

Identity and Role of State-Owned Enterprises for the People's Welfare Based on Article 33 of the Indonesian Constitution

Widhya Mahendra Putra^{1,2,*} Ratih Lestarini¹

¹Law Master School, University of Indonesia, Depok, West Java 16424, Indonesia

²Faculty of Law, Lecturer, University of Indonesia, Depok, West Java, 16424, Indonesia

*Corresponding author. Email: widhi.mahendra@gmail.com

ABSTRACT

The nature of the establishment of SOEs in Indonesia is derived from the formulation of Article 33 of the 1945 Constitution. Article 33 of the 1945 Constitution provides direction, intent and purpose for the state to control important production branches and to control the livelihoods of many people through state-owned enterprises (SOEs). The dynamics of politics, economy, and the era of globalization pushed changes in the management of SOEs. It is important to always look back at the background of the formation and identity of the actual SOEs so that the management and control of SOEs by the state remains in the corridor of Article 33 of the 1945 Constitution. This paper discusses the background of SOE formation that was influenced by ideological, economic and historical reasons. The development of SOEs from time to time shows that the influence of economic and political policies of the authorities is more dominant in influencing the management of SOEs. The identity and role of SOEs as agents of development, with business and social dimensions, demand that SOEs must be able to survive in the era of globalization amid demands from the state, society and the market. Faced with this, the government needs to separate explicitly between the actions of the state (government and the House of Representatives) and corporate actions (SOEs) so that management of SOEs can run professionally and be able to realize the objectives of the state.

Keywords: *identity and role, SOEs, Indonesia, people's welfare*

1. INTRODUCTION

To achieve the goal of the state, which is the greatest prosperity, and welfare of the people, the government needs instruments to achieve that goal. One of the tools to manage production branches that control the lives of many people is through state companies known as State-Owned Enterprises (BUMN). SOE as a state apparatus in realizing the state's purpose represents Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which reads "Production branches which are important for the State and which control the livelihoods of the public are controlled by the State". The nature of the establishment of SOEs is inseparable from the articles of the Constitution, where the role of controlling important production branches of the State—used to realize the purpose of statehood—rests on the shoulders of SOEs as an "extension" of the state. The relationship between State Finance / State Budget and State-Owned Enterprises (SOEs) is in principle governed by two legal regimes at once, namely public law and private law (Akbar 2014: 68). SOE's commitment to public law is due to its nature as a corporation mostly owned by the state, where SOE as a state corporation is

a state instrument to realize the greatest prosperity of the people, in accordance with Article 33 of the 1945 Constitution (2014: 68).

The existence of Article 33 of the 1945 Constitution is inseparable from the ideas of Bung Hatta as one of the founding fathers of the Nation, Bung Hatta was the originator of the idea in the drafting of Article 33 of the 1945 Constitution (Diah 2003: 77). Bung Hatta's thoughts on the politics of Indonesian economics were presented at the *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan* (BPUPKI) as follows:

Indonesia is rich in nature and raw materials. Therefore, it is the duty of the government to protect and preserve this wealth. There are two ways that this can be done. First, to master it with the intention of using it "for the greatest prosperity of the people". Therefore "the branches of production which are important for the state and control the livelihoods of the people are controlled by the state." This means direct handling by the state, including electricity, drinking water supplies, irrigation, roads, generally what is called public goods. Outside this field, direct government activities are still needed in

seeking "large-scale production that controls the lives of many people" (2003).

Hatta did not specifically mention state companies or SOEs as an extension of the state to control and work on the production branches. However, the formulation of Article 33 of the 1945 Constitution, especially in its explanation, the term "companies" was mentioned with the phrase "only companies which do not control the livelihoods of many people may be controlled by the hands of an individual." This means important branches of production that affects the livelihoods of many people are only controlled by the State through SOEs.

State control in the formulation of Article 33 of the 1945 Constitution indicates that Article 33 rejects the understanding of market fundamentalism, markets are expressions of the tastes and desires of the rich who have purchasing power, so that in a pro-market economic system the production patterns (and subsequently consumption patterns) will be formed according to the will of the rich by economic profit and loss calculations. The relation between SOE management and Article 33 of the 1945 Constitution is that national development should not be left to the will of the market and market tastes, especially to the basic instincts (market greed). Over time, the occurrence of political and economic dynamics, as well as changes in the structure of the Constitution due to amendments to the 1945 Constitution, Article 33 as the foundation of the economy has not undergone changes in the formulation. However, the elaboration of Article 33 of the 1945 Constitution is often interpreted in accordance with the political policy direction of each regime and this affects the development of SOE management and operations. The emergence of SOE privatization practices, for example, is inseparable from the influence of the Old Order regime's political economic policies and the country's economic conditions after the Reformation period.

In the end, the demand to pursue profit and the growing era of globalization forced the country to change the management of SOEs. After the reformation, the practice of SOE privatization has become increasingly known and encouraged by the government, because it is considered as the right step to meet these demands. According to J.B. Sumarlin, the privatization of SOE is basically the transfer of rights or assets belonging to the state, in whole or in part to the private party through the sale or exchange. This also includes the use of state assets or SOE / Local SOE assets by joint ventures by granting monopoly rights for certain activities to private parties (Ilmar 2012: xvi). To support the SOE privatization plan, the government completed the legal basis by issuing legislation such as Law Number 19 of 2003 on State-Owned Enterprises and Law Number 40 of 2007 on Limited Liability Companies.

With the change in management of SOEs marked by the publication of the package of laws and regulations, SOE privatization is seen as a green light from the Government. SOEs are competing to privatize and are supported by government investment known as state capital inclusion in SOEs. The privatized SOE will take the form of a limited

liability company and the management of the company is subject to the Limited Liability Company Law. From these practices problems and debates arose regarding state control over SOE and the status of SOE legal entities. The issues that will be discussed in this paper include what is the background to the formation and development of SOEs and how the development of the identity and role of SOEs in achieving the country's goals. It is important to see whether the government's steps to manage the SOE are in accordance with the corridor of the purpose of its formation to become an extension of the State in managing production branches that are important for the State and affects the lives of many people. In that sense, the term profit does or should not necessarily become the main principle in SOE management.

2. DISCUSSION

2.1. Background of Establishing State-Owned Enterprises

Countries in the world generally have state-owned enterprises. The SOEs, in the business sector, are categorized between the administration of services and public interests (public service and public utilities) (Prasetio 2014: 77). The existence of a production branch or line of business, which is considered important and affects the livelihoods of many people, by the State cannot be simply handed over to the private sector. This is considered as the basic reason for the importance of SOEs. Based on the results of a study of SOEs carried out by the United Nations and Development Organization (UNIDO), an organization under the auspices of the United Nations for the development of a joint industry-ICPE (International Center for Public Enterprise) based in Ljubljana, Yugoslavia, it was found that, in general, countries those who have SOEs include the desire and background of state control in the vital and strategic field of life, because that sector involves the public or public interest (Ilmar 2012: 73).

The existence of SOE in a country guarantees that for strategic areas that concern the public and public interests, the government can be present, involved and make a strong contribution. The form of state involvement in SOEs in each country can vary depending on the background of SOE establishment and the country's ideology. Socialist countries certainly have different backgrounds and principles for the establishment of SOEs compared to capitalist countries, where market share is a determinant of the feasibility of a company, be it a state company or a private company, and usually large profits from SOEs, for some States, become the background behind the formation of SOEs in capitalist countries. In addition to ideological reasons, economic, social, political reasons, historical heritages, among others, can also be the background for the establishment of SOEs.

In Indonesia, the background of SOE formation is based on the chosen ideology formulated in Article 33 of the 1945

Constitution. Indonesia's economic democracy, in managing the economy to achieve the welfare of the people, is placed not to incline to the capitalist or socialist systems that rely on Marxism. Bung Hatta as the formulator of Article 33 of the 1945 Constitution, rejected the Marxist or capitalist economic system and gave his views on the concept of Indonesian socialism consisting of three factors, as follows:

First, Indonesian socialism arises because of religious orders. Because there is a religious ethic that requires a sense of brotherhood between human beings in the association of life, Indonesian socialism emerges from religious values, apart from marxism, only a meeting of western social democratic ideals with religious socialism (Islam), where Marxism as a way of life for materialism is still rejected. Second, Indonesia is an expression of the rebellious spirit of the Indonesian people who received unfair treatments from the invaders. Third, Indonesian leaders who cannot accept marxism as a view based on materialism, ... the basics of Indonesian socialism are found in small, collectively-patterned village communities, which still lives to this day (Diah 2003: 78).

From the understanding and thoughts of Hatta regarding Indonesian socialism, Article 33 of the 1945 Constitution was formulated and became the basis of Indonesian democracy or known as the Pancasila economic system. According to Aminuddin Ilmar, the Pancasila economic system consists of three economic actors namely *Koperasi*, state businesses, and private businesses. These three economic actors are expected to cooperate with each other by applying the principle of business partnership in the framework of realizing economic democracy by strengthening national businesses to become a healthy, independent and resilient national economic force, in order to become the driving force for economic development. Based on Article 33 of the 1945 Constitution, SOEs was formed. The background of SOE in principle is based on economic democracy and the Pancasila economic system that was born by Article 33 of the 1945 Constitution. The 1945 constitution is a written constitution along with the basic unwritten legal values and norms that live as constitutional conventions in the practice of everyday state administration, including into the understanding of the constitution or basic law (*droit constitutionnel*) of a country (Asshidique 2015: 29). In the 1945 Constitution, especially in Article 33 the spirit of the nation is contained in managing, managing, regulating, and controlling its own economy.

In addition to the ideological background, the establishment of SOEs is based on economic reasons because in the beginning, independence of SOEs are needed to stimulate economic activities, to indirectly improve the national economy. In summary, the background of SOE formation in Indonesia is influenced by, first, ideological reasons that are influenced by the application of the proclamation, Pancasila, and the application of Article 33 of the 1945 Constitution, as an effort of the Indonesian people to break away from colonialism and

form a new ideological system. Second, for economic reasons, SOEs in the early days of independence were needed to pioneer economic activities that could not yet be carried out by private and cooperative businesses and these business fields were beneficial for national development. Third, historical reasons, to continue the companies previously managed by the Netherlands, to be nationalized as a SOE because they control strategic production branches.

2.2. Development of Government Policies Against SOEs From Time to Time

After passing through periods of independence (1945-1950) Indonesia entered the Sukarno's leadership (1950-1965), the role of the development of SOEs at that time was influenced by political policy. Political tensions between the Indonesian government and the Dutch government regarding the status of West Irian, which is a "status quo" has given rise to a series of events that lead to the nationalization of foreign companies, especially Dutch companies that still survive in Indonesia. Entering the end of 1960, the government made a new regulation that aimed to uniform the management, regulation, control, and legal form of SOEs both newly-formed and with nationalization. This was done because there were still a lot of management of state enterprises that used Dutch legal basis, like the arrangement of ICW and IBW. The new regulation is Law No. 19 Prp. Year 1960 concerning State Enterprises, the making of this regulation was colored by the political policies of the President at that time. Sukarno as President, had a centralized economic perspective, where the intention of "being controlled by the state" in the constitution was defined as full control of state enterprises. As a result, Law No. 19 Prp. Year 1960 gave rise to a contradiction, where on one hand SOEs were required to carry out the function of providing funds for state financial resources, as well as the functions of "public utilities" and "public services" (Hartini 2017).

Formally the purpose of Law No. 19 Prp. Year 1960 concerning State Enterprises can be fulfilled, but in practice it turns out that many state enterprises were economically inefficient and burdening the state budget. As the regime and the President changed in 1965, changes in political economic policies occurred. This policy affected the management of SOEs in this period; this condition is proven by the issuance of Tap. MPRS No. XXIII / MPRS / 1966 concerning Renewal of Economic, Financial and Development Policies, which changed the role of the state in the economic sector more to the supervision of the direction of economic activity, not to control or centrally plan the economy as carried out by the previous government. This regulation later became the basis for economic policy in the New Order, on the basis of this regulation the efficiency of SOEs was carried out by changing it into three forms, namely a service company that carries out public service only, a public company as a company in charge of running the public interest (public service) and one carrying

out public utilities (for profit) functions, the latter is a state-owned company whose function is to seek profits.

The change in paradigm of political economy policy of the New Order, in practice is contradictory. In general, economic policy would be in line with political policy, if government policies and government politics as well as economic policies were centralistic. However, the New Order developed a centralized government and political policy that was paradoxical with its neo-liberal economic policies. The adverse impact of this contradictory policy direction is seen in practice, bureaucrats and military generals led SOEs in the New Order era. This impacted the performance of unprofessional SOEs, which tended to turn it to political and social institutions instead of companies, as bureaucrat capitalization will destroy the company itself.

SOE privatization was the chosen path while entering the mid 1980s, Indonesian SOE experienced poor performance, and generally productivity was also low. Non-departmental units controlled many SOEs. Although the New Order enacted the privatization policy, it was not followed by reforms in the system and structure of SOEs, which were inseparable from political power. For that reason, until 1995 the condition and performance of SOEs did not experience significant improvements. This condition lasted until the end of the New Order government, when Indonesia experienced an economic crisis and a revolution in 1998. The economy was in chaos at that time, encouraging SOE reform. Therefore, SOEs were considered as a driving force that can restore the national economy. SOEs were encouraged to be able to provide economic stability as well as large profits for the country. The tendency of the state in managing SOEs, which only focuses on economic reasons, will have an impact on social dimensions that were ignored. This can be seen, when the government issued new regulations regarding Law No. 19 of 2003 concerning State-Owned Enterprises, according to this Act, the form of SOE business was narrowed down to become a Limited Liability Company and Public Corporation, which in practice, Perum was directed to be transferred to a SOE. These conditions cause, all the characters and characteristics that exist in the business of struggle and public enterprises to also naturally be transferred to the business of the Persero. All of this even though the form of business and the designation of the two forms of SOEs were very different.

The element of seeking profit or protection is the main goal of the Persero SOE, different from the Public Corporation which aims to benefit the public and provide goods and services that are affordable to the public, when the Perum SOE is changed to a Persero, it was feared that the public service dimension of SOEs will disappear and turn into public utilities only. The development of the role of SOE in Indonesia from the period of the regime change showed that—although the constitution from the beginning provided the same concepts and principles regarding the direction of the nation's economy—each regime interpreted the economic system differently. This interpretation was colored by the political and economic policies carried by

each regime and was also influenced by national economic conditions as happened in 1998. Thus, it can be concluded that economic and political factors are more likely to influence the development of the role of SOEs in Indonesia

2.3. Identity and Role of SOEs in Achieving State Goals

Related to the identity of a SOE in achieving the objectives of a state, looking back at the substance of the 1945 Constitution, the existence or identity of SOE is an embodiment of Article 33 of the 1945 Constitution. From the article of the constitution, SOE's identity as a state company can be seen when Article 33 of the Constitution is interpreted in several ways. According to Edi Swasono, the constitutional message regarding the existence of SOEs contains the following interpretation.

First, the economy, which includes all economic institutions, not only cooperative business entities, but also includes SOEs and private business entities. Second, 'structured' in the Indonesian context means that the economy is not allowed to be organized by itself through the mechanism and market power, imperatively it should not be allowed to be arranged according to the will and taste of the market. Thus, the role of the state is not merely to intervene, but to organize, design, and restructure, to create a feeling of togetherness and the principle of kinship and the guarantee of social justice for all Indonesian people. Third, 'important for the state' means the branch of production is vital and strategic for the existence and safety of the nation and the state, to safeguard the sovereignty of the state, including the sovereignty of the country's economy to maintain the independence and sustainability of the country's economy. Fourth, 'the livelihood of the people' is the basic needs of the people to maintain a viable survival for humanity, which was once known as the 'nine staples' that have now developed into twenty-seven staples, extending to electricity, health, education, employment, recreation and so on. Fifth, 'controlled by the state' means the state regulates, organizes, and supervises the branches of production that are important to the country. Indeed 'controlled' is not of 'having' but we need to remember that the subject matter of Article 33 is state control, if control becomes impossible without possession, control must be exercised through ownership. Thus, the important branches of production for the state carried by SOEs must be owned / controlled by the state, and certainly must be examined by the state, according to the global rule, based on the principle of capitalism, one share-one vote, the owner who is certainly the holder biggest stock (Akbar 2014)

According to this interpretation, SOEs depict one of the identities of national economic actors. SOE management cannot follow market economic patterns but must be in state

control, in accordance with the principles of economic democracy adopted by the Indonesian nation. The existence of SOEs is recognized as the guardian of economic sovereignty and state sovereignty through control the state to the branches of production that are important to the state. Besides that, the SOE's role is to ensure that the basic needs are available and affordable to all Indonesian people, and in the context of management and control, the state has dominant control over SOEs through ownership of majority shares. As a national economic agent and state tool to realize social welfare through meeting the basic needs, SOEs basically have an identity basis as an entity that plays a role in the social and business entity dimensions.

Regarding Article 33 of the 1945 Constitution itself is not without criticism, one of which is the critic on the formulation of "branches of production, which are important for the state and which control the lives of many people." Regarding this phrase, Marwah M. Diah argues,

The classification of the branches of production which are important for the country and control the lives of many people is a dynamic understanding. Understanding depends on the values and perceptions of a society that is strongly influenced by the dimensions of space and time. For example, drinking water as a staple. Public perception of drinking water as a staple, will be influenced by time and space. If the supply is abundant then the control by the state will not have an economic meaning (Diah 2003: 113).

In line with this view, Refly Harun argues that the interpretation of the production branches is not static, but dynamic. At one time a branch of production could be considered unimportant and does not control the lives of many people but that perception could change overtime (Harun 2019: 84). Although the branches of production have an open interpretation, the state (government and DPR) has the right to determine that a branch of production still needs to be controlled or not through SOEs. For this reason, it is important to maintain the principles inherent in the identity and role of SOEs in general.

The purpose and objective of SOE shows that it has a dominant role as an agent of development. SOE's identity as a development agent that has a two-dimensional function, namely the social function and the business function, has the consequence that an Indonesian SOE does not only work to pursue profit alone. The business dimension should be understood that in addition to pursuing profits, SOEs are expected to be involved in the national economy. According to Refly Harun, three roles of SOE are needed in the national economy, among others:

First, SOEs stand at the forefront as pioneers if a branch of production has not yet been controlled by other economic actors, both private or the *koperasi*, while it is important for the greatest prosperity of the people. Second, SOEs stand in the middle of market distortions because the role of other economic actors is so strong that

they tend to monopolize and control prices, and SOEs must be present to correct market distortions that occur. Third, SOEs stand behind as a driver, especially when the business sector or production has been going well with other economic actors, both private and the *koperasi* (Harun 2019: 7)

The identity and role of SOEs as agents of development are needed to maintain the stability of the national economy through monopolies, control the price of "the basic needs" that are affordable to the public, encourage other business actors, profits that are partly shared in state finances are needed to increase state revenue from the dividend, the assignments given by the state / government to SOE function as a part of the driving wheel of the economy and people's welfare such as the construction of public infrastructure (roads, bridges, power plants, railways) and other assignments related to the supply of goods and / or services in the community at stable prices.

In the midst of the demands of the globalization era and the demands of good corporate governance, the state's push for SOEs to become a publicly listed company and privatization is considered to be the right choice. The tendency of poor SOE management in the New Order became a scourge for SOE management in the future, such SOEs could be trapped in one direction of bureaucratic power, as an extension of the authorities both directly and indirectly, loaded with political interests. In the form of a *Persero*, the SOE has a private responsibility; the management of the SOE is given the flexibility to run the company professionally. Decreasing *Perum* SOE and increasing *Persero* shows that the government encourages SOEs to become professional business entities in general. However, the impact of the existence of these state-owned SOEs raises new debates about the extent of the state's involvement or control of these SOEs.

The existence of SOEs is deemed as a representation of Article 33 paragraph (2) of the 1945 Constitution, the Constitutional Court itself states that SOE is based on thought that: i) SOE is a state owned business entity; ii) its function is to run a business as a derivation of state control over production branches that are important to the country and to control the livelihoods of many people and Indonesia's natural resources; iii) most or all of the business capital comes from separated state finances; and v) to achieve the maximum prosperity of the people. For this reasoning, SOEs differ from private legal entities that also conduct business on the one hand and also differ from state organizing organs that do not conduct business, such as state institutions, ministries or agencies. Although SOE is not a private legal entity in general, which follows private law in its management, but seeing problems that arise the government should provide strict limits of state involvement for special SOEs in the form of open limited liability companies.

Strict restrictions on the involvement of the state in SOEs are needed so that the state (Government and House of Representatives) is in the right corridor to interfere or not to the actions of SOEs that are corporate. In connection with this matter, the Constitutional Court—in its decision number 12 /

PUU-XVI / 2018 regarding the judicial review of Law Number 19 of 2003 concerning State-Owned Enterprises against the 1945 Constitution of the Republic of Indonesia—emphasized that it must be distinguished between the act of providing capital to establish a SOE or adding SOE capital and the act of the SOE itself or a corporate action. The act of establishing or adding SOE capital is a government action that requires the involvement of the House of Representatives because SOE capital comes from separated State assets, namely State assets originating from the State Budget. On this basis, it should strictly separate between corporate actions and government actions involving the Parliament in the management and control of the Persero SOE must be the government's main concern.

To maintain the identity and role of SOEs, facing the above problems, at least the Government can take the following steps:

1. If the State directs SOEs to be in the form of business enterprises, the State must clearly separate what constitutes as corporate actions (SOEs). This concept is in line with the interpretation of the Constitutional Court (MK) in the Constitutional Court's decision No. 12 / PUU-XVI / 2018, for the category of government actions such as adding capital, the government needs to be involved and requires the approval of the Parliament. Meanwhile, for the category of corporate action, the government will act as a supervisor and can provide consideration through the General Meeting of Shareholders (GMS). With regard to maintaining the social or public dimension, the government can assign assignments to Persero SOE whose benefits are felt by the community, so that profit is not merely one of its only objectives.
2. The state / government may choose to remain consistent in maintaining the business forms of state-owned enterprises in accordance with their respective goals and objectives.

This is accompanied by the formulation and re-categorization of the scope of business or the nature of the business that falls in the SOE's field of work and which is the Perum SOE. Avoiding legal uncertainty in managing SOEs is a necessity, the task of the state is to ensure that the functions of the public dimension and the dimensions of business entities in each form of SOE business can run well, so that state objectives can be achieved.

3. CONCLUSIONS

The background of forming a state company or SOE is generally influenced by ideological, economic and historical reasons. Meanwhile, the development of SOE formation is divided into four phases namely the initial phase of independence, the phase of the Old Order, the New Order, and the Post Reformation phase. The development of SOEs from time to time shows a tendency that each regime practices the interpretation of the concept of economic democracy in different constitutions and economic and political policies, which characterize each step of SOE development in Indonesia.

In the context of the constitution, the identity of a SOE is not only of a public or social dimension but also of a business entity dimension as a national economic agent, for that the identity of a SOE is better known as an agent of development. However, in practice, SOEs run by the State have a dilemma between demands to be managed professionally according to private rules and managed with strict limits from the state that hinder the progress of SOEs. The purpose and objectives of the SOE business, both the state-owned company and the public corporation, should not affect the basic functions of the SOE itself, which have a public dimension and business entity dimension. For this reason, the Government needs to separate explicitly between government actions involving the Parliament and corporate actions on the management and control of state-owned SOEs, and ensure that the basic functions of SOEs with a public dimension can be carried out, or still maintain the two forms of SOEs that have consistently existed.

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