates for commissioners and directors as well as the proposed amount of remuneration. Separately, the task of the nomination committee is to identify, evaluate and nominate a new director on board, and also facilitate the selection of new directors by shareholders. While the remuneration committee in charge of determining compensation or salary or bonus for directors and commissioners. Nomination and remuneration committee has the independent director member in order to work effectively and objectively. The committee should hire advisor from external parties who directly report to the company's compensation committee. In Article 121 of the Company Law of 2007 known what was called the audit committee, remuneration committee and nomination committee which responsible to the board of directors, but the task and role are not clearly stipulated in the Company Law of 2007. Wahyu (2012:78) said that this provision has consequences that the implementation of commissioners control would be delayed, especially the whole company financial control in order to consider the interests of all company stakeholders, it is not paying attention to the majority shareholder interests, so that the function of the commissioner in order to carry out the principles of GCG becomes ineffective. In the absence of norms governing the terms and duties of independent commissioner and the duties and role of the audit committee, nomination, remuneration, it indicates that the values of the accountability principle in Indonesia's Code of 2006 have not been significantly stipulated in the Company Law of 2007.

Third, the responsibility principle. Social and environmental responsibility (CSR). CSR provisions in the Company Law of 2007, Article 74, and further regulated by Government Regulation Number 47 The year 2012 on Social and Environmental Responsibility. According to the Article 74, the company which obliged to implement CSR is the company that runs its business in the field of natural resources, company that

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manage and exploit natural resources. The natural resources are environmental elements that consist of natural resources and overall non-biological that affect the ecosystem. For example, plantations, forestry, oil and gas, mining, the timber industry and paper industry. But the explanation of Article 74 paragraph (1) is a company that runs its business activities related to natural resources, company that do not manage and use natural resources, but its business activities have an impact on the function of the ability of the natural resource. In the explanation of the article does not mentioned the criteria of business activities that have an impact on the functioning ability of natural resources, which can provide a loophole for the company who are not engaged in natural resources, whether the activities have an impact on the functioning ability of natural resources or not, so there is still some doubt whether a company is required or not to implement CSR. While in Indonesia's Code of 2006 states that every company is required to implement CSR. This shows that the responsibility principle as stated in Indonesia's Code of 2006 has not been significantly stipulated in the Company Law of 2007.

Fourth, the independence principle. The dominance of the shareholders. Indonesia's Code of 2006 confirms that for the smooth implementation of the GCG principles, the company must be managed independently so that each organ of the company not dominating each other and can not be interfered by other parties. Each organ of the company must avoid domination by any party, not affected by particular interests, free from conflicts of interest and any influence or pressure so that decisions can be made objectively. Each organ of the company must carry out its functions and duties in accordance with the statutes and regulations, not dominating and or shifting the responsibility from one to another. Organ company should perform its functions in accordance with the applicable provisions on the principle that each organ is independent in carrying out the duties, functions, and responsibilities solely for the company interests. Commissioners as an organ of the company in charge of and are responsible collectively for overseeing and advising the board of directors and ensure that the company implements the GCG. However, the board should not be participating in making operational decisions. The position of each member of the board of directors including the chief commissioner is equal. The main task of the commissioner as primus inter pares is to coordinate the activities of the board of commissioners. In performing its duties, the commissioner is complied to some of the juridical principles according to the provisions of the Company Law of 2007, which the commissioner as a supervisory board, the commissioner is an independent board, the commissioner does not have management authority (non-executive), the commissioner can not give instructions that bind to directors, and commissioners can not be ruled by the Annual General Meeting (AGM). But the Company Law of 2007 still determine that the Commissioner is appointed by the shareholders through the general meeting of shareholders, so morally the commissioners still have the duty of executing the will of the shareholders, in particular, the majority holder. Because the position of commissioner is dependent upon the shareholders through the AGM, so the positions of commissioners mean controlling the directors to carry out their duties according to the wishes of shareholders. In this position, the commissioner functions as the company controller from the shareholders through the AGM being ineffective. Thus it can be said that the commissioner organ is more intended as a guard of the majority shareholder interests so that directors not act out of these interests. This suggests that the dominance of shareholders, who are the independence elements, have not been significant enough regulated in the Company Law of 2007.

Fifth, the fairness principle. Protection of minority shareholders. The rights of minority shareholders stipulated in the Company Law of 2007 in Article 61 (1), Article 62, Article 79 paragraph (2), Article 97 paragraph (6), Article 114 paragraph (6), Article 138 paragraph (3), and Article 144 paragraph (1). However, these rights are not really a legal protection to minority shareholders as stated in Indonesia's Code of 2006. The interest of majority shareholder often contradict with a minority shareholder. It is common when minority shareholders are only used as a complement in a company. Minority shareholders can certainly lose in the decision-making mechanism, as a decision tree based on the percentage of shares owned and if the majority shareholders use this opportunity to control the company in accordance with its interests without regard to the interests of minority shareholders, it will harm the minority shareholders. The minority shareholders interests are forced due to the power of the majority shareholder to monopolize the course of the company's business. The majority shareholder power is found through the following ways: 1. By a majority vote at a general meeting of shareholders; 2. Through the appointment of directors sided with him; 3. Through the appointment of a commissioner who is also on his side (Fuady, 2008: 55). The next thing about the planning and implementation of CSR. Article 74 of the Company Law and Government Regulation Number 47 of 2012 did not regulate the planning and implementation of adequate CSR. Indonesia's Code of 2006 states that a company must fulfill its social responsibility in caring the communities around the company by making adequate planning and implementation. In addition, it also stated that the directors should have a clear written plan and focus on the implementation of corporate social responsibility. In fact, a tension between companies and communities around the company often occurred, as a result of the neglected commitment and implementation of CSR. Often the company interests differ from the public interests, companies and communities should have a reciprocal relationship with the implications: first, the company had a positive impact on society through its business operations. Second, external social conditions also affect the company. For the community, a good CSR will increase the added value, as it will create employment, improve the quality of the company's social location, and local workers absorbed will get the protection of their rights as workers. CSR is an important concept to be implemented by a company, it is intended to create a reciprocal relationship between companies and communities and the surrounding environment. Therefore, it is important to CSR spelled out in detail in the Company Law of 2007. In the absence of elaboration in detail in the Company Law of 2007 on the protection of minority shareholders; and planning CSR, this suggests that the fairness principle values in Indonesia's Code of 2006 have not been significantly stipulated in the Company Law of 2007.

Conclusions

Based on the results of research and discussion, it could be concluded that corporate governance principles which have not been significant enough stipulated in the Company Law of 2007 as follows: The transparency principle: the terms of directors and board of commissioners, not all of the limited liability companies must be audited, and empowerment of the company secretary role. The accountability principle: the requirements and tasks of the independent commissioners, the task of the audit committee, nomination, unclear remuneration, and CSR. The responsibility principle: not all limited companies were obliged to CSR. The independence principle: the dominance of the shareholders. The fairness principle: protecting minority shareholders, planning, and implementation of CSR.

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