



THE CONCEPT OF MONOPOLY AND DEMONOPOLISATION POLICY OF STATE OWNED ENTERPRISES (SOEs) IN INDONESIA

Putu Samawati¹, M. Hawin², and Sulistiowati³

¹Ph.D. Student of Law Faculty of Gadjah Mada University, Komplek UGM Jalan Sosio Yustisia No.1 Bulaksumur Caturtunggal Sleman, Yogyakarta, Indonesia

²Law Faculty of Gadjah Mada University, Komplek UGM Jalan Sosio Yustisia No.1 Bulaksumur Caturtunggal Sleman, Yogyakarta, Indonesia.

³Law Faculty of Gadjah Mada University, Komplek UGM Jalan Sosio Yustisia No.1 Bulaksumur Caturtunggal Sleman, Yogyakarta, Indonesia.

Email. putusamawati80@gmail.com

Abstract

This paper focuses on the study of the concept of monopoly policy and demonopolization of SOEs in Indonesia. The study subjects took samples on two SOEs that provide services for the fulfillment of the livelihood of many people, namely PT. PLN (Persero) as state-owned provider of Electric Power and PT. Pelindo (Persero) as a state-owned port service provider. Both types of SOEs were originally authorized to conduct business activities in a monopoly manner under Act No.15 years 1985 about electricity and Act No.21 years 1992 about Shipping. Furthermore, this monopoly right is revoked by the enactment of Act No.30 years 2009 about electricity and Act No.17 years 2008 about Shipping. The interesting thing then is the return of monopoly right of business activity of electricity provider to PT. PLN (Persero) through the decision of the Constitutional Court No.111/PUU-XIII/2015. Understand justification Monopoly policy or demonopolization of SOEs conducted by the Indonesian government against PT. PLN (Persero), PT. Pelindo (Persero), and knowing how the legal order provides space for both SOEs to implement monopoly or demonopolization policy is the focus of discussion in this paper. Both issues will be presented through a series of normative juridical (doctrinal) research with philosophical approaches, legal history, and legislation. The result of normative-prescriptive analysis will then be interacted using qualitative descriptive analysis method, by inductive conclusion. The main objective of the government's monopoly policy through SOEs is to safeguard/protection the assets of natural resources and ensure the protection of the public



interest or the benefit of the people. On the other hand the SOEs demonopolization policy conducted by the government is also aimed at the effectiveness and efficiency of meeting the needs of the community. Demonopolization is an effort to encourage the private sector to become a business competitor for SOEs, aimed at improving the performance of healthy competing companies and improving services to consumers/communities, resulting in a perfect competition market. While maintaining a monopoly exemption policy for state-owned companies to publicly protect the assets of the state and protect the interests of life of most Indonesians.

Key Words: Monopoly, Demonopolization, SOEs, Indonesia

Introduction

Establishment of a state enterprise in Indonesia has its own history, beginning with the enactment of nationalization during the reign of President Sukarno by taking over the companies abandoned Dutch and Japanese occupiers. The forced nationalization by the Indonesian government against the colonial heritage companies ended with the issuance of Law No.31 of 1963 on the Dissolution of the Dutch Nationalization Company¹. In addition to establishing the nationalized state enterprise of the Dutch and Japanese colonization companies, the Indonesian government also established state enterprises based on the mandate from Article 33 paragraph (2) and (3) of the 1945 Constitution which functioned as an "agent of development", with the main objective to encourage the national economy, especially companies engaged in infrastructure and public utilities.² the essence of production sources is important for the state and controlling the livelihood of the public is greatly dominated by state

¹ Teddy Anggoro. 2016. *Monopoli Alamiah Badan Usaha Milik Negara*. Depok: Herya Media. page 57-94

² Aminuddin Ilmar. 2012. *Hak Menguasai Negara dalam Privatisasi BUMN*. cetakan pertama. Jakarta: Kencana Prenada Media Group. page 73



enterprises, the monopoly done by state enterprises in various business sectors is a way to move the economy of the country at that time.³

The reversal of the Orde Lama by changing the Orde Baru during the presidency of President Soeharto, changed the direction of economic policy in the management of state enterprises. Instruction of the President of the Republic of Indonesia No.17 of 1967⁴, impact on the direction of implementation of state enterprises directed to independence in the management of its business with the priority of business in the form of the company, through the enactment of Government Regulation No.12 years 1968 about concerning the Limited Liability Company (Persero). In the Orde Baru period, vital sectors important to the state and controlling the livelihood of the people remain to be cultivated by state enterprises with monopolistic conditions, such as: port sector; production, transmission and distribution of electricity to the public; telecommunication; cruise; flights; drinking water; public trains; atomic power generation; mass media; production of weaponry and war equipment.⁵ It is clear that the government of Orde Baru still gives monopoly rights to state enterprises as an extension of the government in terms of holding rights over the areas of production that are important to the state and affect the livelihood of the public, in particular the sectors of public services and infrastructure.

Economic policy during the Orde Baru period that still gives space to state companies to monopolize branches of production that are considered

³ H. Abdul Manan. 2014. *Peranan Hukum dalam Pembangunan Ekonomi*. cetakan pertama. Jakarta: Kencana Prenada Media Group. page 22-27

⁴ Instruksi Presiden Republik Indonesia No.17 years 1967 about the Directive and Simplification of State Enterprises into three forms of State Enterprises into a State Department, Public Corporation, Public / State Company), as well as the elimination policy of the General Executive Board (BPU) with the aim of eliminating dualism in the leadership of state enterprises, and enabling decisive decomposition and debirocratization between government agencies and state enterprises.

⁵ Peraturan Republik Indonesia, Undang-undang No.1 Tahun 1967 tentang Penanaman Modal Asing, Pasal 6 ayat (1) dan (2). Lihat juga dalam Teddy Anggoro. Op Cit. page 112-113.



vital or important for the state and affect the livelihood of the people, undergoing changes during the order of reform, in which the movement of state enterprises to monopolize the activities economic one by one is released. The term State-Owned Enterprise (SOEs) was introduced as a substitute for the term State Enterprise (SE) with the issuance of Act No.19 years 2003 about Badan Usaha Milik Negara. After the monetary crisis in 1998 with the proposed stability and strengthening of the economy the government privatized heavily against SOEs, including also demonopolization of public utility sectors. The impetus for the privatization and demonopolization of SOEs stems from the IMF's insistence on the evaluation of poor state enterprises' performance during the new order with corruption, collusion and nepotism (KKN) activities undertaken by the government. Various legislation was also published as a basis for strengthening the implementation of the economic recovery of the nation which became one of the prerequisites in the Letter of Intent of the IMF dated January 15, 1998 and amended January 20, 2000.⁶

Many state companies initially granted monopoly rights in conducting business activities related to production branches are important for the state and concerning the livelihood of the public, furthermore their monopoly rights are revoked. PT. PLN (Persero) and PT. Pelindo (Persero) are an example of a State Enterprise originally granted a monopoly right through Act No.15 years 1985 about electricity and Act No.21 years 1992 about Shipping. Furthermore, this monopoly right is revoked by the enactment of Act No.30 years 2009 about electricity and Act No.17 years 2008 about Shipping. The interesting thing then is the return of monopoly right of business activity of electricity provider to PT. PLN (Persero) through the decision of the Constitutional Court No.111 / PUU-XIII / 2015.

⁶ Kwik Kian Gie. 1998. *Praktek Bisnis dan Orientasi Ekonomi Indonesia*. PT. Gramedia Pustaka Utama & IBBI: Jakarta. page 36



Demonopolization policy towards PT. Pelindo (Persero) and restore the right of monopoly to PT. PLN (Persero) raises questions relating to the seriousness of the government in managing the nation's economy. The fundamental problem with the enforcement of SOEs demonopolization by the government raises the assumption that there are no more important production branches and concerns of the lives of the people who need to get the attention and direct management by the government, as described in Article 33 of the 1945 Constitution and Article 51 of Act No.5 years 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. On the one hand, monopoly rights restoration of state-owned enterprises is publicly lethal to private sector to compete with SOEs, which is realized that so far SOEs service to the consumer also not satisfactory. Both of these assumptions serve as the basis for explaining the subject of the study on the basis of the revocation of monopoly rights to the state-owned electric power supply providers and state-owned port services providers by enacting monopolistic and demonopolization policies openly. It also discussed about how the legal level provides space for SOEs Provider of Electric Power and SOE Port Service Providers to implement monopoly and demonopolization policy.

Materials and Methods

The main material used as the material of analysis in this research was Indonesian legislation that focus on monopoly policy and demonopolization of PT. PLN (Persero) and PT. Pelindo (Persero). The study of Indonesian positive law was done in an effort to answer the problem from the aspect of legal principles and norms⁷. This research was conducted to collect, describe, systematize, analyze, interpret and evaluate

⁷ Soejono dan H. Abdurrahman. *Metode penelitian hukum*. Jakarta: PT.Rineka Cipta. 2003. page. 112.



the norms of positive law which in nature provides the balance of basic thinking of the concept of monopoly policy or demonopolization of business activities undertaken by SOEs.⁸ Types of documentary research generally use literature as the main ingredient for data collection. The data collection was done to support the analysis to answer the problems in this research using philosophical approach, the approach of legislation, and the approach of legal history. The problems in this paper will be analyzed by linking the results of documentary material management using the parameters of the principle of legal certainty, the principle of equilibrium and the principle of justice to understand whether the actions of monopoly or demonopolization of the two SOEs that manage the production branches are important for the state and affect the livelihood of many people contrary to the basic conception of the purpose of the establishment of SOEs and mandates contained in the constitution of the Republic of Indonesia Article 33 of the 1945 Constitution.⁹ The conclusion was done inductively by looking at special facts and then will be obtained the concept of a general nature to be enforced thoroughly¹⁰, especially in terms of understanding the concept of monopoly and demonopolization of SOEs doing business in the management sector of production branches is important for the state and concerning the livelihood of the people by taking into account the synergy between the effort to create healthy business competition with the protection of state assets and the welfare of the people of Indonesia .

⁸ Bernard Arief Sidharta. *Filsafat Ilmu Hukum*. Bandung: Laboratorium Hukum Fakultas Hukum Universitas Khatolik Parahyangan. 2001. page 23

⁹ Noeng Muhadjir. *Metodologi Penelitian Kualitatif*. Yogyakarta: Rake Sarasin. 1998. page.29.

¹⁰ Bambang Sunggono. 2007. *Metodologi Penelitian Hukum*. Jakarta: PT.Raja Grafindo Persada. page. 10.



Results and Discussion

Demonopolization policy towards PT. PLN (Persero) and PT. Pelindo (Persero) practices had some legal problems. The position of monopoly in the case of the implementation of electricity by PT. PLN (Persero) was returned based on the Decision of the Constitutional Court of the Republic of Indonesia No.111/PUU-XIII/2015. The decision of the Constitutional Court restores the right to administer power to the state conducted by BUMN or BUMD, in other words the demonopolization policy stipulated under Article 11 paragraph (1) of Act No. 30 Year 2009 about Electricity jo Article 9 paragraph (3) Government Regulation No.14 Year 2012 about Electricity Supply Business Activities is contradictory to the provisions of state controls contained in Article 33 paragraph (2) and (3) of the 1945 Constitution.¹¹ Meanwhile, PT. Pelindo (Persero), its monopoly rights in conducting business activities are revoked by the enactment of Act No.17 Year 2008 about Shipping, especially in the explanation of Article 26 paragraph (1) stipulating that the regulation for the port field contains provisions on the abolition of monopoly in port operation. In contrast to PT. PLN (Persero), PT. Pelindo (Persero) has also been submitted for testing related to the Shipping Act at the Constitutional Court, but the decision of the Constitutional Court rejected the petition of the petitioner and still granted the demonopolization rights in the port operation. Being interesting to be examined more deeply considering that both SOEs were originally given the right of monopoly and then demobilized, one of which then restored the right of monopoly to conduct its business activities. Both SOEs are role models that can be used as discourse in viewing the existence of how the law plays a role in determining the demonopolization policy towards SOEs, especially in the domain of business competition law.

¹¹ Amar Putusan Mahkamah Konstitusi No.111/PUU-XIII/2015 tentang Putusan Pengujian Undang-undang No.30 Tahun 2009 tentang Ketenagalistrikan terhadap UUD NRI Tahun 1945.



Conceptually the law of business competition requires the realization of the efficiency of allocation that focuses primarily on its behavior and impact, not on the offender / who is doing. The efficiency of allocation will be realized one of them by creating a competitive business competition. Competitive competition will improve product quality and improve customer service. In order for the market economy to run well and give benefit to many people then the competition must be effective by involving a number of competitors freely and responsibly so as to prevent the occurrence of monopolistic practices and unfair business competition.¹² Fair competition in business activities is one of the best ways to achieve optimal utilization of resources to meet the needs of society at large. Competitors in business activities is a form to provide better service to consumers, because it has a pick of a product. Competitors in business activities as well as motivation to create strategies to innovate in producing products or distributing products. According to Areeda,¹³ competition can contribute to advancing justice because competing prices reasonably increase the choice for both buyers and sellers. The essence of creating healthy business competition can have a positive impact on society.

Efforts in creating a fair business competition are carried out by the government by issuing Act No.5 years 1999 about Prohibition of Monopolistic Practices and Unfair Business Competition. The enactment of this law as an effort to guarantee and implement the role of law in development. Based on the objective of Act No.5 years 1999, it was seen that, the government had done an act of state administration in juridical economic activity that was monopolistic arrangement and unfair business competition related to production and marketing of goods and or service.

¹² Binoto Nadapdap. 2009. *Hukum Acara Persaingan Usaha*. Jakarta: Jala Permata Aksara. page 3-4

¹³ Johnny Ibrahim. 2009. *Hukum Persaingan Usaha: Filosofis, Teori, dan Implikasi Penerapannya di Indonesia*. Cetakan ketiga. Malang: Bayumedia Publishing. page 102-104



However, in matters affecting the livelihood of the people and important production branches for the state as referred to in Article 33 of the 1945 Constitution there are exceptions to the state, namely the state is allowed to monopolize. As specified in Article 51 of Act No.5 years 1999. Article 51 of Act no. 5 years 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition, states that the monopoly and/or concentration of activities related to the production and/or marketing of goods or services affecting the livelihood of the people and the production branches that are important to the state shall be governed by law and organized by State-Owned Enterprises and/or bodies or institutions established or appointed by the Government.

The monopoly exceptions imposed by the government as a form of constitutional enforcement with the aim of protecting the interests of the people and the production branches that are important to the state. The meaning of production branches that are important to the state and affect the livelihood of the people means that the income of goods and services felt vital to human life in a certain period of time, whereas in the period of time the supply is limited, so that the supplier can determine the price and terms - other trade conditions that harm the masses for their personal gain. In other words Production branches that control the livelihood of the people are divided into three categories, namely:¹⁴

- 1) Related allocations, goods or services derived from natural resources.
- 2) Related to the distribution, the basic needs of society, but a time or continuously can not be met the market.
- 3) Related to stabilization such as defense of security, monetary, fiscal and regulation

¹⁴ Mubyarto dan Revrison Baswir. 1989. *Pelaku dan Politik Ekonomi Indonesia*. Yogyakarta: UGM Press. Hlm 74



Based on that, it can be seen that the government had the task of maintaining the economy of the Indonesian state, especially in terms of maintaining factors of production that affect the livelihood of the people so that can be distributed to the people without any monopoly from the private sector. Efforts to maintain the stability of fulfilling the needs of the people and to protect the state assets was the concept of monopoly exclusion of business activities undertaken by SOEs justified by law to be implemented.

The opposite side was the demands of globalization that require no limits, especially in terms of running a business becomes a big challenge for the government. The decision to democratize SOEs was taken as a first step to implement the free market commitments and at the same time to revitalize SOEs to be self-reliant and tough. Demonopolization is an attempt to abolish the monopoly¹⁵, in other words a situation in which a business entity is granted the right to monopolize a particular business activity, then that right is revoked by applicable laws and regulations.¹⁶ Demonopolization opens an opportunity to private companies to compete in business activities similar to state enterprises with the primary objective of providing consumers with choice to obtain better quality products (goods / services).¹⁷ Fundamentals of the implementation of demonopolization must create a pluralist entrepreneur in the conduct of a similar business, in other

¹⁵ Kamus Besar Bahasa Indonesia online. Source: <http://kbbi.web.id/demonopolisasi.html>

¹⁶ Petersen, Niels. "Antitrust Law and The Promotion of Democracy and Economic Growth". *Journal of Competition Law & Economic*. 9(3). Doi:10.1093/joclec/nht003. Advance access publication 14 May 2013, downloaded from <http://jcle.oxfordjournals.org/at> Gadjah Mada University on November 9, 2015. page 603

Jay G. Martin. "An Overview of The Privatization of The Latin American Oil and Gas Sector". *Rocky Mountain Mineral Law Special Institute 103A RMMLF-INST9 (1999)*. source: <https://www.rmmlf.org/publications/digital-library/a/n/an-overview-of-the-privatization-of-the-latin-american-oil-and-gas-sector>

¹⁷ Mikulas Sedlak and Ivanka Roberts. 1991. "An Inevitable part of Economic Reform: Demonopolization and The Development of Economic Competition. *Soviet and Eastern European Foreign Trade Journal*. Vo. 27. No.2 (Summer 1991). Taylor & Francis Ltd: Soviet. <http://www.jstor.org/stable/2774925>. page 55.



words the business owner should not be single, and demonopolisation must be done through legislation.¹⁸

Demonopolization was one strategy that can be done to improve the competitiveness of state enterprises that are considered less productive as a result of less professional management. If the government opens opportunities for the private sector to conduct business activities similar to the business activities of state-owned companies that have been monopolized, with the guarantee of fair business competition, then the impact will be enjoyed by consumers as the community. According to Thomas S. Friedland,¹⁹ there are at least five effects of the enactment of demonopolization by the government, namely:

1. At the transition of profits, the consumer initially has no choice of a product because it is monopolized, turned into the access of suffrage over a product (goods / services) more diverse.
2. Product price is cheaper.
3. Competitive quality and price of products.
4. Increased revenues for entrepreneurs due to open access to business.
5. Increase revenue for the government, from opening employment opportunities, tax revenues, and other possible revenues.

The demonopolization policy undertaken by the government against SOEs was the state's attempt to find a strategy to promote development by creating a perfect competition market through equal opportunity to private companies operating similarly to State-owned Enterprises. The goal was to attract investors, which will affect the increase of income for the country, the opening of jobs, and increasing the purchasing power of the community for the availability of product choices

¹⁸ Ibid page 56.

¹⁹ Thomas S. Friedland. 1978. "The Estimation of Welfare Gains From Demonopolization". *Southern Economic Journal*. Vol 45. No.1 (Jul. 1978). Southern Economic Association: USA. Source: <http://www.jstor.org/stable/1057620>. page 117.



offered, which will indirectly improve the welfare of the people. The main concern in implementing a monopoly or demonopoly policy against SOEs was to consider in advance the issue of legal certainty, justice for the parties who accept the policy, and the balance between the parties who will accept the policy. Legal certainty was a fundamental thing desired when a legal entity wants to invest or run its business activities. With the legal certainty function of a legal norm, the behavior of business actors and consumers will be more directed, regular and there were consequences for violation of the norm.²⁰

The role of the law to provide predictability was to provide guarantees to the activities of economic actors.²¹ The granting of this guarantee was realized with the legal certainty that could eliminate the doubts of economic actors in their activities and business development efforts. While the role of law to create justice, is intended to provide equal treatment to economic actors including legal treatment of the government as the perpetrator as well as the economic facilitator so that state intervention on excessive economic areas can be limited.²² There is another opinion which states that the goal of law is the general good, in which the ultimate goal of human life is happiness. The law must therefore be linked to the pursuit of happiness.²³ The law can be called just, if the law produces and guarantees happiness and protects all citizens.²⁴

Associated with the purpose of law, in its function as the protection of human interests, the principal purpose of law is to create an orderly

²⁰ Esmi Warassih. *Pranata Hukum: Sebuah Telaah Sosiologis*. Semarang: PT. Suryandanu Utama. page 13

²¹ Paingot Rambe Manalu. 2000. *Hukum Dagang Internasional : Pengaruh Globalisasi Ekonomi Terhadap Hukum Nasional, Khususnya Hukum Hak atas Kekayaan Intelektual*. Jakarta: Novindo Pustaka Mandiri. page. 41.

²² Ibid. page 42

²³ E. Sumaryono. 2002. *Etika dan Hukum : Relevansi Teori Hukum Kodrat Thomas Aquinas*. Yogyakarta: Kanisius. page 67

²⁴ Ibid. page 68



society, creating order and balance. With the achievement of order in society, it is expected that human interest will be protected.²⁵ Nevertheless, in Radbruch's opinion,²⁶ a legal certainty must be safeguarded for security within the state, then positive law must always be obeyed, even if the content is unfair or also less suitable for the purpose of law, but there are exceptions, that is, when the contradiction between the contents the rule of law and justice becomes so great that the rule of law seems unfair, then at that time the rule of law may be released. The condition puts in mind the enactment of the principle of equilibrium. The principle of balance was the implementation of the principle of good faith, the principle of honest transactions and the principle of justice. The balance in the law was based on the fact that there was a great disparity in society, therefore a regulatory system was needed that can protect those who have an unfavorable position. The benchmark for determining the principle of equilibrium in business competition law were to look at:²⁷

- 1) whether the balance is laid and measured between the public interest or the individual's interest;
- 2) Balance between legal certainty and justice;
- 3) Balance between economic growth and law enforcement;
- 4) Balance between economic value and social value;
- 5) Balance between the principle of formal legality and material legality.

This format can provide a better order in determining the basic concept of monopoly or demonopoly execution of SOEs.

²⁵ Sudikno Mertokusumo. 2002. *Mengenal Hukum*. Yogyakarta: Liberty. page. 70.

²⁶A. Gunawan Setiardja. 2001. *Dialektika Hukum dan Moral dalam Pembangunan Masyarakat Indonesia*. Yogyakarta: Kanisius. dan Jakarta: PT. BPK Gunung Mulia. page. 42.

²⁷Ni Luh Made Mahendrawati. 2016. "Asas Keseimbangan dalam Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat". Ringkasan Disertasi Program Studi Doktor Ilmu Hukum Fakultas Hukum Universitas Brawijaya. page 88-89



Conclusions

Concept of Monopoly or demonopolization policy to SOEs in Indonesia must be implemented the parameters of the principle of legal certainty, the principle of equilibrium and the principle of justice. Main purpose of this concept is to guarantee to protect of natural resources and to protect of fulfilling the needs of the people. Monopoly or demonopolization policy to SOEs is an effort of government to built SOEs more effective and efficient especially for SOEs working. This steps was needed to provide equal treatment to economic actors including legal treatment of the government as the perpetrator as well as the economic facilitator so that state intervention on excessive economic areas step by step can be limited, and the Role of participant and contribution of society in state development will be more and more.

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