

A COMPARATIVE STUDY OF INDONESIA'S AND NEW ZEALAND'S COMPANY LAWS

Tomi Suryo Utomo

Abstract

Company law will be an important policy for both the Indonesian Government and New Zealand Government in the future. This is because that law has proven to be extremely effective in developing companies' performance and improving the economic situation in these countries. This paper examines the similarities and differences of company laws in Indonesia and New Zealand. There are two reasons why Indonesia and New Zealand have been chosen for this paper. The first reason is that Indonesia and New Zealand reformed their company laws in the 90s. The second one is due to the similarity of the main source of company law in Indonesian and New Zealand, namely from the common law jurisdiction. Finally, this paper suggests that Indonesia should learn from New Zealand's experience which has a more comprehensive system of company law.

Introduction

The existence of New Zealand's Company Law 1993 brings a radical¹ and substantial² change to the field of company law in New Zealand. Through the introduction of several fundamental principles, such as shareholders' remedies and the solvency test, this Act places shareholders, in particular minority shareholders in a better and safer position compared to the previous act. This Act provides a more comprehensive system concerning the protection of minority shareholders. The new

¹ Richard Nelson, 'Company Law Reform in New Zealand' (1991) 19 *International Business Lawyer* 202.

² Peter Fitzsimons, *Australian and New Zealand On Different Corporate Paths* (1994) 8 *Otago Law Review* 267

Company Act of 1993 includes “a number of elements designed to improve the ability of shareholders to enforce their own rights or the rights of their company”.³

The Company Act, for example, introduces a minority buy-out right to protect minority shareholders from corporate changes that bring about disadvantages to them.⁴ This right, which is also called “appraisal right” in the USA and Canada⁵, enables shareholders to demand the company to buy their shares.⁶ Several important changes were also made by the New Zealand Government, such as directors’ duties and liquidation.⁷

Indonesia also followed this policy by launching the new Company Act in 1995, after the Indonesian government was heavily criticized by academics and practitioners because of the absence of acquisition and minority shareholders protection regulations in the Indonesian Commercial Code. It only consists of 21 articles concerning companies regulation in Indonesia and came into force in March 1996. Therefore, The Indonesian Company Law of 1995 constitutes an important step in legal development in Indonesia. Compared to the twenty first provisions of the Commercial Code which regulated company law before the new Company Act was launched, it appears that this law is more accommodating and reflects a modern concept of company law.

In 2007, the Indonesian government amended the Company Law of 1995. Several changes are made in the new company law. They include the general meeting of share holder, corporate social responsibility, director accountability and the liquidation of company. Among these amendments, corporate social responsibility (CSR) is assumed as the most important thing in the new Indonesian Company Act of 2007.

Since the enactment of the Indonesian Company Act of 1995, the Indonesian government decided the source of the Act is not limited to Civil Law tradition only but it tried to combine the Act with Common Law. This is parallel with a trend at international level where many countries adopt more than one legal system in their

³ Peter Fitzsimons, *The Companies Act 1993: A New Approach To Shareholder Litigation in New Zealand* (1997) 18 *The Company Lawyer*, 306.

⁴ David O. Jones, 1993, *Company Law in New Zealand, A Guide to the Companies Act 1993*, Wellington, Butterworths, at.77.

⁵ *Id.*

⁶ Article 111 of the Company Act of 1993. Also see David O. Jones, *Id.*

⁷ Gillespie Young Watson (Commercial, Property & Trust Lawyers, *The Companies Act 1993*, <http://www.gywlaw.co.nz> (last visited 11/01/09).

company laws. An example of this is ex-British Colony countries, called *Commonwealth countries*. In general, the British Law functions as *role model* for those. The tradition changes gradually.⁸ The example is New Zealand. Historically, this country adopts British Law. However, it starts adopting the US company law system as the source of its company law.⁹

This paper examines the similarities and differences of company laws in Indonesia and New Zealand. There are two reasons why Indonesia and New Zealand have been chosen for this paper. The first reason is that Indonesia and New Zealand reformed their company laws in the 90s and made several important changes into their company laws in 2007. The second one is due to the similarity of the source of the provisions which protect minority shareholders in Indonesian and New Zealand, namely from the common law jurisdiction (especially from the North American regime).

Overview Of Indonesia's And New Zealand's Company Laws

A. The Historical Background of Indonesia's and New Zealand's Company Laws.

Indonesia

The existence of company law under the Indonesian Commercial Code was often criticized by practitioners and academics both in Indonesia and overseas, arguing that this Code, which was a heritage of the Dutch Colonialisation era, is outdated and cannot cover the new development of companies law, such as Holding Company, Joint Ventures, Merger, Consolidation, Acquisition and other issues dealing with shareholder protection. Consequently, this law only provides weak protection for business people and consumers who become the minority shareholders of a company.

In realizing that the Indonesian Commercial Code is insufficient to regulate economic activities, the Indonesian government has taken a serious step to reform the contents of company regulation in the Commercial Code since the 1960s. In 1961, for

⁸ Cally Jordan, 1997, *International Survey of Corporate Law in Asia, Europe, North America and the Commonwealth*, Melbourne, The Centre for Corporate Law and Securities Regulation (Faculty of Law, University of Melbourne), at 112-113.

⁹ *Id.*, at 113.

example, the government through LPHN¹⁰ formed a committee chaired by Prof. Sukardono to reform the Indonesian Company Law. However, at that time, this committee did not succeed in making a new company law. In the next years, the government again formed other committees to complete the works of previous committees, namely: (a) a committee formed by the Ministry of Justice (1965); (b) an intern committee in the Ministry of Justice (1969); (c) a committee formed by LPHN (1971); (d) a committee to form the bill of the Indonesian Company Law (1971) and; (e) a committee formed by the Ministry of Justice (1975).¹¹

Even though these committees worked hard to try to reform the Company Law through several papers and reports, until the 1990s the new Indonesian Company Law could not be realized.

This situation, of course creates some problems for businesspeople in Indonesia because in practice the company law develops rapidly and many aspects of this development cannot be regulated by the Commercial Code which was made in the mid-19th Century. To handle the problem regarding this new development which “occurs outside the codes”,¹² in the 1970s to 1990s, the Indonesian government tried to pass several regulations, such as government regulations, the decrees of ministry, and circular letters.¹³

In 1971, for example, the government passed the Act No. 4 of 1971 in which one of articles replaced article 54 of the Commercial Code concerning shares. Under this Act, the outdated shares regulation in the Code changed to the principle “one share one vote”.¹⁴ The main reason for this replacement was to attract foreign investors to invest their capital in Indonesia.

On 22 December 1987, the government released a deregulation package called the December package in order to cover some development in company activities. This package consists a several provisions, such as government regulations,

¹⁰ LPHN is the acronym of Lembaga Pembinaan Hukum Nasional (the Body of the National Legal Development).

¹¹ Jusuf Anwar and Felix Oentoeng Soebagjo, *Ke Arah Undang-Undang Perseroan Yang Baru Suatu Sumbangan Pemikiran* (Toward the New Company Law) (in Sumantoro, 1986, *Hukum Ekonomi* (Economic Law), at 283-4.

¹² Corporate Law (1987) International Business Lawyer, 80

¹³ *Id.*

¹⁴ Jusuf Anwar and Felix Oentoeng Soebagjo, *supra* note 10, at 284.

presidential decrees, presidential instructions, ministers decrees, decisions of the chairman of the Coordinating Board for Investment and decrees of Bapepam.¹⁵

Another important event which happened in the 1980s was when the Ministry of Justice issued a publication in 1987. The content of this publication is closely related to Article 47 of the Commercial Code. According to the publication, the existence of Article 47 of the Commercial Code, which regulates “the matter of the company’s dissolution by operation of law”, is regarded to be ‘a dead letter’. The main reason for this was because this article no longer functioned in a company’s activities in Indonesia.¹⁶

In order to regulate the practices of merger, consolidation and acquisition which are not regulated in the Commercial Code, the government launched several regulations in 1993. An example of this is the Decree of the Minister of Finance No. 222/KMK/017/1993. Under this decree, some practices of “mergers and consolidations involving banks” are covered.¹⁷

After the beginning of the 1990s, however, this situation can be no longer maintained. This is because of the increasing pressure of businesspeople and academics to ask the government to enact a representative and modern company law as soon as possible. This was successfully realized in 1995 when at that time the government passed the New Indonesian Company Law called “Undang-Undang Perseroan Terbatas (UUPT)” or the Indonesian Limited Liability Company. This law came into force in March 1996. The most interesting phenomenon is the existence of the new Indonesian Company Law, which is a mixture of the principles of civil law jurisdiction (Dutch and German models) and common law jurisdiction¹⁸ (in particular the North American regime). Examples of common law principles in this Act are the protection of minority shareholders, director’s duties and fiduciary duties.

¹⁵ Kartini Muljadi, *Law of Corporations (Indonesia)* (1989) International Business Lawyer, 40.

¹⁶ Kartini Muljadi, *Law of Corporations (Indonesia)* (1987) International Business Lawyer, 494. “Article 47 of the Commercial Code provides that if a company’s aggregate losses constitute 75 per cent or more of its authorised capital the company shall be considered dissolved by operation of law” (*Id.*, at 494).

¹⁷ Kartini Muljadi, *Mergers and Acquisitions Supplement* (1996) International Financial Law Review, available in Lexis Nexis, Market Library, ALLNWS File.

¹⁸ See Benny S. Tabalujan, *The New Indonesian Company Law* (1996) 17 University of Pennsylvania Journal of International Economic Law 908; Timothy Lindsey, *Indonesia Commercial Law: Companies & Banking*, available in reading materials of Commercial Law in the South East Asia, 3.1; Austin I. Pulle, *The New Company Law of Indonesia* (1996) 17 The Company Lawyer 122.

In order to realize good corporate governance, the Indonesian government amended the Company Law of 1995 in 2007. Several changes are made in the new company law. They include the general meeting of share holder, corporate social responsibility, director accountability and the liquidation of company. It is hoped that the existence of the new company law can provide a better protection and legal certainty for businesspeople.

New Zealand

Historically, the process of the development of New Zealand's Company Law can be divided into three periods: (1) 1860-1960s (adopting English company legislation); (2) 1970s (considering the Australian model); (3) 1980s-1990s (adopting the North American regime)¹⁹

1860-1960s (Adopting English Company Legislation)

It cannot be denied that the UK Company Law played an important role in forming New Zealand's Company Law from 1860-1960s. During this period, the Company Act was inspired by the UK Company Law which led New Zealand's Company Law to be "a mirroring of English Company Legislation".²⁰ This fact was mainly caused by the policy of the New Zealand government, which was to maintain "the uniformity of New Zealand company within the British Commonwealth".²¹ As a result of this policy, in 1933 the government enacted the Company Act which employed the UK Company Act 1929 as its model.²² This tradition was still maintained by the government in the next twenty two years, when the New Zealand government passed the Company Act of 1955 which "was almost an exact copy of the United Kingdom Act of 1948".²³ In practice, the Company Act 1955 was successful enough in regulating company activities in New Zealand in terms of developing "the conduct of business affairs which were not contemplated when the Act was passed".²⁴ Examples of this are the increasing takeover offers and business investment by way of deposits.²⁵ Apart from this success, the Company Act was also criticised when the Act

¹⁹ Peter Fitzsimons, *supra* note 2, at 267

²⁰ *Id.*

²¹ *Id.*; Cally Jordan, *supra* note 8, at 37.

²² Cally Jordan, *Id.*.

²³ *Id.*

²⁴ New Zealand, 1973, *Special Committee to Review the Companies Act, Final Report* (The MacArthur Report), Wellington, Government Printer, at 10.

²⁵ *Id.*

created some problems which “arise under section 102 as regards the registration of charges created by companies and these matters still await legislative cure”.²⁶

1970s (Considering the Australian Model)

Through a special committee (“the Mac Arthur Committee”) formed in 1968, the New Zealand government tried to reform its Company Law during the 1970s.²⁷ At that time, the Committee focused on “correcting specific problems that had arisen over time” but they did not pay much attention towards introducing important and new fundamental principles.²⁸ As a consequence, the committee’s works are regarded as the works which “did not provide the substance for the proposed reforms”.²⁹ An interesting phenomenon which happened during that time was the effort of the New Zealand government to consider the Australian Company Law as a model for the New Zealand Company Law reform. Beside this, the government started to “move away from a consideration of English Company Law”.³⁰ The main reason for this is because since the 1960s, the volume of trade between New Zealand and Australia has increased but the trade level between New Zealand and the UK has decreased.³¹ Another interesting phenomenon happened in 1978 when the New Zealand government enacted the Securities Act 1978. This hints that New Zealand was starting to abandon the tradition of adopting the UK Company Law and trying to look at other company laws, in particular the North American regime.³²

1980s and 1990s (Adopting the North American Regime)

At the beginning of the 1980s, New Zealand and Australia both signed “the Closer Economic Agreement (CER)”, which was an important step for both countries.³³ To follow up this agreement, they created a policy of harmonizing legal systems in their countries, including company law.³⁴ However, in the following years, the development of company laws in these countries has taken different paths.³⁵ This

²⁶ *Id.*

²⁷ Cally Jordan, *supra* note 22, at 37, *see also* Peter Fitzsimons, *supra* note 19, at 275.

²⁸ Cally Jordan, *Id.*

²⁹ Peter Fitzsimons, *supra* note 27, at 275.

³⁰ *Id.*

³¹ *Id.*

³² Cally Jordan, *supra* note 28, at 38.

³³ Peter Fitzsimons, *supra* note 31, at 279.

³⁴ *Id.*

³⁵ *Id.*

is because the New Zealand government chose not follow the Australian Company Law for several reasons.

The first reason is connected with the fact that the Australian legislation is deemed as “outdated and dense in form”³⁶ and also “complex and difficult”.³⁷ The second reason is that the Australian law was considered to be “in a state of flux”.³⁸ The third reason is that “the Australian law was not a sufficient advance in relation to capital rules and directors’ accountability to justify using it as a model for reform”.³⁹

As an alternative for its company law reform, New Zealand finally adopted the North American regime. This option was influenced by the political and economic relationship between New Zealand and North America during the 1980s.⁴⁰ The result of this climate was the birth of the New Zealand Company Law 1993, which is heavily influenced by the North American Corporates Law. Example of this is the solvency test, which is an adoption of the principle of the North American regime.⁴¹ the existing New Zealand Company Act of 1933 is also assumed to be an important development in regulating companies activities in this country where this law is more oriented to “North American Regimes for inspiration” and for the first time left the tradition of adopting the UK Company Act as a model.⁴² Even though during the drafting process this law had been criticized as “having lost its integrity”⁴³, the Act is in fact more progressive and sensitive in responding to the needs of businesspeople by regulating some new developments of companies activities that cannot be found in the previous law. Under this law, therefore, several aspects have been introduced, including: Abolishing the distinction between private and public company; Allowing a company is owned by a shareholder; Abandoning the doctrine of capital maintenance; Changing the basis of association from a contractual agreement to a statutory regime; Changing shareholder remedies from traditional common law

³⁶ New Zealand Law Commission, *Company Law Reform and Restatement*, NZLC R.9, Wellington, 1989, 11 (in Peter Fitzsimons, *supra* note 34, at 280).

³⁷ *Id.*, at 38 (in Peter Fitzsimons, *supra* note 35).

³⁸ *Id.*, at 11 (in Peter Fitzsimons, *supra* note 35, at 281).

³⁹ *Id.*, at 37 (in Peter Fitzsimons, *supra* note 35, at 282).

⁴⁰ Peter Fitzsimons, *supra* note 35, at 284.

⁴¹ *Id.* “During the three year period which commenced on 1 Juli 1994 and runs through to 30 June 1997, two separate core company law statutes are in operation in New Zealand in parallel. These statutes are the Companies Act 1955 (the “1955 Act”) and the Companies Act 1993 (the “1993 Act”). At any particular time in this three year period, a company is governed by the rules in the 1955 Act or the 1993 Act, not both. By 1 July 1997, the new regime (in the 1993 act) will have superseded the old regime (the 1955 Act)”. [Andrew L. Hames, ‘New Zealand’ (in Sheila Buckley (Ed.) and Dennis Campbell (Gen.Ed.), ‘Protecting Minority Shareholders’, (1996) 461)].

⁴² Cally Jordan, *supra* note.32, at 4.

⁴³ *Id.*

remedies to statutory remedies; Regulating duties of directors in a statutory; Introducing the principle of a core Act to New Zealand's Company Act of 1993.⁴⁴

In late 2006, the New Zealand Government made several changes in the Companies Act 1993, such as changes in annual reporting to shareholders, requirements for a concise annual report and exemption from filing information for certain overseas companies. Another amendment was also made, such as disqualification of directors who have been disqualified from acting as directors in Australia.⁴⁵ In order to give effect to those changes, the Governor-General made orders and regulations on 14 May 2007.⁴⁶

B. THE INDONESIAN AND NEW ZEALAND COMPANY LAWS: PROBLEMS AND PROSPECTS

The Problems

Despite its success in accommodating several developments of company activities, the existing Indonesian Company Law still has some problems. The first one is linked to the fact that this law, like in other civil law jurisdictions, regulates companies' activities in general sense and detailed provisions will further be regulated by the implementing regulations, such as government regulation. But some detailed provisions which specifically regulate the existence of companies in Indonesia have not yet been made by the Indonesian government. The example of this is Corporate Social Responsibility (CSR).⁴⁷ Several problems such as institutions which are responsible for CSR and involve in reviewing the application of CSR in Indonesia should be solved by providing sufficient information about the procedures for undertaking CSR.

The second problem is closely related to the principle of two-tier company management which has been maintained by the Indonesian government in its new Company Law. It cannot be denied that this principle, which comes from the civil law jurisdiction, can create difficulties for the government in terms of legal harmonization

⁴⁴ David. O. Jones, *supra* note 4, at vii.

⁴⁵ Richie Flinn and Tim Matthews, *New Zealand: Changes In Annual Reporting Reduce Costs For Firms: Business Law Reform-Regulations And Commencement Orders*, at 1-2, 12 June 2007, <http://www.mondaq.com/article.asp?articleid=49046&print=1> (last visited 10/01/09).

⁴⁶ *Id.*

⁴⁷ Under the Article 74 of the Indonesian Company Law of 2007, Social Corporate Responsibility is called "Tanggung Jawab Sosial dan Lingkungan " (Environment and Social Responsibility).

with other jurisdictions, in particular the Anglo-American Regime. This is because there is an obvious tendency for this principle to be left by most advanced countries, such as the USA, Canada and New Zealand where they now allow a company to be owned by a shareholder. Another possible problem concerns to the protection of minority shareholders which adopts the common law jurisdiction.⁴⁸ The problem that may arise is connected with the fact that Indonesia is a civil law country and “its courts are unfamiliar with the vast body of common law decisions that define abstract legal concepts”.⁴⁹ Furthermore, this can create legal uncertainty for foreign investors and “the law could undermine investor confidence in Indonesia”.⁵⁰

Like Indonesia, several problems can also be found in the existing New Zealand Company Law. First, reregistration that is obliged by the Company Law of 1993, can create some difficulties for shareholders. According to Jones there is a possibility that “some shareholders lose special rights or privileges contained in the Memorandum of Association (“the Memorandum”) or the Articles of Association (“the Articles”) which cease to have effect on deemed reregistration (cl (a) of the Schedule to the Companies Reregistration Act 1993)”.⁵¹ To explain this possibility, he gives two examples that may arise as follows:

1. A company which has several classes of shares on issue. The provisions in the schedule to the Companies Reregistration Act 1993 do not differentiate between different classes of shares. As a consequence, all shares of the company will have the same rights, namely those set out in s 36 of the Companies Act 1993. In these circumstances, a preference shareholder would be prejudiced as a result of deemed reregistration because that shareholder would not longer have preferential dividend rights.⁵²
2. A company which has pre-emptive rights contained in its Articles requiring a vendor shareholder to offer his or her shares to the remaining shareholders. The provisions of the Companies Reregistration Act 1993 do not preserve such pre-emptive rights.⁵³

⁴⁸ Austin I. Palle, *The New Company Law of Indonesia* (1996) 17 The Company Lawyer 122.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ David O. *supra* note 44, at 2.

⁵² *Id.*

⁵³ *Id.*

Secondly, the distinction between personal right and derivative right in the New Zealand Company Act 1993 can raise a problem for courts and plaintiffs, in terms of “determining whether a person is precluded from bringing a derivative action because he or she has a personal remedy in respect of the same facts”.⁵⁴

Beside this, the existence of the New Zealand Company Act 1993 can also create problems due to the absence of several provisions in this Act. Liability for shares issued on incorporation, for example, is not clearly regulated in the company Act 1993.⁵⁵ Another example is compulsory acquisition provisions. Under this Act the provision of allowing a shareholder to own 90 per cent of the shares in a company compulsorily which was regulated in the previous Act (the Companies Act 1955) is not included in the new Act.⁵⁶

The Prospects

The existing Indonesian Company Law is “a unique legislative mix of civil and common law concepts”.⁵⁷ Because of this nature, two future developments resulted from the existence of the Company Law. First, the Company Law can be used as an appropriate vehicle to attract foreign investors both from civil law and common law countries to invest their capital in Indonesia. This is understandable because the content of the Company Law is familiar for investors who come from these jurisdictions, such as the USA, Canada, the UK, Australia, Germany, France and Japan. Secondly, the existing Company Law can cover some developments as a result of commercial activities which will occur in the future. This is because the Act regulates companies’ activities in a general sense. Apart from its weakness, the flexible nature of this Act can avoid ongoing amendment due to rapid development in the commercial world.

As in Indonesia, the New Zealand Company Act also has good prospects for two reasons. First, this Act adopts the US Model Business Corporation Act and the Canadian Business Corporation Act.⁵⁸ As a consequence, some principles which develop in these countries can also be found in New Zealand’s Company Act.

⁵⁴ *Id.*, at 133.

⁵⁵ Julie Crangle, Rudd Watts and Stone, *Amending the Companies Act 1993* (1997) New Zealand Law Journal, 96.

⁵⁶ *Id.* For detailed information about the problems that may arise due to the contents of the New Zealand Company Law, see Julie Crangle, Rudd Watts and Stone’s paper.

⁵⁷ Benny S. Tabalujan, *The New Indonesian Company Law* (1996) 17 University of Pennsylvania Journal of International Economic Law 908.

⁵⁸ Richard Nelson, *Company Law Reform In New Zealand* (1991) International Business Lawyer, 202.

Furthermore, this can bring about positive impacts on the legal development in New Zealand in terms of legal harmonization with the US and Canada. Secondly, the similarity of the New Zealand Company Act with the US and Canadian Corporation Laws can also create a good climate for foreign investment in New Zealand. Furthermore, in recent years foreign investors who come from the USA and Canada have been the most important business partners for the New Zealand government.⁵⁹

CONCLUSION

Company law will be an important policy for both the Indonesian government and New Zealand Government in the future. This is because that law has proven to be extremely effective in developing companies' performance and improving the economic situation in these countries. In particular, for Indonesia, company law is an effective instrument to help overcome businesspeople problems.

In regard to the company law, it seems that Indonesia should learn from New Zealand's experience which has a more comprehensive system. Therefore, the regular amendment of company law should be a priority in the legal development policies of Indonesia in the near future to adjust to rapid and global changes in international trade.

⁵⁹ According to the Overseas Investment Commission, the USA is one of the biggest foreign investors in New Zealand. (Chuang Peck Ming, *Singapore Now One of Top Foreign Investors in NZ*, Business Times (Singapore), available in Lexis Nexis, ASIAPC Library, ALLASI File).

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