CONSTITUTIONAL COURT

REPUBLIC OF INDONESIA

JUDGMENT SUMMARY OF

CASE NUMBER 61/PUU-XVIII/2020

Regarding

Constitutionality of the Privatization of State-Owned Enterprises Subsidiaries

Applicant	**:**	**United Pertamina Labor Union Federation (Federasi Serikat Pekerja Pertamina Bersatu/ FSPPB)** in this case represented by Arie Gumilar as President
Case Type	**:**	Judicial Review of Law Number 19 of 2003 on State-Owned Enterprises (UU 19/2003) to the 1945 Constitution of the Republic of Indonesia (UUD 1945).
Merits of Case	**:**	BUMN subsidiaries is not prohibited to be privatized in Article 77 letter c and letter d of Law 19/2003, it is contrary to the principle of energy sovereignty and the right to control the state as regulated in Article 33 paragraph (2) of the 1945 Constitution, and the principle for the greatest prosperity of the people guaranteed. Article 33 paragraph (3) of the 1945 Constitution;
Judgment	**:**	Rejecting the Applicant's request in its entirety
Judgment Date	**:**	Wednesday, September 29th, 2021.

Judgment Summary :

The Applicant is FSPPB, which is a federation of labor union that has been registered at the Manpower and Transmigration Sub-Office of Central Jakarta Administration City with Registration Number 260/I/N/IV/2003 dated April 9th, 2003. As a legal entity, the Applicant is represented by Arie Gumilar as FSPPB President. The applicant is a representative of an Institution or Agency or Organization that has concern for the protection of PT Pertamina (Persero) Workers who are members of various labor unions at PT Pertamina and therefore acts in the interests of PT Pertamina (Persero) workers.

With respect to the authority of the Court, because of the request to review the constitutionality of legal norms, in this case Law 19 of 2003 on State-Owned Enterprises to the 1945 Constitution, the Court has the authority to hear the request of the Applicant;

Regarding the legal position of the Applicant, the Court has the opinion that the Applicant has been able to explain the existence of a link between the FSPPB as a federation that brings together labor union within PT Pertamina (Persero) and its subsidiaries, in explaining his authority to fight for the interests of workers who are members of the labor unions in the FSPPB. The Applicant has also described the potential constitutional losses that will be experienced in the event of privatization of a subsidiary of PT Pertamina (Persero) which is not restricted by Article 77 letter c and letter d of Law 19/2003, the Applicant also has explained his constitutional rights which are considered harmed by the enactment of the legal norms for which judicial review is requested, namely the right to guarantee energy sovereignty and control over natural resources so that the Applicant who represents workers within PT Pertamina (Persero) including its subsidiaries can also be guaranteed their survival. The potential loss that the Applicant considers will occur is closely related to the regulation on the privatization of a subsidiary of PT Pertamina (Persero) which is not regulated in Article 77 letter c and letter d of Law 19/2003. In addition, according to the Court, if it is related to the duties and functions of the federation as regulated in Article 4 paragraph (1) and paragraph (2) of Law 21/2000, the purpose of the federation is indeed that workers with the federation provide protection, defend their rights and interests, and improve proper welfare for workers. Then according to the Court, regardless

of whether or not the unconstitutionality of the norm of Article 77 letter c and letter d of Law 19/2003 is requested for review, the Applicant has been able to describe the loss of his constitutional rights and/or authority, or at least the potential loss of his constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law. Therefore, the Court has the opinion that the Applicant has the legal standing to file the *a quo* request.

Regarding the merits of case of the Applicant's request, the Court shall refer back to the previous Constitutional Court judgments related to natural resources, namely in the Review of the Electricity Law, the Mineral and Coal Law, the Oil and Gas Law, the Management of Coastal Areas and Small Islands Law and the Water Resources Law, all of which have interpreted the phrase "production branches that are important to the state", the phrase "controlled by the state", and the phrase "the greatest prosperity of the people" as contained in Article 33 paragraph (2) of the 1945 Constitution and Article 33 paragraph (3) of the 1945 Constitution. Based on the Constitutional Court judgments, concerning the management of natural resources, as the implementation of the principle of rights controlled by the state as regulated in Article 33 of the 1945 Constitution and interpreted by the Court as the power to make policies (*beleid*) and management actions (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudenaad*) for the purpose of the greatest prosperity of the people between each type of natural resource management has its own different characteristics that are adapted to the unique nature of the natural resource in question. However, the absolute condition that must be met and must be considered by the state in the management of all types of natural resources is that management must be carried out to achieve the greatest prosperity of the people. In other words, the phrase "for the greatest prosperity of the people" is used to assess the constitutionality of natural resource management carried out by the state whether it has been carried out for the purpose of the greatest prosperity of the people or not. In explaining the management function (*beheersdaad*), the Court considered, "…done through a share-holding mechanism and/or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as institutional instruments, through the state, *cq*. the Government shall utilize its control over these sources of wealth to be used for the greatest prosperity of the people."

The Court has the opinion that the provisions of Article 33 of the 1945 Constitution do not reject privatization, as long as it does not negate state control, *c.q*. the Government, to become the main determinant of business policy in production branches that are important for the state and/or control the livelihoods of many people. Thus, there is no need to worry about privatization as long as it adheres to the principle of "not causing the loss of state control, c.q. the Government, to become the main determinant of business policy in production branches that are important for the state and/or control the livelihoods of many people. Moreover, subsidiaries under a company managed by a state-owned company will remain under the control of a state-owned company that is bound by the principle of "privatization does not negate state control", one of which is by regulating the sale of shares that can still maintain the principle of state control. Forms of control by the state can be implemented, among others, by not opening up opportunities for the sale of shares in their entirety to the public in the IPO. The control function can still be carried out with the majority share ownership of the parent company (State-Owned Company) being able to maintain voting control (control over the majority of votes due to majority share ownership) in producing decisions and policies related to company management.

The government's current legal political policy, although in the future there will be private shares in State-Owned Company subsidiaries, these State-Owned Company subsidiaries are still under state control to provide the greatest benefit for the prosperity of the people. This principle has been implemented in the provisions of Article 2A paragraph (2) and paragraph (7) of Government Regulation Number 44 of 2005 concerning Procedures for State Capital Participation and Administration in State-Owned Companies and Limited Liability Companies as amended by Government Regulation Number 72 of 2016, which basically states that the state is obliged to own shares with special rights (golden share) in a subsidiary of a state-owned enterprise and the state-owned subsidiary is still treated the same as a state-owned enterprise in order to obtain government assignments or carry out public services.

Regarding the Applicant's concerns about the uncertainty of the status of employees of state-owned companies and subsidiaries of state-owned companies conducting privatization according to

the Court should be taken into account. As an important asset owned by the company, the privatization as far as possible not to cause anxiety for employees. Therefore, in carrying out privatization as far as possible it is necessary to strive so that there is no termination of employment, even if this should occurs, then this is a last resort, and must be resolved in accordance with the laws and regulations.

Based on the above legal considerations, the Court has the opinion that the absence of a prohibition on the privatization of a company owned by an Enterprise/ its Subsidiary as stipulated in Article 77 letter c and letter d of Law 19/2003 does not cause the state to lose the right to control the state. Moreover, a number of laws and regulations as well as the Court's decision have provided a legal corridor that this step can be taken as long as it does not negate the control of the state to become the main determinant and controller of business policies in production branches that are important for the state and/or control the livelihoods of many people. This means that, to the extent and as long as it is carried out within the intended corridor, the norms in Article 77 letter c and letter d of Law 19/2003 are not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. Thus, the Applicants' request has no legal basis. Accordingly, the Court rejected the Applicant's request in its entirety.

DISSENTING OPINION

Regarding the Court's judgment, there is a constitutional judge who has a dissenting opinion, namely Constitutional Judge, Daniel Yusmic P. Foekh, as follows:

The Applicant has not suffered any constitutional loss and has no direct interest in the norms of Article 77 letter c and letter d of Law 19/2003 which is requested for review so that there is no *causal verband* (casuality) between the request of the *a quo* norm and the constitutional loss suffered by the Applicant. Thus, the Applicant does not have the legal standing to file the *a quo* request and the Court should have rendered a judgment stating that the Applicant's request cannot be accepted (*niet ontvankelijke verklaard*).