

The Presence of Government in Managing SOEs: A Criticism from the Perspective of Law

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ABSTRACT.

Referring to Article 33 of the 1945, government Constitution establish and control production sectors affecting sustainable livelihoods of most people. As legal state, government consider enforcing Law number 19 of the Year 2003 about SOEs, due to the inferior role of SOEs. The article addressed the research problem concerning the role of law in repositioning government in the SOEs management. The method applied was normative juridical with library research. The result showed that SOEs were treated differently from other private business because of their status as state enterprises. The society expectation to gain benefits from the SOE still cannot be optimally fulfilled. Issues concerning the bureaucracy and centralism, politic, and various potential deviations are parts of the non-optimal role of SOEs as business entities. The presence of the government as an authority with the power to issue regulations must be able to improve the performance of SOEs to be more effective and efficient to prosper the people. In conclusion, the presence of the government in the management of SOEs has not yet improved the performance of these state companies in achieving their founding goals. It is necessary to reformulate the position and controlling of the government in managing the SOEs as mandated in the constitution.

Keywords: *management of SOEs, government, law*

1. INTRODUCTION

The phenomenon of SOEs applies in any economic system. As SOEs adopt many economic systems, either market mechanisms, social democracy, or capitalist, the role of SOEs varies greatly in various countries.[1] The position of government in supervising and controlling is to ensure the effective social control mechanisms to take further actions against the management proved unable to provide services and goods in an accountable, fair, and well-organized manner [2]. Nevertheless, SOEs has the potential to be a strategic organization to achieve political goals of government.

Political economy system of a country shows how the management of SOEs in general. The current Indonesian economic system implies state involvement. This condition can be observed in the management of SOEs, aiming to realize the prosperity for the people. The establishment of SOEs in Indonesia plays two main roles: firstly, as a profit-oriented state company to increase the state income and foreign exchange for the state; secondly, as a tool for the government to provide services to the people in the effort to conduct public welfare. [3] The dualism of SOEs roles is in line with division of types of SOEs into public and corporate companies.

SOEs management system is part of the economic policy. The availability of efficient economic institution is an achievement in economic development. Efficient

market mechanism also reflects the economic institution. Efficient market requires structuring or organizing for the economic institutions to be more efficient, effective and transparent.

The policies concerning the management of SOEs in Indonesia should grant certainty in conducting business. Law will play its role in economic development if it can create three qualities, i.e. predictability, stability, and fairness. First, predictability means that the law grants certainty about the action taken. Second, stability means that the law can accommodate competing interests in the community. Third, law must be able to create fairness. If there is no standards concerning what are fair and good, then the older power can lose its legitimacy.[4]

The establishment of Law Number 19 of the Year 2003, as a legal standard for SOEs management has not made SOEs more optimal since it is still unable to achieve the objectives. Various problems raise in the journey of SOEs because government is dominant in the management system. This condition leads to the unclear position of SOEs as an incorporated organization. Whether it is a business with full autonomy or only as the executors of the organizational structure of a separate department in the government. This paper will discuss the role of law in repositioning the government's position over the management of SOEs.

2. SOEs AS THE PILLAR OF INDONESIAN ECONOMY

Since the first decade of the independence revolution to date, SOEs have contributed greatly to progress and development of national economy. Looking back on the early days of independence, when the private business sector had not run effectively due to unorganized political and economic situation after the struggle for independence, government relied on SOEs to supply goods and services as well as build infrastructures. At that time, we can say that SOEs was the main pillar for the national economy and development. In the next period, the role of SOEs was still significant for the development of the national economy, such as taking a critical and risky role for the development of underdeveloped sectors that was untouched by private companies. This way, many government assignments allocated to SOEs to conduct pioneering development projects and SOE was known as an agent of development with all their strengths, weaknesses, and various controversies.[5]

The role of SOEs in carrying out such assignments leads to their positions as the agent of development. As business entities, the existence of SOEs do not only perform for profit-oriented goals, but also prioritize the public interests through the construction of projects involving the interests of the people. At the same time, SOEs also constitute as the source of income for the country, which have a huge number of assets at various scales and types of business, and have operational areas covering almost all regions of Indonesia.

SOEs have unique characteristics in their positions as the organizations. On the one hand, as agent of development, SOEs are expected to carry out government policies and programs, while on the other hand they must continue to function as commercial business units operating based on fair business principles. In some cases, the ambivalence of the two functions often fails to run in harmony. This condition is potential to confuse the perception of the management team of SOEs causing the management some difficulties to determine strategic and operational steps.[6]

The main role and duty of the State related to the existence of SOEs in the Indonesian economy is to improve efficiency, equity and ability to realize the main objectives of SOEs establishment. The consistency in achieving the objectives and expectation for SOEs establishment must be the priority for both State and business entities. The involvement of the State in managing strategic production activities is interpreted as an effort to prosper the people. Since its establishment, SOEs have been expected to be the pillars of the Indonesian economy

3. IMPLICATIONS OF THE GOVERNMENT'S PRESENCE IN SOE'S MANAGEMENT

Article 1 point 1 Law Number 19 of the Year 2003, stipulates that SOE is categorized as a business entity whose entire or most of the capital is owned by the state

through direct participation from separated state assets. This provision emphasizes the government's position as a part of SOEs management, formed by targeting social objectives and profit-oriented activities. SOEs as business entities that are generally managed privately have special conditions in certain matters that provide spaces for public to take parts in the management system.

The basic thought is that government as public organizer have incentives related to social goals. One of the principles in public mechanisms is to target social goals need to be provided to groups or communities. Sometimes, there may be gap or difference between the interest and goals of the state as the owner and as a businessmen. The real challenge is to find the precise balance of political influence and management capacity to take action.[7] This situation is the complexity of the position of the state as a businessmen in achieving the two different objectives.

SOEs have special characteristics with complex and conflicting objectives, strong political intervention, and lack of transparency causing SOEs to practice unique governance compared to private sectors. From the state side, there are challenges, such as many interests of various state agencies / ministries interfering the SOEs management. In term of the supervisory board, the challenges are their weak authority to oversee the board of directors as well as their position as bureaucratic officials with limited time to oversee the SOEs. While on the management, SOEs managers frequently meet the challenges of poor remuneration systems and low management discipline.[8]

Certain SOEs are more concerned with playing the bureaucracy role, which should actually be undertaken by government and thus ignore the main business as an operator in business management and development. With the additional role as a regulator, SOEs are trapped in bureaucratization so that they are not competitive when they have to compete with private companies with effective and efficient performance. This circumstance is due to the over-protection granted by government that lead SOEs to be complacent, stagnant, and either creative or innovative. The privileges given to SOEs are not only the role as businessmen but also as regulator role.[9]

SOEs encounter many big problems and hard challenges, for instance: most of SOEs suffer from significant losses due to inability to compete in business competition both in domestic and international markets. This condition is an expense on state finance because SOEs are not managed under the principles of good business management due to the dominant government intervention in the company's operations.[10]

Politicians established the policies that does not support the development of SOEs because they use SOEs to support their political positions through excessive works, targeted regional investment, and deliberately apply underpricing or overpricing of goods purchased (from politically arranged suppliers). Politicians have tendencies to bribe managers, and vice versa, managers have incentives to bribe politicians for promotion or arrangement of ownership in the office, so that the

corruption emerges in such an endogeneity in this case. Since politicians must be responsible for some of the economic inefficiency costs they promote, but in this situation they see most of the benefits (politics), and they have less concerns to pursue meaningful changes.[11]

The involvement of the bureaucracy with their interests frequently become a deviation factor in policy direction through formal policies, which are detrimental to SOEs. Many bureaucrats in SOEs experience difficulties in distinguishing themselves as bureaucrats or company professionals, thus causing political costs difficult to measure. Large assets that are not supported by the optimization of the benefits will result in over-investment and wasting money, which is burdensome for SOEs and the state. The convenience of the state in the form of subsidies provided to SOEs is equivalent to the cost for many people, while the social nature of SOEs has not made a significant contribution to society.

SOEs have strategic positions with their natural monopoly status that revenue comes from captive markets rarely owned by the private sector. This condition enables the opportunities for the management of SOEs to utilize their positions for personal gains. SOEs as the agent of development are allowed to expend considerable cost only for the development, this action will allow great opportunities for deviations in the management of SOEs. Leaks and deviations that often occur in SOEs include: (1) taking up fictitious expenditure posts to accommodate political costs (2) additional costs that are not relevant to SOEs core business (3) unreasonable spending and abnormal business aspects causing SOEs being a high-cost business (4) over-investments raising continuous costs throughout the lives of SOEs.[12] The privileges granted by the state to SOEs make them insensitive in responding the business environment, weak in competition, slow in taking actions and decision-making, and thus lots of momentum end in a loss. Long-term involvement of the bureaucracy in SOEs cause difficulties for directors to act objectively.

4. THE ROLE OF LAW IN REALIZING SOE'S EFFICIENCY

The economic policy constitutes a political decision since it affects the distribution of wealth and income in society. The ruler will determine the economic policy and will make decisions from the various alternatives to solve economic problems. Therefore, who governs is crucial in determining economic policies, while determining who governs is a political product.[13] This pattern of patron-client relations also shows that in determining economic policies, the interests of nation-state are not the most dominant. This situation shows that the law really does great efforts to tame the power, however in certain context, the power can make the law to be very wild. This phenomenon is part of the dialectical process of socio-economic life that has continued for a long time and it is difficult to predict when it will end.[14]

Efficient economic conditions will be achieved if the condition of 'no one can be made better off than

making someone worse-off' is applied.[15] This is what is called fair, which is not only the main target of the politic but also a legal objective. With a justice-centered approach in the political economy, the state plays an important role in upholding justice,[16] especially in the economy directly impacting the wider community.

Article 33 of the 1945 Constitution can be simply interpreted that the state must protect all contents under its authority, including safety, economic security, and state assets from the control of certain groups or individuals, as well as controlling important production activities, including public facilities with benefits used for public needs and welfare. Therefore, as long as Article 33 of the 1945 Constitution is still listed, the involvement of the State is necessary to manage economy of Indonesia. [17]

Bung Hatta underlines that the concept controlled by the state in Article 33 of the 1945 Constitution does not mean that the state itself is a businessman, entrepreneur or *ondernemer*. However, the state power of the government is utilized to create regulations that can smooth the economy, and regulations that prohibit the practice of exploitation by investors to weaken the people or small business owners.[18] What is delivered by Bung Hatta in principle is the affirmation that the State through its apparatus has the role as a regulator in creating conducive climate in managing the country's economy. With the current condition of SOEs, that not complying with the objectives of its establishment, it is inseparable from the facts that the existence and role of the law which has been unable to observe the actual needs of the economic conditions that must be realized.

Laws about SOEs stipulate that the capital for SOEs establishment constitutes part of state finances, this condition provides authority to several state institutions, such as Ministry of Finance, Ministry of SOEs, technical ministries related to the work scopes of SOEs, House of Representatives (DPR), Supreme Audit Agency (BPK), State Development Audit Agency (BPKP) and Anti-Corruption Commission (KPK), to supervise and audit the SOEs performance and finance. These state institutions are the bureaucratic chains with authority to be directly involved in the management of SOEs. It will be very difficult for SOEs management to act objectively in gaining the best business feel. Meanwhile, many bureaucrats also take advantage of the situation, by seeing SOEs as financial barns for personal gains so that the SOEs will eventually lose spirit as a business entity.

The government should focus only on bureaucratic jobs, without caring for the issued excluded from the core competences. The government task is only to control. Thus, matters out of the government's concern or not in the context of "controlling" (only) must be excluded from the government. Government running a business is an anomaly. As a result, state-owned enterprises have more negative impacts rather than benefits. It is impossible for bureaucrats to be able to run business properly because the mission of bureaucrats is to serve fairly. Due to mission for a fair service, it is impossible to run a business which is basically discriminative, namely, serving those who can only afford it. [19]

Law Number 19, the Year 2003, as an legal standard for the SOE management should give the government the proper position expected in Article 33 of the 1945 Constitution. The actual interpretation empirically has placed the government in a dominant position in managing SOEs, which adversely affects the development of the country's economy. Meanwhile, law has taken significant place of considerable meaningful systems for economic development. The state law is an important matter that has broad implications for reforming state economic system.

5. CONCLUSIONS

SOE is a state company established to create a firm and stable national economy. The establishment of Law Number 19, the Year of 2003, concerning SOEs, has enabled a dominant position to the government in managing SOEs. This circumstance negatively impacts the development of SOEs as the pillar of national economy. Considering the law is very important for the development of the national economy, it is necessary to revise policies by reformulating the position of the government in managing SOEs so as to create a pure SOE position as a business entity. When SOEs is free from the bureaucratic chain, it will be more convenient for the management to manage state businesses that is expected to realize its goals, namely, the welfare for the people of Indonesia.

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